REPUBLIC OF KENYA

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Recommended for approval for tabling.

EG 31/03/22

TWELFTH PARLIAMENT (SIXTH SESSION)

THE SENATE

PAPERS LAID	
DATE	05/04/2022
TABLED BY	DLM
COMMITTEE	—
CLERK AT THE TABLE	MR. AMOLO

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

.....

REPORT ON THE ALTERNATIVE DISPUTE RESOLUTION BILL (SENATE BILLS NO. 34 OF 2021)

.....

Approved
31/03/2022

Rt Hon Speaker
You may approve
for tabling
31/03/22

Clerk's Chambers,
First Floor,
Parliament Buildings,
NAIROBI.

DC-EG
Recommended & Forwarded
31/03/22

March, 2022

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FOREWORD BY THE CHAIRPERSON

1. The Alternative Dispute Resolution Bill (Senate Bills No. 34 of 2021) seeks to put in place a legal framework to govern the settlement of certain civil disputes by conciliation, mediation and traditional dispute resolution.

2. The Bill was published on 12th May, 2021 and was read a First Time in the Senate on 6th July, 2021, following which it stood committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration.

3. The Committee considered the Bill at length. A call for submission of memoranda was placed in two newspapers with national circulation on Friday, 9th July, 2021. The advertisement was also posted on the Parliament website and social media platforms. In response to the advertisement, the Committee received written submissions from twenty-six stakeholders which were considered by the Committee in making its recommendations on the Bill.

4. Additionally, on 20th September, 2021, the Committee held a daylong hybrid public hearing on the Bill, where a total of twenty-three stakeholders and members of the public presented their submissions. These included the Kenya National Commission on Human Rights, Commission on Administrative Justice, National Steering Committee for the Implementation of the Alternative Justice Systems Policy, Mediation Accreditation Committee of the Judiciary, Chartered Institute of Arbitrators, Nairobi Centre for International Arbitration, Institute of Chartered Mediators and Conciliators, Mediation Training Institute East Africa, and the Law Society of Kenya, among others.

5. A notable thread in the submissions by key stakeholders was a request to the mover of the Bill, and to the Committee, to have the Bill withdrawn. This was on the basis that the process of developing a National Alternative Dispute Resolution Policy was at an advanced stage, and this would subsequently inform drafting of legislation on the various forms and aspects of alternative dispute resolution.

6. Arising from this, and following extensive deliberations with the mover of the Bill, the Committee recommends that consideration of the Bill be not proceeded with. An opportunity may be accorded to the Mover to move the Bill at Second Reading stage, and have Senators make their contributions, following which the Mover would withdraw the Bill before the Question on Second Reading of the Bill is put.

7. Additionally, the Committee recommends that the Attorney General be required to submit to Parliament the National Alternative Dispute Resolution Policy, together with any draft Bills thereon, within forty-five days of tabling of this Report. This is to address instances where Parliament is requested to drop consideration of a Bill to await conclusion of the policy process by the Executive, which then ends up taking inordinately long to be concluded.

8. The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it in undertaking this important assignment. The Committee further wishes to thank stakeholders and members of the public who participated during the public hearing as well as those who submitted written memoranda on the Bill.

9. It is now my pleasant duty, pursuant to standing order 143(1), to present a Report of the Standing Committee on Justice, Legal Affairs and Human Rights on the Alternative Dispute Resolution Bill (Senate Bills No. 34 of 2021).

Signed..... Date 29th March 2022

SEN. ERICK OKONG'O MOGENI, SC, MP,
CHAIRPERSON,
STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

PREFACE

The Standing Committee on Justice, Legal Affairs and Human Rights is established pursuant to the Senate Standing Order 212 and mandated to: -

'consider all matters relating to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and implementation of the provisions of the Constitution on human rights.'

The Committee is comprised of –

1) Sen. Erick Okong'o Mogeni, SC, MP - Chairperson
2) Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson
3) Sen. Amos Wako, EGH, EBS, SC, FCIArb, MP
4) Sen. James Orengo, EGH, SC, MP
5) Sen. Fatuma Dullo, CBS, MP
6) Sen. Mutula Kilonzo Junior, CBS, MP
7) Sen. (Dr) Irungu Kang'ata, CBS, MP
8) Sen. Johnson Sakaja, CBS, MP
9) Sen. Isaac Ngugi Githua, MP

The Minutes of the Sittings of the Committee in considering the Alternative Dispute Resolution Bill (Senate Bills No. 34 of 2021) are attached to this Report collectively as ***Annex 1***.

ADOPTION OF THE ALTERNATIVE DISPUTE RESOLUTION BILL (SENATE BILLS NO. 34 OF 2021)

We, the undersigned Members of the Senate Standing Committee on Justice, Legal Affairs and Human Rights, do hereby append our signatures to adopt this Report –

Sen. Erick Okong'o Mogeni, SC, MP	-Chairperson	
Sen. (Canon) Naomi Jillo Waqo, MP	-Vice-Chairperson	
Sen. Amos Wako, EGH, EBS, SC, FCIArb, MP	-Member	
Sen. James Orengo, EGH, SC, MP	-Member	
Sen. Fatuma Dullo, CBS, MP	-Member	
Sen. Mutula Kilonzo Junior, CBS, MP	-Member	
Sen. Irungu Kang'ata, CBS, MP	-Member	
Sen. Johnson Sakaja, CBS, MP	-Member	
Sen. Isaac Ngugi Githua, MP	-Member	

CHAPTER ONE: INTRODUCTION

A. Background on the Alternative Dispute Resolution Bill (Senate Bills No. 34 of 2021)

1. The Alternative Dispute Resolution Bill (Senate Bills No. 34 of 2021) is sponsored by Sen. (Arch) Sylvia Mueni Kasanga, MP. A copy of the Bill is attached to this Report as ***Annex 2***.

2. The Bill was published on 12th May, 2021 and was read a First Time in the Senate on 6th July, 2021. Following the First Reading in the Senate, it stood committed, pursuant to Standing Order 140 (1), to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration.

3. Before publication of the Bill on 12th May, 2021, the Bill had initially been introduced in the Senate and read a First Time on 19th September, 2019. However, before the passage by the Senate, the High Court in Petition No. 284 of 2019 held that the concurrence process under Article 110(3) of the Constitution is mandatory and is a condition precedent before any House of Parliament can consider a Bill. The court further ordered the immediate cessation of consideration of all Bills that were pending before either House, and for which joint concurrence by the Speakers of both Houses could not been demonstrated, in order to allow such Bills to be subjected to the mandatory joint concurrence process contemplated under Article 110(3) of the Constitution.

4. As part of implementing the Court decision, it was determined that concurrence as required under the Constitution could not be demonstrated in respect of this Bill. The Bill was withdrawn and republished in compliance with the Court orders in Petition No. 284 of 2019.

B. Justification for the Bill

5. There is currently no comprehensive legislation in Kenya governing the resolution of disputes by mediation, conciliation, and traditional dispute resolution. The law is scattered in several pieces of legislation, such as Part VI of the Civil Procedure Act and the Intergovernmental Relations Act. This is despite the fact that resolution of disputes forms part and parcel of everyday life in a society and the court process in the country is, in most cases, time consuming and expensive for many parties.

6. The goal of having robust alternative dispute resolution mechanisms is to guarantee peace, enable trade and investment, and contribute to the economic, social, and political development of the country. This will also ensure that all persons access justice, obtain remedy for grievances in line with human rights standards. The Bill therefore seeks to implement articles 48 and 159(2)(c) of the Constitution of Kenya, 2010 with respect to enhancing access to justice and promoting the use of alternative dispute resolution mechanisms in resolving disputes.

C. Objective of the Bill

7. The Alternative Dispute Resolution Bill (Senate Bills No. 34 of 2021) seeks to put in place a legal framework for the settlement of certain civil disputes by conciliation, mediation and traditional dispute resolution and provide for the guiding principles applicable.

D. Overview of the Bill

8. To achieve the above objective, the Bill proposes the following—

(i) Application of the Bill

9. Part I provides for the interpretation, the object, application, and guiding principles of alternative dispute resolution. It sets out the disputes that can be resolved through mediation, conciliation, or traditional dispute resolution.

10. It also sets out the disputes that will be exempted from the application of the Act. These include disputes concerning interpretation of the constitution, claims for violation, infringement or denial of a fundamental right, disputes governed by the Arbitration Act, election disputes, and disputes involving public interest.

(ii) Accreditation and registration of mediators and conciliators

11. Part II of the Bill provides for accreditation and registration of mediators and conciliators by setting out the qualifications for registration of a person as a mediator and conciliator; consideration of application for registration and revocation of registration; and setting out a code of conduct to govern mediators, conciliators, and traditional dispute resolvers.

(iii) Process of mediation and conciliation

12. Part III of the Bill provides for mediation and conciliation by setting out circumstances under which a dispute pending in court may be referred to conciliation or mediation; voluntary submission of disputes for conciliation or mediation by parties.

13. It further provides for the commencement of mediation or conciliation; the role of the parties in the alternative dispute resolution process; appointment and obligations of mediator or conciliator; confidentiality of the mediation or conciliation process; and conclusion of the process.

(iv) Traditional dispute resolution

14. Part IV provides for traditional dispute resolution by providing for registration of traditional dispute resolvers; how a dispute resolution process starts and how it comes to an end.

(v) Recognition of settlement agreements

15. Part V contains provisions on the recognition of settlement agreements by courts; instances when the court may reject a settlement agreement; stay of proceedings and the need for advocates to advise parties to a dispute to consider subjecting it to alternative dispute resolution in the first instance.

(vi) Miscellaneous provisions

16. Part VI contains miscellaneous provisions including the suspension of limitation period for alternative dispute resolution process; payment of expenses to the mediator or conciliator or traditional dispute resolver or expert or any other relevant party; and the making of rules for the better carrying into effect the provisions of the Act.

(vii) Consequential Amendments

17. Part VII contains consequential amendments to various Acts of Parliament that will arise as a result of the enactment of the Alternative Dispute Resolution Bill (Senate Bills No. 34 of 2021). The Acts to be amended to align them with the Bill are the Nairobi Centre for International Arbitration Act and the Civil Procedure Act.

E. Consequences of the Bill

18. This Bill creates a mechanism for the resolution of disputes through means alternative to courts of law. This will result in increased access to justice, the reduction of backlog of cases in courts and contribute to less costly and party-centered resolution of disputes thereby implementing Articles 48 and 159(2)(c) and (3) of the Constitution as regards access to justice.

CHAPTER TWO: PUBLIC PARTICIPATION

A. Invitation and consideration of stakeholder submissions on the Bill

19. The Standing Committee on Justice, Legal Affairs and Human Rights, pursuant to Article 118 of the Constitution and Senate Standing Order 140, invited submissions from members of the public on the Bill via an advertisement placed in the *Daily Nation* and *Standard* newspapers on Friday, 9th July, 2021 (***Annex 3***). The advertisement was also posted on the Parliament website and social media platforms.

20. In response to the advertisement, the Committee received written and oral submissions from twenty-six stakeholders. These were –

1) Kenya National Commission on Human Rights
2) Commission on Administrative Justice
3) National Steering Committee for the Implementation of the Alternative Justice Systems Policy
4) Mediation Accreditation Committee (Judiciary)
5) Chartered Institute of Arbitrators, Kenya Branch
6) Council of Governors
7) Nairobi Centre for International Arbitration
8) Law Society of Kenya
9) Federation of Women Lawyers (FIDA-Kenya)
10) Law Society of Kenya, Nairobi Branch
11) Mombasa Law Society
12) Institute of Chartered Mediators and Conciliators
13) Mediation Training Institute East Africa
14) The Young Bar Association
15) Women in Alternative Dispute Resolution
16) Dispute and Conflict Resolution International
17) Association of Professional Societies in East Africa
18) Legal Resources Foundation
19) Kenya Christian Professionals Forum
20) Kenya National Chamber of Commerce and Industry
21) Kenya National Council of Elders
22) Victoria N. Simiyu Okata, Advocate
23) Tabitha Joy Raore, Advocate
24) John Mwendwa, Advocate
25) Wilberforce Odhiambo Akello, Advocate
26) Anna Konuche, Advocate

Copies of the written submissions are attached to this Report collectively marked as *Annex 4*.

21. Additionally, on 20th September, 2021, the Committee held a hybrid public hearing meeting at Tribe Hotel, Kiambu County, where a total of twenty-three stakeholders and members of the public presented their submissions.

22. The Committee proceeded to consider the Bill and the submissions received thereon, as set out in the matrix attached to this Report as ***Annex 5***.

B. Summary of Stakeholder submissions proposing withdrawal of the Bill

23. Notable among the submissions received by the Committee were those of key stakeholders who urged that the Bill be not proceeded with, primarily to allow for the formulation and adoption of a policy framework for alternative dispute resolution, which would then inform drafting of a Bill on ADR. Highlights of the said submissions are set out below –

a) Nairobi Centre for International Arbitration (NCIA)

24. The NCIA informed the Committee that the Attorney-General appointed a National Steering Committee for the formulation of the National ADR Policy to, among others, oversee the process for formulation of a national policy on alternative dispute resolution, and propose appropriate reforms to the legal and institutional framework for alternative dispute resolution. The Steering Committee developed a policy framework and made legislation legislative proposals, and the same are awaiting consideration by Office of the Attorney General. NCIA observed that there is need for conclusion of the process for formulation of a proposed National Alternative Dispute Resolution Policy to precede legislation on ADR.

25. On referral of cases by courts to alternative dispute resolution, NCIA submitted that there is existing legislation within the Civil Procedure Act and Rules on reference of matters to Mediation and proposed that it is preferable that changes be made to the Civil Procedure Act if the provisions therein are inadequate.

26. There is diversity of culture in mediation. For example, in some, the parties prepare the agreement, while in others, a mediator does point out possible options for the settlement. In some jurisdictions that distinction may be what separates mediation from conciliation. This unique diversity should not be collapsed into the one method

as proposed in Part III. NCIA proposed that all options for concluding a mediation settlement agreement should be provided.

b) Commission on Administrative Justice

27. The Commission observed that it would be important to consider a holistic approach involving both Houses of Parliament and all stakeholders on all legislative proposals aimed at ensuring effective operationalization of Article 159(2)(c) of the Constitution for the following reasons –
    i) there is a Mediation Bill, 2020 introduced in the National Assembly; and
    ii) there is in existence a National ADR Policy which was developed by the NCIA. Hence best practices on law making dictates that policy should ideally precede legislation.

c) The Registrar, Mediation Accreditation Committee – Judiciary

28. Proposed that the entire Part IV which provide traditional dispute resolution be deleted and that the application of the proposed Bill to Traditional Dispute Resolution Mechanisms be removed from the Bill altogether

d) The National Steering Committee for the Implementation of the Alternative Justice Systems Policy (NASCI-AJS Committee)

29. NASCI-AJS Committee was appointed by the Hon. Chief Justice on 9th December, 2020 to implement the Alternative Justice System (AJS) Policy which seeks to mainstream into the formal justice system traditional, informal justice systems and other informal mechanisms used to ensure access to justice in Kenya. The committee singled out one main concerns about the current Bill which is that it takes the form of regulation rather than facilitation of the different forms of ADR including AJS.

30. In this regard, three aspects of the ADR Bill were highlighted –
    i) Clauses 31 and 32 of the ADR Bill are potentially unconstitutional and strategically unwise for at least four reasons, namely –
        a) places on advocates and disputants the obligation to promote ADR in Article 159 of the Constitution, which responsibility the Constitution places on the Judiciary;
        b) require parties to utilize ADR and only resort to the court system where those attempts fail. This violates the principle of voluntariness which is inherent in Article 159(2)(c) of the Constitution;

c) create the perception that ADR (including AJS) will be unable to resolve the majority of the cases presented to the Courts by anticipating that if all disputes are presented for ADR or AJS, there will still be a big percentage of cases which will end up in Court. Additionally, they do not distinguish cases which are not amenable for ADR or AJS resolution which, by law, must be determined in Court or before certain tribunals;

d) impose criminal sanctions on lawyers for doing that which they are trained and licensed to do, represent their clients in Court. Rather than pursue this route, the ADR Bill should provide incentives for parties and their lawyers to choose ADR or AJS; and

e) do not take into account practical realities lawyers face before commencing suits on behalf of their clients – including the statute of limitations; the need for immediate Court protection or reliefs; the futility of pursuing ADR or AJS for the specific dispute, etc.

ii) The requirement that a "Traditional Dispute Resolver" shall be acquainted with "customary law" is unwise and untenable since most AJS do not solely use "customary law" in resolving dispute. They often utilize a dialectical ken of normative principles drawn from anthropological, community, "modern", constitutional and other borrowed normative orders. Additionally, to require the Center to prepare and maintain a list of traditional dispute resolvers as provided under clause 27(2) might be viewed as impermissible regulation since there are literally hundreds of thousands of AJS fora and mechanisms where disputes are resolved every day.

iii) In attempting to capture all forms of ADR in a single Bill, the ADR Bill misses the complexity of AJS which is excellently captured in the AJS Policy. In particular, like its previous version, the Bill begins with an assumption that there is a closed category of ADR mechanisms which it seeks to capture and bring within the gaze of the law. The object of the Bill should be the opposite: to acknowledge, as the Constitution does, that there are many mechanisms of accessing justice outside Court and find ways to facilitate and promote them in a way which aggrandizes the values of the Constitution without undermining human rights.

31. Consequently, the NaSCI-AJS recommended that the Bill be withdrawn at this time and that it be subjected to more robust and wider engagement with stakeholders. In the alternative, NaSCI-AJS recommended that all references to AJS and TDRM in the Bill be removed.

e) The Council of Governors

32. The Council of Governors submitted that the Judiciary in collaboration with the Nairobi Centre for International Arbitration finalized the Alternative Dispute Resolution Policy and presented the same to the Attorney-General. It was recommended that the Senate awaits the outcome of the Policy to align the Bill to the Policy.

f) The Charted Institute of Arbitrators (CIArb) – Kenya Branch

33. The Charted Institute of Arbitrators (CIArb) observed that –

i) There is need for some form of regulations, but care must be taken not to turn the process into a technical and rigid process;

ii) There is need to consider the practicability to regulate traditional dispute resolution process and process to certify dispute resolver under customary law;

iii) The Bill has not addressed adjudication as a mechanism of dispute resolution; and

iv) Under the Nairobi Centre for International Arbitration Act, NCIA trains and provide accreditation. Other institutions provide training but now NCIA will be responsible for accreditation. This may raise issues of discrimination in favour of NCIA trainees.

g) Mombasa Law Society

34. Observed that the Bill is not in conformity with the provisions of Article 159 of the Constitution. The Constitution is clear that judicial authority is vested in the Judiciary by the sovereign people of our country. While alternative dispute resolution is encouraged in Article 159(2) (c), this Bill now comes in to make the judicial process its alternative and pushes it to the periphery. As such, it undermines the right to access the judiciary which is the fundamental method of dispute resolution as per the constitution and further erodes the independence of the judiciary which must be upheld.

35. Further, the Mombasa Law Society noted that the Bill as drafted has not taken into consideration the provisions of Article 27, 28, 32 and 48 of the Constitution which safeguard equality and freedom from discrimination, human dignity, freedom of conscience, religion, belief and opinion, and access to justice.

36. On traditional dispute resolvers, it was noted that the same needs further clarity especially in light of our diverse social backgrounds.

h) The Legal Resource Foundation Trust (LRF)

37. The Bill in its design is an affront to the constitution for the following reasons;
    i) The Bill undermines the Judiciary in a way that endangers the principle of separation of powers by shifting the role of the judiciary as envisaged under Article 159 of the Constitution of Kenya on promoting ADR to legal practitioners, advocates.
    ii) It creates an institution to oversee application of ADR in dispute resolution outside of the framework contemplated under Chapter 10 of the Constitution.

38. The Bill, by seeking to regulate through registration traditional dispute resolvers offends succinct recommendations in the AJS Policy which was launched on 27th August 2020 by the Chief Justice and for which a National Steering Committee on Implementation of Alternative Justice Systems (AJS) Policy has already been put in place.

i) The Institute of Chartered Mediators and Conciliators (ICMC)

39. ICMC made general comments observing that the Bill appears to have been drafted without consultation and participation of relevant stakeholders and professionals in the field. There is therefore need for inclusive participation of relevant stakeholders to broaden the scope for proper administration of the alternative dispute resolution practice.

40. Additionally, it was submitted that the Nairobi Centre for International Arbitration (NCIA) primarily deals with arbitration and it is not properly constituted hence lacking crucial expertise in all alternative dispute resolution practices. As such, NCIA cannot oversee the practice and set standards in line with international best practices as provided in the Bill.

j) The Law Society of Kenya – Nairobi Branch

41. The LSK – Nairobi Branch made general comments suggesting that –
    i) If the Bill was to be an all-inclusive ADR Bill, it should focus on giving general policies and governance direction so as to create consistency and allow specific and dedicated bills such as AJS Bill and Mediation and Conciliation Bill to be enacted thereafter either in the rules or in Acts specific to each type

of dispute resolution. This is because, the different ADR methods require a lot of specificity and one framework may be unable to cover them all. In the alternative, the current Bill be transformed to a Mediation and Conciliation Bill as opposed to its current reference which is a term with an extremely wide scope.

ii) Being the first ADR Bill, the Bill should acknowledge the forms of ADR and give definitions and general guidelines, but not go into the nitty-gritties such as accreditation and registration. This will be best covered in Rules.

iii) Part IV on Traditional Dispute Resolution be discarded, given the competence of traditional dispute resolvers cannot be ascertained as customary rules are not coded. It is close to impossible to legislate on TDR. Further, there is no provision for registration of the traditional dispute resolvers and their regulation.

iv) The Bill refers to conciliation whereas Article 159 talks of reconciliation. Within the ambit of ADR conciliation and reconciliation are two different processes. The Bill ought to specify which process is being referred to.

v) Provisions in the ADR Bill and the Mediation Bill should be harmonised to avoid duplication and conflict.

vi) That the Bill does not take note of the difference between court annexed mediation and self-referred mediation all through different provisions. This is a recipe for confusion.

k) Mr. Wilberforce Odhiambo Okello

42. The Bill ought to be relooked as it violates the constitution, the independence of court system, the role of courts and judicial system and the contractual freedom of parties in the following ways –

i) it violates and contradicts various statutes including the provisions of Civil Procedure Act, Civil Procedure Rules, Advocates Act, Land Act 2012, Land Registration Act 2012, Arbitration Act 1995, Public Procurement laws, Labour Relations Act, the Small Claims Act, Fair Administration Act etc All these must be amended to give effect to the impugned Bill.

ii) the Bill is a claw back to the constitutional rights as it seeks to make mediation mandatory as opposed to voluntary nature of alternative dispute resolution mechanism, ousts Kenya from the adversarial legal system, and seeks to prevent claimants from filing claims against Government.

iii) the Bill offends the structural architecture of the courts, and it seeks to slow and reduce the efficacy and efficiency in resolution of commercial disputes by adding another layer or restriction before approaching court which will elongate the dispute resolution processes.

iv) Part IV which provides for Traditional Dispute Resolution purports to regulate Traditional Justice Systems without taking into consideration the diverse cultures containing their unique traditional dispute resolution mechanisms. To formalize the traditional dispute resolution mechanisms and register the Dispute Resolvers in basically an affront and violation of the fundamental rights to culture as opined under Article 44 of the Constitution.

v) Part V is unconstitutional as clauses 31,32 ,33 ,34,35 and 36 of the Bill abrogates fundamental rights and Bill of Rights and particularly Article 22 of the Constitution as they seek to restrict access to justice, they inhibit legal representation is contravention of Article 49 of the Constitution, they destroy the principle of advocate client confidentiality and violates article 50 of the Constitution, violates the advocate client confidentiality, and also the Part abrogates and violates the independence of judiciary and purport to place alternative dispute resolution above judicial system and processes.

l) Ms Anna Konuche, Advocate

43. Opposes the Bill on the following grounds –

i) It is unconstitutional to force all disputants to adopt a specific way of dispute settlement;

ii) It is unconstitutional to force advocates to advise their clients in a certain manner;

iii) Not all disputes can be solved through ADR;

iv) The creation of the so-called conciliators is a concept that has not been well thought out;

v) The requirement of resorting to customary law does not make sense where we do not have a codified law known as customary law; and

vi) This law by design will render lawyers jobless and irrelevant.

m) The Young Bar Association

44. The Young Bar Association (TYBA) observed that the ADR Bill seeks to supplant, instead of supplementing the law and the work of lawyers by providing that a party to a dispute shall take reasonable measures to resolve the dispute through alternative dispute resolution before resorting to a judicial process. They were of the view that submission to Alternative Dispute Resolution should be voluntary and that it should be the court's discretion to determine whether to refer a case to mediation, conciliation, or arbitration, and it should do so on a case-to-case basis, without legislators fettering that discretion with hard and fast rules like the ones the ADR Bill proposes.

45. As a result, the following recommendations were made so as to bring the Bill in line with the law and the best interests of all stakeholders –

i) Make submission to ADR mechanisms voluntary instead of making it mandatory;

ii) Allow lawyers the discretion to devise the best strategies for the resolution of client's problems without strong-arming them to direct clients to ADR;

iii) Provide for legal training to be the primary qualification for conciliators and mediators in addition to any other competencies that the Nairobi International Centre for Dispute Resolution may deem fit; and

iv) Redirect the resources committed to mounting a court-independent ADR system to developing a court-connected ADR system.

CHAPTER THREE: COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

A. The Committee made the following observations—

46. Article 48 of the Constitution obligates the State ensure every Kenyan access justice and that costs, if required, shall be reasonable and shall not impede access to justice. Additionally, Article 159(2)(c) and (3) obligates the courts and tribunals to promote alternative forms of dispute resolution. Article 159/(2)(c) and (3) of the Constitution states as follows –

> *(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*
> *(a) ...*
> *(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*
> *(3) Traditional dispute resolution mechanisms shall not be used in a way that—*
> *(a) contravenes the Bill of Rights;*
> *(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or*
> *(c) is inconsistent with this Constitution or any written law.*

47. In addition to the Constitutional provisions, arbitration is comprehensively provided under the Arbitration Act No 4 of 1995. The other forms of alternative dispute resolution have not been comprehensively provided though they are provided for in bits and pieces under various legislations. These legislations include Part VI of the Civil Procedure Act Cap. 21 of the laws of Kenya which provide for court mandated mediation and the Intergovernmental Relations Act No 2 of 2012 which provide for resolution of intergovernmental disputes by use of alternative dispute resolution processes.

48. The administration of justice in the country faces various challenges including physical access, prohibitive cost and cases take long before they are determined. Further, there exist various processes outside of court involved in the resolution of disputes. Such processes include by use of chiefs, faith-based personnel, community led as well as trained professional such as mediators.

49. Whereas arbitration and court mandated mediation are anchored in law, all other alternative dispute resolution processes by, for example, chiefs, faith-based personnel, community led as well as trained professional such as mediators are not regulated by law. Therefore, the Alternative Dispute Resolution Bill, 2021 seek to fill a gap in our law with a view to not only ensure access to justice for all but justice is done.

50. Among the views received from stakeholders were submission from more than eight stakeholders who appealed to the Committee for withdrawal of the Bill primarily to allow for the formulation and adoption of a policy framework for alternative dispute resolution, which would then inform drafting of a Bill on ADR. These views are discussed in the preceding Chapter of this Report.

51. The Committee further observed in the year 2020, the Mediation Bill was introduced in the National Assembly. However, in February 2022, the Mediation Bill was withdrawn in order to allow further consultations and incorporation of additional input from the National Steering Committee on ADR Policy.

52. Standing order 154(1) of the Senate Standing Orders provides that 'Either before the commencement of business or on the Order of the Day for any stage of the Bill being read, the Senator in charge of a Bill may, without notice, claim to withdraw the Bill.'

B. The Committee Recommendations

53. Arising from the above observations, and following consultations with the sponsor of the Bill, the Standing Committee on Justice, Legal Affairs and Human Rights recommends that –

a) the Alternative Dispute Resolution Bill (Senate Bills No. 34 of 2021) be **not** proceeded with, and that the sponsor **withdraws** the Bill, pursuant to standing order 154 of the Senate Standing Orders; and

b) the Attorney-General to submit to Parliament, within forty-five (45) days of tabling of this Report, the National Alternative Dispute Resolution Policy.

ANNEXES

Annex 1: Minutes of the Committee in considering the Bill.

Annex 2: Copy of the Alternative Dispute Resolution Bill, 2021

Annex 3: Advertisement for submission of memoranda placed in the *Nation* and *Standard* newspapers on Friday, 9th July, 2021.

Annex 4: Copies of stakeholder submissions on the Bill.

Annex 5: Matrix on consideration of public submissions on the Bill.

TWELFTH PARLIAMENT | SIXTH SESSION

MINUTES OF THE THIRTY FOURTH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THE ZOOM ONLINE MEETING PLATFORM, ON TUESDAY, 22ND MARCH, 2022, AT 10:30 AM.

PRESENT

1.	Sen. Erick Okong'o Mogeni, SC, MP	- Chairperson **(Chairing)**
2.	Sen. (Canon) Naomi Jillo Waqo, MP	- Vice Chairperson
3.	Sen. Fatuma Dullo, CBS, MP	- Member
4.	Sen. Mutula Kilonzo Junior, CBS, MP	- Member
5.	Sen. (Dr.) Irungu Kang'ata, CBS, MP	- Member
6.	Sen. Isaac Ngugi Githua, MP	- Member

ABSENT WITH APOLOGY

1.	Sen. Amos Wako, EGH, EBS, SC, FCIArb, MP	- Member
2.	Sen. James Orengo, EGH, SC, MP	- Member
3.	Sen. Johnson Sakaja, CBS, MP	- Member

SECRETARIAT

1.	Mr. Charles Munyua	- Clerk Assistant
2.	Mr. Moses Kenyanchui	- Legal Counsel
3.	Mr. Mitchell Otoro	- Legal Counsel
4.	Mr. Said Osman	- Research Officer
5.	Mr. Kennedy Owuoth	- Fiscal Analyst
6.	Ms. Purity Orutwa	- Clerk Assistant *(Taking minutes)*
7.	Mr. James Kimiti	- Hansard/ Audio Officer
8.	Ms. Hawa Abdi	- Serjeant at Arms
9.	Ms. Sandra Alusa	- Intern
10.	Mr. Titus Michubu	- Pupil

MIN. NO. 180/2022 PRAYER

The sitting commenced with a word of prayer by the Vice Chairperson.

MIN. NO. 181/2022 ADOPTION OF THE AGENDA

The Committee adopted the agenda of the Sitting, having been proposed by Sen. Mutula Kilonzo Junior, CBS, MP and seconded by Sen. (Dr.) Irungu Kang'ata, CBS, MP.

MIN. NO. 182/2022 THE POLITICAL PARTY PRIMARIES BILL (SENATE BILLS NO. 35 OF 2020)

The Committee considered and adopted the Report on the Political Party Primaries Bill (Senate Bills No. 35 of 2020), having been proposed by Sen. Mutula Kilonzo Junior, CBS, MP and seconded by Sen. Isaac Ngugi Githua, MP.

MIN. NO. 183/2022 THE ALTERNATIVE DISPUTE RESOLUTION BILL (SENATE BILLS NO.34 OF 2021)

The Committee considered and adopted the Report on the Alternative Dispute Resolution Bill (Senate Bills No.34 of 2021), having been proposed by Sen. (Dr.) Irungu Kang'ata, CBS, MP and seconded by Sen. (Canon) Naomi Jillo Waqo, MP.

MIN. NO. 184/2022 THE ELECTION (AMENDMENT) (NO.2) BILL (SENATE BILLS NO. 43 OF 2021)

The Committee considered and adopted the Report on the Election (Amendment) (No.2) Bill (Senate Bills No. 43 of 2021) having been proposed by Sen. (Canon) Naomi Jillo Waqo, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.

MIN. NO. 185/2022 THE CONSTITUTION OF KENYA (AMENDMENT) BILL (SENATE BILLS NO. 46 OF 2021)

The Committee considered and adopted the Report on the Constitution of Kenya (Amendment) Bill (Senate Bills No. 46 of 2021), having been proposed by Sen. Mutula Kilonzo Junior, CBS, MP and seconded by Sen. Isaac Ngugi Githua, MP.

MIN. NO. 186/2022 PETITION ON AMENDMENT TO THE CONSTITUTION OF KENYA AND OTHER RELEVANT LAWS ON THE ELECTION OF A DEPUTY PRESIDENT AND A DEPUTY GOVERNOR

The Committee considered and adopted the Report on a Petition by Taratisio Ireri Kawe, regarding proposed amendments to the Constitution and various statutes on the election of a Deputy President and Deputy Governor, whenever such a position became vacant. The Report was proposed by Sen. (Dr.) Irungu Kang'ata, CBS, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.

MIN. NO. 187/2022 ANY OTHER BUSINESS

Members were informed that the following meetings were scheduled for Wednesday and Thursday that week, and that the respective stakeholders had confirmed attendance. Consequently, Members were urged to avail themselves for the meetings –

No.	Date	Time	Meeting
a)	Wednesday, 23rd March, 2022	8.00 am	Meeting with the Attorney General and the Law Society of Kenya to consider a Statement sought by Sen. Samson Cherarkey, MP on unqualified persons practicing as Advocates in various private companies.
b)	Thursday, 24th March, 2022	8.00 am	Meeting with the Chairperson of the Independent Electoral and Boundaries Commission to discuss the status of preparedness for the 2022 General Elections.

MIN. NO. 188/2022 ADJOURNMENT

The meeting was adjourned at 11:14am. The next meeting was scheduled for Wednesday, 23rd March at 8:00 am.

SIGNED: .....

(CHAIRPERSON)

DATE: ..... 30/03/2022 .....

TWELFTH PARLIAMENT | FIFTH SESSION

MINUTES OF THE NINETY-SIXTH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD AT WHITESANDS BEACH RESORT, IN MOMBASA COUNTY, ON FRIDAY, 26TH NOVEMBER, 2021 AT 10.00 A.M.

PRESENT

1. Sen. Erick Okong'o Mogeni, SC, MP - Chairperson **(Chairing)**
2. Sen. Amos Wako, EGH, EBS, SC, FCIArb, MP - Member
3. Sen. Fatuma Dullo, CBS, MP - Member (V)
4. Sen. (Dr.) Irungu Kang'ata, CBS, MP - Member
5. Sen. Isaac Ngugi Githua, MP - Member (V)

ABSENT WITH APOLOGY

1. Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson
2. Sen. James Orengo, EGH, SC, MP - Member
3. Sen. Mutula Kilonzo Junior, CBS, MP - Member
4. Sen. Johnson Sakaja, CBS, MP - Member

SECRETARIAT

1. Dr. Johnson Okello - Director, Legal Services
2. Ms. Mercy Thanji - Legal Counsel
3. Mr. Charles Munyua - Clerk Assistant
4. Mr. Said Osman - Research Officer
5. Mr. Moses Kenyanchui - Legal Counsel
6. Ms. Lucianne Limo - Media Relations Officer
7. Mr. Javan Nang'eyo - Sergeant at Arms
8. Ms. Purity Orutwa - Clerk Assistant (*Taking Minutes*)
9. Ms. Hawa Abdi - Sergeant at Arms
10. Mr. James Kimiti - Hansard Officer

MIN. NO. 462/2021 PRAYER

The sitting commenced with a word of prayer by Sen. Fatuma Dullo, CBS, MP.

MIN. NO. 463/2021 ADOPTION OF THE AGENDA

The Committee adopted the agenda of the Sitting, having been proposed by Sen. (Dr.) Irungu Kang'ata, CBS, MP and seconded by Sen. Isaac Ngugi Githua, MP.

MIN. NO. 464/2021 JUDGMENT BY THE COURT OF APPEAL IN CIVIL APPEAL NO. E084 OF 2021 - *SPEAKER OF THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA & ANOTHER Vs SENATE OF THE REPUBLIC OF KENYA & 12 OTHERS*

The Committee was taken through a brief on the Judgment delivered by the Court of Appeal on 19th November, 2021 in Civil Appeal No. E084 of 2021 - *Speaker of the National Assembly of the Republic of Kenya & Another Vs Senate of the Republic of Kenya & 12 Others.*

It was noted that the Judgment had greatly eroded the gains made in the Judgment delivered by the High Court on 29th October 2020 in HC Petition No. 284 of 2019. Consequently, it was resolved that an appeal be preferred to the Supreme Court on the aspects of the Court of Appeal Judgment that the Senate was dissatisfied with.

In this regard, the Committee directed the legal team to file the Notice of Appeal within the required timelines. The Committee would convene at a later date to consider the draft Petition and Record of Appeal to be filed at the Supreme Court.

MIN. NO. 465/2021 THE ALTERNATIVE DISPUTE RESOLUTION BILL (SENATE BILLS NO. 34 OF 2021)

The Committee noted that, due to the extensive public and stakeholder submissions received on the Bill, it was important that the matrix be considered at a physical sitting during which at least five Members were present, to enable decisions to be made on the respective clauses of the Bill.

Consequently, further consideration of the Bill was deferred.

MIN. NO. 466/2021 THE LIFESTYLE AUDIT BILL, (SENATE BILL NO. 36 OF 2021)

The Committee noted that, due to the extensive public and stakeholder submissions received on the Bill, it was important that the matrix be considered at a physical sitting during which at least five Members were present, to enable decisions to be made on the respective clauses of the Bill.

Consequently, further consideration of the Bill was deferred.

MIN. NO. 467/2021 **I) THE ELECTION (AMENDMENT) BILL (SENATE BILLS NO. 42 OF 2021);**
II) THE ELECTION (AMENDMENT) (NO. 2) BILL (SENATE BILLS NO. 43 OF 2021); AND
III) THE ELECTION (AMENDMENT) (NO 3) BILL (SENATE BILLS NO. 48 OF 2021).

The Committee noted that a public hearing on the three Bills was scheduled to be held in Nairobi on 3rd December, 2021. The Committee further resolved to explore the possibility of undertaking public hearings on the Bills, at selected regions outside Nairobi, in January, 2022.

MIN. NO. 468/2021 **THE CONSTITUTION OF KENYA (AMENDMENT) BILL (SENATE BILLS NO. 46 OF 2021).**

The Committee resolved to explore the possibility of undertaking public hearings on the Bills, in Kitui County and other selected regions, in January, 2022.

MIN. NO. 469/2021 **ADJOURNMENT**

There being no other business, the meeting was adjourned at 12.45 pm. The next sitting will be held on Friday, 26th November, 2021 at 2.00 pm, in Mombasa County.

SIGNED: .....
(CHAIRPERSON)

DATE: 30/03/2022

TWELFTH PARLIAMENT | FIFTH SESSION

MINUTES OF THE SEVENTY-THIRD SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD AT TRADEMARK HOTEL, KIAMBU COUNTY, ON MONDAY, 20TH SEPTEMBER, 2021 AT 12.10 P.M.

PRESENT

1. Sen. Erick Okong'o Mogeni, SC, MP - Chairperson (V)
2. Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson **(Chairing)**
3. Sen. Fatuma Dullo, CBS, MP - Member
4. Sen. Mutula Kilonzo Junior, CBS, MP - Member

ABSENT WITH APOLOGY

1. Sen. Amos Wako, EGH, EBS, SC, FCIArb, MP - Member
2. Sen. James Orengo, EGH, SC, MP - Member
3. Sen. Irungu Kang'ata, CBS, MP - Member
4. Sen. Johnson Sakaja, CBS, MP - Member

IN ATTENDANCE

a) Sponsor of the Bill

1. Sen. (Arch) Sylvia Kasanga, MP

b) Mediation Accreditation Committee (Judiciary)

1. Hon Caroline Kendagor - Deputy Registrar
2. Hon Moses Wanjala - Deputy Registrar

c) National Steering Committee for the Implementation of the Alternative Justice Systems Policy

1. Dr. Stephen Ouma Akoth - Vice Chairperson
2. Prof. Winifred Kamau - Member

d) Nairobi Centre for International Arbitration

1. Mr. John Ohaga SC - Chairperson, National Steering Committee for Formulation of ADR Policy (V)
2. Mr. Lawrence Muiruri - Registrar/CEO
3. Ms. Lorna Kerubo - Senior Capacity Building Officer

e) Kenya Christian Professionals Forum

1. Vincent Kimutai Kimosop
2. John Dadu Hinzano

f) Institute of Chartered Mediators and Conciliators/Mediation Training Institute East Africa

1. Kevin Kokebe
2. Everlyne Owuor

g) Dispute and Conflict Resolution International

1. Justice (Rtd) Lee Muthoga

h) Association of Professional Societies in East Africa

1. Mr. Felix Owaga Okatch – Chairman
2. Mr Shafiq Taibjee
3. Mr Collins Kowuor

i) Legal Resources Foundation

1. Job Mwaura - Ag. Programs Coordinator and Monitoring and Evaluation Specialist
2. Timothy Mwichigi - Project Manager, PLEAD

j) Individuals

1. Ms. Victoria N. Simiyu Okata, Advocate
2. Dr. Esther Muiruri

SECRETARIAT

1. Mr. Charles Munyua - Clerk Assistant
2. Mr. Said Osman - Research Officer
3. Mr. Moses Kenyanchui - Legal Counsel
4. Ms. Sylvia Nasambu - Clerk Assistant
5. Mr. Javan Nang'eyo - Senior Serjeant at Arms
6. Ms. Lucianne Limo - Media Relations Officer
7. Ms. Purity Orutwa - Clerk Assistant (*Taking Minutes*)
8. Mr. James Ngusya - Serjeant at Arms
9. Mr. James Kimiti - Hansard Officer

MIN. NO. 356/2021 PRAYER

The sitting commenced with a word of prayer by the Vice Chairperson.

MIN. NO. 357/2021 ADOPTION OF THE AGENDA

The Committee adopted the agenda of the Sitting, having been proposed by Sen. Fatuma Dullo, CBS, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.

MIN. NO. 358/2021 **PUBLIC HEARING ON THE ALTERNATIVE DISPUTE RESOLUTION BILL (SENATE BILL NO. 34 OF 2021) - RESUMPTION**

The Vice Chairperson welcomed the stakeholders who had appeared before the Committee to present their submissions on the Alternative Dispute Resolution Bill (Senate Bill No. 34 of 2021).

Thereupon, the Committee proceeded to receive submissions from –

a) Mediation Accreditation Committee (Judiciary);
b) National Steering Committee for the Implementation of the Alternative Justice Systems Policy;
c) Nairobi Centre for International Arbitration;
d) Kenya Christian Professionals Forum;
e) Institute of Chartered Mediators and Conciliators/Mediation Training Institute East Africa;
f) Dispute and Conflict Resolution International;
g) Association of Professional Societies in East Africa;
h) Legal Resources Foundation; and
i) Two Individuals

Copies of the written submissions by the said stakeholders are annexed to these Minutes.

MIN. NO. 359/2021 **ADJOURNMENT**

There being no other business, the meeting was adjourned at 2.50 pm. The next sitting will be held on Tuesday, 21st September, 2021 at 8.00 am.

SIGNED: .....
(CHAIRPERSON)

DATE: 30/03/2022.....

TWELFTH PARLIAMENT | FIFTH SESSION

MINUTES OF THE SEVENTY-SECOND SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD AT TRADEMARK HOTEL, KIAMBU COUNTY, ON MONDAY, 20TH SEPTEMBER, 2021 AT 9.00 A.M.

PRESENT

1. Sen. Erick Okong'o Mogeni, SC, MP - Chairperson (V)
2. Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson **(Chairing)**
3. Sen. Fatuma Dullo, CBS, MP - Member
4. Sen. Mutula Kilonzo Junior, CBS, MP - Member

ABSENT WITH APOLOGY

1. Sen. Amos Wako, EGH, EBS, SC, FCIArb, MP - Member
2. Sen. James Orengo, EGH, SC, MP - Member
3. Sen. Irungu Kang'ata, CBS, MP - Member
4. Sen. Johnson Sakaja, CBS, MP - Member

IN ATTENDANCE

a) Sponsor of the Bill

1. Sen. (Arch) Sylvia Kasanga, MP

b) Commission on Administrative Justice

1. Ms. Florence Mumbi - Director, Complaints, Legal and Investigations
2. Ms. Faith Sialai - Senor Legal Officer

c) Law Society of Kenya, Nairobi Branch

1. Ms. Helene Namisi - Vice Chairperson
2. Ms. Angela Munga-Mwadumbo - Convener, Mediation Bar Bench Group

d) The Young Bar Association

1. Mr. Manwa Hosea - Chairperson
2. Ms. Teresiah Wavinya - Member
3. Mr. Misare Willis - Member

e) Chartered Institute of Arbitrators, Kenya Branch

1. Ms. Jane S. Mwangi - Managing Partner, Robson Harris

f) Federation of Women Lawyers (FIDA-Kenya)

1. Ms. Sandra Oyombe - Member

g) Mombasa Law Society

1. Ms. Muthoni Kirutiri - Secretary General

SECRETARIAT

1. Mr. Charles Munyua - Clerk Assistant
2. Mr. Said Osman - Research Officer
3. Mr. Moses Kenyanchui - Legal Counsel
4. Ms. Sylvia Nasambu - Clerk Assistant
5. Mr. Javan Nang'eyo - Senior Serjeant at Arms
6. Ms. Lucianne Limo - Media Relations Officer
7. Ms. Purity Orutwa - Clerk Assistant (*Taking Minutes*)
8. Mr. James Ngusya - Serjeant at Arms
9. Mr. James Kimiti - Hansard Officer

MIN. NO. 352/2021 PRAYER

The sitting commenced with a word of prayer by Sen. Fatuma Dullo, CBS, MP.

MIN. NO. 353/2021 ADOPTION OF THE AGENDA

The Committee adopted the agenda of the Sitting, having been proposed by Sen. Mutula Kilonzo Junior, CBS, MP and seconded by Sen. Fatuma Dullo, CBS, MP.

MIN. NO. 354/2021 PUBLIC HEARING ON THE ALTERNATIVE DISPUTE RESOLUTION BILL (SENATE BILL NO. 34 OF 2021)

The Vice Chairperson welcomed the stakeholders who had appeared before the Committee to present their submissions on the Alternative Dispute Resolution Bill (Senate Bill No. 34 of 2021)

Thereupon, the Committee proceeded to receive submissions from –

a) Sen. (Arch) Sylvia Kasanga, MP – the Sponsor of the Bill;
b) Commission on Administrative Justice;
c) Law Society of Kenya, Nairobi Branch;
d) The Young Bar Association;
e) Chartered Institute of Arbitrators, Kenya Branch;
f) Federation of Women Lawyers (FIDA-Kenya); and
g) Mombasa Law Society.

Copies of the written submissions by the said stakeholders are annexed to these Minutes.

MIN. NO. 355/2021 **ADJOURNMENT**

There being no other business, the meeting was adjourned at 11.50 am. The next sitting will be held on Monday, 20th September, 2021 at 12.10 pm.

SIGNED: .....

(CHAIRPERSON)

DATE: .....30/03/2022.....

SPECIAL ISSUE

Kenya Gazette Supplement No. 97 (Senate Bills No. 34)

REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

SENATE BILLS, 2021

NAIROBI, 12th May, 2021

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THE ALTERNATIVE DISPUTE RESOLUTION ACT, 2021

A Bill for

AN ACT of Parliament to provide for the settlement of civil disputes by conciliation, mediation and traditional dispute resolution mechanism; to set out the guiding principles applicable; and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

PART I – PRELIMINARY

Short title.

1. This Act may be cited as the Alternative Dispute Resolution Act, 2021.

Interpretation.

2. (1) In this Act –

"advocate" has the meaning assigned to it under section 2 of the Advocates Act; Cap. 16.

"alternative dispute resolution" refers to constitutionally compliant mechanisms, processes and methods of dispute resolution other than judicial determination;

"alternative dispute resolution clause" means a contract clause within a written contract or a separate written agreement entered into by the parties agreeing to submit to alternative dispute resolution a dispute which may arise between them in respect of a defined legal relationship;

"alternative dispute resolution process" means all the steps taken in an attempt to resolve a dispute by alternative dispute resolution from the time a dispute is referred to alternative dispute resolution or steps are taken to resolve a dispute by alternative dispute resolution up to the time the parties reach an agreement or the alternative dispute resolution report is drawn up;

"Centre" means the Nairobi Centre for International Dispute Resolution established under section 4 of the Nairobi Centre for International Dispute Resolution Act; No. 26 of 2013.

"Committee" means the Mediation Accreditation Committee established under section 59A of the Civil Procedure Act; Cap. 21.

"community" means social units or groups brought together by different types of affinities such as culture, dialect, race, family, neighborhood, faith, business, age, and common interest;

"conciliation" means an advisory and confidential structured process in which an independent third party, called a conciliator, actively assists parties in their attempt to reach, on a voluntary basis, a mutually acceptable settlement agreement to resolve their dispute;

"conciliator" means an impartial person accredited and registered to facilitate conciliation and includes employees and persons employed by that person;

"customary law" means rules of custom that an indigenous people of a given locality view as enforceable;

"mediation" means a facilitative and confidential structured process in which parties attempt by themselves, on a voluntary basis, to reach a mutually acceptable settlement agreement to resolve their dispute with the assistance of an independent third party called a mediator;

"mediator" means an impartial person accredited and registered to facilitate mediation and includes employees and persons employed by that person;

"party" means a person who is party to a dispute, and includes a legal person, a national government, a county government, or a state agency;

"report" means the alternative dispute resolution report prepared by a conciliator, mediator or a traditional dispute resolver at the end of alternative dispute resolution process setting out the nature of the dispute, the stage the matter had reached, the outcome and any other relevant matter subject to confidentiality as provided for under section 22;

"settlement agreement" means a written agreement between the parties entered into at the end of an alternative dispute resolution process setting out the terms of agreement;

"traditional dispute resolution" means a process in which parties attempt to reach a mutually acceptable settlement agreement to resolve their dispute by the application of customary law of the community concerned

and with the assistance of a third party called a traditional dispute resolver; and

"traditional dispute resolver" means a person or a group of persons who are by the traditional custom of their community recognized and accepted as possessing the skills, wisdom and social standing required to oversee and adjudicate over traditional dispute resolution.

Object of the Act.

3. The object of this Act is to—

(a) give effect to Article 159(2)(c) of the Constitution;

(b) provide an effective mechanism for amicable dispute resolution;

(c) promote a conciliatory approach to dispute resolution;

(d) facilitate timely resolution of disputes at a relatively affordable cost;

(e) facilitate access to justice;

(f) enhance community and individual involvement in dispute resolution; and

(g) foster peace and cohesion.

Application of the Act.

4. (1) This Act shall apply to civil disputes including a dispute to which the National Government, a county government or a State organ is a party.

(2) Despite subsection (1), this Act shall not apply to –

(a) disputes subject to arbitration under the Arbitration Act;

No. 4 of 1995.

(b) disputes where a tribunal established under written law has exclusive jurisdiction;

(c) election disputes;

(d) disputes involving the interpretation of the Constitution;

(e) a claim for a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights; or

(f) disputes where public interest involving environmental or occupational health and safety issues are involved.

Guiding principles of alternative dispute resolution.

5. The following principles shall apply to the resolution of disputes under this Act—

(a) voluntary participation in the alternative dispute resolution process and a party may withdraw from alternative dispute resolution process at any time;

(b) the right to information, including the right to be informed of the existence of an alternative dispute resolution process prior to the commencement of the process of determining a dispute;

(c) confidentiality, except in the case of traditional dispute resolution;

(d) determination of disputes in the shortest time practicable taking into account the nature of the dispute;

(e) impartiality in the determination of a dispute under this Act by the conciliator, mediator or traditional dispute resolver and disclosure of any conflict of interest that may arise;

(f) a conciliator, mediator or traditional dispute resolver shall not facilitate the resolution of a dispute unless he or she is competent to facilitate that dispute; and

(g) a party to a dispute may use more than one form of alternative dispute resolution mechanism in an attempt to resolve that dispute.

PART II – ACCREDITATION AND REGISTRATION OF CONCILIATORS AND MEDIATORS

Requirement for registration.

6. (1) A person shall not practice as a conciliator or a mediator under this Act unless that person has been accredited and registered as a conciliator or mediator by the Centre.

(2) A person shall be qualified for registration and accreditation if the person—

(a) meets the requirements set out under Chapter Six of the Constitution; and

(b) such other educational and professional qualifications as the Centre may determine.

Accreditation and registration of

7. (1) A person who intends to practice as a conciliator or a mediator shall submit an application in the prescribed

form together with the application fees to the Centre for accreditation and registration. conciliators and medintors.

(2) The Centre shall consider the application within thirty days from the date of receipt of the application, and –

(a) where the applicant meets the requirements for registration, register the applicant as a conciliator or a mediator as the case may be; or

(b) where the applicant does not meet the requirements for registration, decline registration.

(3) The Centre shall, within seven days of determining an application under subsection (2), inform the applicant of its decision and where it declines registration, the reasons for declining.

(4) The Centre shall keep a register of all applicants, accredited conciliators and mediators.

8. The Centre may revoke the registration of, or suspend a conciliator or a mediator if the conciliator or mediator— Revocation of registration.

(a) fails to comply with the terms and conditions of the registration;

(b) has been adjudged bankrupt; or

(c) is in breach of a code of conduct and is found guilty of such breach.

9. (1) A person whose application for accreditation has been declined or whose registration has been revoked or suspended may make an application to the Centre, within seven days of receipt of the reason for refusal of application for accreditation and registration, or revocation or suspension of registration, for review of the decision of the Centre. Right of review and appeal against the decision of the Centre.

(2) A person who is dissatisfied with the decision of the Centre under subsection (1) may appeal to the High Court within seven days of receipt of that decision.

10. (1) The Centre shall publish a code of conduct for conciliators and mediators. Code of conduct.

(2) Without prejudice to the generality of subsection (1), the code of conduct shall—

(a) be consistent with this Act;

(b) where necessary, be consistent with internationally acceptable standards;

(c) provide for initial and further or continuous training of conciliators and mediators; and

(d) provide for complaints, disciplinary and grievances procedure concerning conciliators, mediators and traditional dispute resolvers, and relevant enforcement procedures.

PART III – CONCILIATION AND MEDIATION

Referral of cases to conciliation or mediation.

11. (1) A court before which a dispute is filed or pending may refer the dispute for determination through conciliation or mediation where—

(a) the dispute is with respect to a matter that provides for resolution through alternative dispute resolution;

(b) the law requires the dispute to be settled through alternative dispute resolution;

(c) the court is of the view that conciliation or mediation will facilitate the resolution of the dispute; or

(d) a party to the dispute, with the consent of the other party, applies to the court to have the whole or part of the dispute referred for resolution through conciliation or mediation.

(2) A court shall not refer a dispute for resolution through conciliation or mediation if—

(a) the court determines that there is no dispute between the parties requiring resolution through conciliation or mediation;

(b) there is no dispute between the parties with regard to the matter agreed to be referred to alternative dispute resolution or covered under this Act;

(c) the clause making provision for alternative dispute resolution of the agreement, contract or any arrangement entered into by the parties is inoperative, incapable of being performed or void;

(d) previous attempts at determining the dispute through alternative dispute resolution have failed;

(e) substantial public interest involving constitutional, environmental, or occupational health and safety issues are involved;

(f) the costs that are likely to be incurred would be disproportionately high;

(g) there is a likelihood of delay;

(h) a binding judicial precedent is required; or

(i) a party is likely to be prejudiced as a result of power imbalances.

(3) A court shall specify the time within which a report on the referral shall be filed with the court.

Submission to conciliation or mediation.

12. (1) Parties may, on their own initiative, use conciliation or mediation to resolve a dispute.

(2) A party shall, where an agreement makes provision for determination of a dispute through conciliation or mediation, refer the dispute arising from such an agreement to conciliation or mediation.

(3) A party to an agreement which has not made provision for submission of a dispute to alternative dispute resolution or a dispute covered under this Act may, with the consent of the other party to the agreement, submit a dispute arising out of that agreement for determination through conciliation or mediation.

Commencement of conciliation or mediation.

13. (1) Resolution of a dispute through conciliation or mediation commences when—

(a) the court refers the dispute to a conciliator or mediator for conciliation or mediation respectively; or

(b) a person submits a request to refer the dispute for determination through conciliation or mediation.

(2) The person to whom a request to submit a dispute for determination through conciliation or mediation is sent shall respond to the invitation within fourteen days of receipt of the request or the period specified in the invitation.

(3) Where a person fails to respond to a request to refer the dispute for determination through conciliation or mediation within the period specified under subsection (2), such person shall be deemed to have rejected the request.

Role of the parties.

14. (1) A party to a dispute shall—

(a) take reasonable measures to resolve the dispute through alternative dispute resolution before resorting to a judicial process;

(b) cooperate with the other party and the conciliator or mediator in the resolution of the dispute;

(c) participate in good faith in an alternative dispute resolution process;

(d) maintain confidentiality as provided for under section 30; and

(e) where an agreement is reached, ensure the agreement is written and sign the agreement.

(2) A party is considered to have taken reasonable measures to resolve a dispute through alternative dispute resolution under subsection (1)(a) if that party has—

(a) notified the other party of the issues that are in dispute and offered to settle them through alternative dispute resolution;

(b) responded in the affirmative to a notification under paragraph (a);

(c) provided relevant information and documents to the other party to enable that other party understand the issues and how they might be resolved;

(d) considered whether the dispute can be resolved through an alternative dispute resolution process; and

(e) where an alternative dispute resolution mechanism is agreed to,—

(i) participated in the determination of the conciliator or mediator to facilitate the process; and

(ii) attended the alternative dispute resolution process.

Appointment of a conciliator or mediator.

15. (1) The parties to a dispute may appoint a conciliator or mediator to facilitate an alternative dispute resolution process.

(2) Unless the parties otherwise agree, there shall be one conciliator or mediator.

(3) Where parties fail to agree on the appointment of a conciliator or mediator, each party shall appoint their preferred conciliator or mediator.

(4) Where the parties appoint more than one conciliator or mediator, the conciliators or mediators shall act jointly.

Obligations of a conciliator or mediator.

16. (1) A conciliator or mediator shall, in facilitating the determination of a dispute, be independent and impartial.

(2) In determining a dispute, a conciliator or mediator shall—

(a) conduct an assessment of the parties to the dispute and the dispute before commencement of conciliation or mediation to determine whether conciliation or mediation is appropriate;

(b) provide a written statement regarding the conciliation or mediation process to the parties at least one day before commencement of the conciliation or mediation process, setting out—

(i) what the conciliation or mediation is about;

(ii) the rights and obligations of the parties;

(iii) the role of the parties; and

(iv) the role of the conciliator or mediator;

(c) advise a party who does not have a legal representative or professional advisor in the conciliation or mediation process of their right to seek independent legal or professional advice;

(d) ensure, at all stages in conciliation or mediation, that a party has the capacity to participate in the process;

(e) facilitate communication and understanding by all participants to enable the parties resolve the dispute;

(f) assist parties to identify their needs and interests to enable the parties resolve the dispute;

(g) prepare a report within three days of the conclusion of the conciliation or mediation process or such period as may be directed by court; and

(h) prepare and authenticate a settlement agreement.

(3) A conciliator or mediator shall conduct the conciliation or mediation process in such manner as he or she considers appropriate for the effective determination of the dispute and shall, for this purpose—

(a) take into account the wishes of the parties including any request by a party that the conciliator or mediator hear oral statements; and

(b) take steps to ensure the speedy settlement of the dispute.

Disclosure by a conciliator or mediator.

17. (1) A conciliator or mediator shall, before accepting an appointment to act as a conciliator or mediator in the resolution of a dispute, disclose any circumstance which may—

(a) create a likelihood of bias; or

(b) affect the conduct of the conciliation or mediation process.

(2) A conciliator or mediator shall promptly disclose to the parties any circumstance which arises during conciliation or mediation and which is likely to affect—

(a) the impartiality of the conciliator or mediator; or

(b) the conduct of the conciliation or mediation process.

(3) Parties to a conciliation or mediation process may substitute a conciliator or mediator who makes a disclosure under subsection (2).

Revocation of appointment of a conciliator or mediator.

18. (1) The parties may revoke the appointment of a conciliator or mediator who, without reasonable cause, fails to—

(a) commence the conciliation or mediation process within the period agreed by the parties; or

(b) conduct conciliation or mediation in accordance with the prescribed rules.

(2) A conciliator or mediator may resign at any time after appointment.

(3) A conciliator or mediator who has resigned or whose appointment has been revoked shall, within seven days of revocation of appointment or resignation prepare a report and furnish a copy of the report to the parties and, where the dispute was referred for resolution by the court, to that court.

(4) The parties shall, within fourteen days from the date of revocation of the appointment or resignation of a conciliator or mediator, appoint another conciliator or mediator.

Attendance and representation in conciliation or mediation.

19. (1) A person who is not a party to conciliation or mediation shall not attend the alternative dispute resolution process unless the parties agree and the conciliator or mediator consents to the attendance.

(2) A party to conciliation or mediation may be represented by an advocate, an expert or such other person as the party may consider appropriate.

(3) A conciliator or mediator may, where necessary and where the parties agree to pay the expenses, obtain expert advice on a technical aspect of a dispute.

(4) A request for the services of an expert may be made by the conciliator or mediator, or by a party with the consent of the other party.

(5) A party shall communicate, in writing to the conciliator or mediator and the other party, the name, address and the extent of the authority of any representative at least seven days before the representative's participation in conciliation or mediation.

Date, time and place of conciliation or mediation.

20. A conciliator or mediator shall, in consultation with the parties, determine a convenient place, date and time for the conduct of the conciliation or mediation process.

Identification of issues in dispute.

21. (1) A party shall submit to the conciliator or mediator and the other party to the dispute a statement of issues at least seven days before the first session of conciliation or mediation or within such period as the parties may agree.

(2) A conciliator or mediator may request each party to submit—

(a) a written statement of that party's position;

(b) the facts and grounds in support of that position; and

(c) any documents and evidence that the party considers appropriate.

(3) A conciliator or mediator may request a party to submit additional information at any stage of conciliation or mediation process.

Confidentiality of conciliation or mediation.

22. (1) A record, report, settlement agreement or any document submitted or prepared in the course of the conciliation or mediation process shall be confidential and shall not be submitted to a person who is not a party to the conciliation or mediation proceedings.

(2) For the purposes of subsection (1), a party shall not rely on as evidence in judicial proceedings,—

(a) the record of the conciliation or mediation;

(b) a statement made at the conciliation or mediation; or

(c) any information obtained during a conciliation or mediation process.

(3) A conciliator or mediator shall not disclose information submitted in the course of a conciliation or mediation process to any person who is not a party to the process without the consent of the parties.

(4) The parties may expressly waive the confidentiality requirement under subsection (1).

(5) The confidentiality requirement under this Act shall not apply where disclosure is—

(a) required by law;

(b) necessary to protect a child or a vulnerable person;

(c) necessary to report or lessen a serious and imminent threat to the life, health or property of a person;

(d) necessary to report the commission or prevent the likely commission of an offence;

(e) necessary for the purpose of enforcement of the settlement agreement; or

(f) necessary to prove or disprove a claim or complaint concerning negligence or misconduct of a conciliator or mediator based on conduct occurring during conciliation or mediation.

(6) Evidence submitted or used in a conciliation or mediation process which is admissible or subject to discovery in proceedings shall not be or become inadmissible or subject to confidentiality solely because it was submitted or used in conciliation or mediation.

Settlement agreement.

23. (1) A conciliator or mediator may formulate terms of a possible settlement if it appears that there exist issues to a dispute to which the parties are agreeable and submit them to the parties for adoption and signature.

(2) Where the parties reach an agreement, the conciliator or mediator shall prepare a settlement agreement within three days of such agreement.

(3) The conciliator or mediator shall explain the contents of the settlement agreement to the parties and, where the parties agree to the contents of the agreement, require the parties to execute the agreement in the presence of the conciliator or mediator.

(4) A settlement agreement shall, upon execution by the parties, be binding on the parties.

(5) A conciliator or mediator shall authenticate a settlement agreement and furnish a copy of the agreement to each party and, where the dispute was referred for resolution by the court, to that court.

(6) A party to a settlement agreement may, for the purpose of record and enforcement, register the agreement with the Committee.

(7) Application for registration under subsection (6) shall be made to the Committee within seven days of the receipt of the settlement agreement by the respective party.

End of conciliation or mediation.

24. (1) A conciliation or mediation process ends when —

(a) the parties execute a settlement agreement;

(b) the conciliator or mediator, upon consultation with the parties, determines that further conciliation or mediation is not feasible;

(c) the parties jointly submit a notice in writing to the conciliator or mediator that they do not intend to proceed with the conciliation or mediation process; or

(d) a party submits a notice, in writing, to the conciliator or mediator and the other party that he or she does not intend to proceed with the conciliation or mediation process.

(2) Within seven days of the conclusion of a conciliation or mediation process, the conciliator or mediator shall submit a copy of the report to the parties and, where the dispute was referred for resolution by the court, to that court.

(3) Where the parties agree to settle the dispute, the conciliator or mediator shall submit, within seven days of the settlement, a copy of the report together with a copy of the settlement agreement to the parties and, where the dispute was referred for resolution by the court, to that court.

Restriction of the role of a conciliator or mediator in other proceedings.

25. A conciliator or mediator shall not, unless with the consent of the parties or if required by law—

(a) act as an arbitrator, representative or an advocate of a party in any judicial proceeding in respect of a dispute he or she facilitated; or

(b) be presented by the parties as a witness in any proceedings arising out of or in connection with conciliation or mediation he or she facilitated.

Exclusion of liability.

26. (1) A conciliator or mediator is not liable for any act or omission in the performance of his or her role under this Act unless the conciliator or mediator is proven to have acted fraudulently, negligently or in bad faith.

PART IV – TRADITIONAL DISPUTE RESOLUTION

Competence of a traditional dispute resolver.

27. (1) A person shall not act as a traditional dispute resolver unless that person is acquainted with the customary law to be applied in resolving the dispute.

(2) A traditional dispute resolver shall be impartial and apply the rules of natural justice.

(2) The Centre may, in as far as is reasonably practicable, prepare and maintain a list of traditional dispute resolvers.

Submission to traditional dispute resolution.

28. (1) A party may submit a dispute for resolution through a traditional dispute resolution process.

(2) A court before which a dispute is filed or pending may refer a dispute for resolution through a traditional dispute resolution process at any time where—

(a) the court determines that traditional dispute resolution will facilitate the resolution of the dispute or a part of the dispute; or

(b) a party to the dispute, with the consent of the other party, applies to the court to have the whole or part of the dispute referred to traditional dispute resolution.

(3) A person shall not be forced or coerced to submit to a traditional dispute resolution process.

(4) A traditional dispute resolution process shall be void where the process or settlement agreement contravenes the Constitution, a written law or public policy.

End of traditional dispute resolution.

29. (1) A traditional dispute resolution process ends when—

(a) the parties reach an agreement; or

(b) a traditional dispute resolver, upon consultation with the parties, determines that further traditional dispute resolution is not feasible.

(2) At the end of a traditional dispute resolution process,—

(a) where a settlement agreement is reached, the traditional dispute resolver shall, within seven days of the settlement—

(i) prepare a settlement agreement for execution by the parties; and

(ii) submit a copy of the settlement agreement to the parties and, where the dispute was referred for resolution by the court, to that court;

(b) where traditional dispute resolution process is terminated by the traditional dispute resolver or a

party to the dispute, the resolver shall, within seven days of the termination—

(i) prepare a report; and

(ii) furnish a copy of the report to the parties and, where the dispute was referred for resolution by the court, to that court.

(3) Except where a dispute was referred for resolution through traditional dispute resolution by a court or at the request of the parties, a settlement agreement need not be in writing.

Effect of settlement agreement.

30. (1) A settlement agreement in traditional dispute resolution is binding between the parties.

(2) A party to a settlement agreement may, for the purpose of record and enforcement, register the agreement with the Committee.

(3) Application for registration under subsection (2) shall be made to the Committee within seven days of the receipt of the settlement agreement by the respective party.

PART V—RECOURSE TO COURT AND RECOGNITION AND ENFORCEMENT OF SETTLEMENT AGREEMENTS

Duty of advocate to advise on alternative dispute resolution.

31. (1) An advocate shall, prior to initiating judicial proceedings, advice a party to consider resolving the dispute by way of alternative dispute resolution.

(2) An advocate who contravenes subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings.

Confirmation that alternative dispute resolution has been considered.

32. (1) A party shall file with the court an alternative dispute resolution certificate in the prescribed form, at the time of commencing judicial proceedings, stating that alternative dispute resolution has been considered.

(2) A party entering appearance shall file with the court an alternative dispute resolution certificate in the prescribed form, at the time that party enters appearance or acknowledges the claim, stating that alternative dispute resolution has been considered.

(3) An advocate shall file with the court an alternative dispute resolution certificate in the prescribed form, at the time of instituting judicial proceedings or entering

appearance, stating that the advocate has advised a party to consider alternative dispute resolution.

(4) A court may take into account the fact that a party has considered or participated in alternative dispute resolution when making orders as to costs, case management or such orders as the court determines.

Resort to judicial proceedings.

33. A party may apply to the High Court or the court that referred the dispute for resolution through an alternative dispute resolution process –

(a) for an interim measure of protection;

(b) to challenge jurisdiction of the alternative dispute resolution;

(c) to challenge the appointment or impartiality of the conciliator, mediator or traditional dispute resolver;

(d) to challenge referral of the dispute to alternative dispute resolution; or

(e) to challenge the settlement agreement.

Stay of proceedings.

34. (1) A referral of a dispute for determination through alternative dispute resolution under section 11 shall serve as a stay of proceedings.

(2) A court before which proceedings are brought in a dispute which is the subject of alternative dispute resolution agreement or pending before alternative dispute resolution process may, if a party so applies not later than the time when that party enters appearance or acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to alternative dispute resolution.

(3) Proceedings before the court shall not be continued after an application under subsection (2) has been made and the matter remains undetermined.

(4) Where the court declines to stay judicial proceedings, any provision of the alternative dispute resolution agreement to the effect that a settlement agreement is a condition precedent to the bringing of judicial proceedings in respect of any dispute is of no effect in relation to those proceedings.

Recognition and enforcement of a settlement agreement.

35. (1) Where a referral to alternative dispute resolution leads to the settlement of a dispute or part of the dispute, the settlement shall be—

(a) prepared and filed in court;

(b) recorded by the court as a judgment of the court; and

(c) enforced by the court as its judgment.

(2) Where a referral to alternative dispute resolution does not lead to a settlement, the court shall continue with the proceedings from the point at which the referral was made.

(3) A settlement agreement shall be recognized as binding and upon registration in accordance with section 23(6) or section 30(2) and application in writing to the High Court or the court that referred the matter to alternative dispute resolution, be enforced subject to this section and section 36.

(4) Unless the High Court or the court that referred the dispute for alternative dispute resolution otherwise orders, a party relying on a settlement agreement or applying for its enforcement shall furnish —

(a) the original settlement agreement or a duly certified copy of it; and

(b) the original report or a duly certified copy of it.

Grounds for refusal of recognition or enforcement of a settlement agreement.

36. The recognition or enforcement of a settlement agreement may be refused where —

(a) at the request of the party against whom it is invoked, that party furnishes to the High Court or the court that referred the dispute to alternative dispute resolution proof that —

(i) a party to the alternative dispute resolution process was under some incapacity;

(ii) the settlement agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the country where the settlement agreement was made;

(iii) the party against whom the settlement agreement is invoked was not given proper

notice of the appointment of a conciliator, mediator or traditional dispute resolver;

(iv) the party against whom the settlement agreement is invoked was not given proper notice of the alternative dispute resolution process or was otherwise unable to present its case;

(v) the settlement agreement deals with a dispute not contemplated by or not falling within the terms of the referral to alternative dispute resolution, or it contains decisions on issues beyond the scope of the referral to alternative dispute resolution, provided that if the decisions on issues referred to alternative dispute resolution can be separated from those not so referred, that part of the settlement agreement which contains decisions on issues referred to alternative dispute resolution may be recognised and enforced;

(vi) the appointment of the conciliator, mediator or traditional dispute resolver was not in accordance with the alternative dispute resolution clause, this Act or any other law or the law of the country where the alternative dispute resolution took place;

(vii) the alternative dispute resolution process was not conducted in accordance with the relevant alternative dispute resolution clause, this Act, any other law or the law of the country where the alternative dispute resolution took place;

(viii) the settlement agreement has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which that settlement agreement was made; or

(ix) the making of the settlement agreement was induced or affected by fraud, bribery, corruption or undue influence;

(b) if the High Court or the court that referred the dispute to alternative dispute resolution finds that—

(i) the subject-matter of the dispute is not capable of settlement by alternative dispute resolution under the law of Kenya; or

(ii) the recognition or enforcement of the settlement agreement would be contrary to the public policy.

PART VI – MISCELLANEOUS PROVISIONS

Limitation period.

37. Where the subject matter of alternative dispute resolution involves a dispute to which any limitation period under the Limitations of Actions Act applies, the parties to alternative dispute resolution process may agree in writing to suspend the running of the limitation period from the date of commencement of alternative dispute resolution process to the end of alternative dispute resolution process.

Cap. 22.

Alternative dispute resolution expenses.

38. (1) Unless the parties agree otherwise, the parties shall equally pay alternative dispute resolution expenses, including the fees and expenses of—

(a) the conciliator, mediator or traditional dispute resolver;

(b) any administrative assistance received;

(c) experts called; and

(d) any expenses incurred in connection with the alternative dispute resolution process and the settlement agreement.

(2) The alternative dispute resolution expenses shall be on the basis of a written agreement entered into between the parties and the conciliator, mediator or traditional dispute resolver at the commencement of the alternative dispute resolution process.

(3) The alternative dispute resolution expenses shall be reasonable and proportionate to the importance of the issue or issues at stake and to the amount of work carried out by the conciliator, mediator or traditional dispute resolver.

Rules and regulations.

39. (1) The Attorney General may, in consultation with the Centre, make rules of practice and procedure, and regulations generally for the better carrying into effect of any provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the Attorney General may, in consultation with the Centre, make rules and regulations to provide for—

(a) submission and referral of a dispute to alternative dispute resolution;

(b) appointment of a conciliator, mediator or traditional dispute resolver;

(c) the specific roles applicable to a mediator, conciliator, traditional dispute resolver or any other person facilitating an alternative dispute resolution process;

(d) the conduct of an alternative dispute resolution process;

(e) the forms to be used for submission or referral of a dispute to alternative dispute resolution, filing of a settlement agreement, or any matter to be filed;

(f) the requirements and the process of application for accreditation and registration of conciliators and mediators, and related activities;

(g) grounds for, and the procedure relating to cancellation or suspension of registration;

(h) professional conduct and etiquette of conciliators, mediators and traditional dispute resolvers;

(i) any fee which may be charged for anything done under this Act; and

(j) any other matter as may be necessary for the promotion of the objects of this Act.

(3) For the purpose of Article 94(6) of the Constitution —

(a) the purpose and objective of the delegation under this section is to enable the Attorney General to make rules and regulations to provide for the better carrying into effect the provisions of this Act

(b) the authority of the Attorney General to make rules and regulations under this Act shall be limited to bringing into effect the provisions of this Act and fulfilment of the objectives specified under this section;

(c) the principles and standards applicable to the rules made under this section are those set out in the Interpretation and General Provisions Act and the Statutory Instruments Act. Cap. 2. No. 23 of 2013.

PART V – CONSEQUENTIAL AMENDMENTS

40. The Nairobi Centre for International Arbitration Act is amended by deleting the long title and substituting therefor the following new long title— Amendment to the Long title to No. 26 of 2013.

AN ACT of Parliament to provide for the establishment of a center for alternative dispute resolution and international commercial arbitration; to provide for the establishment of an Arbitral Court; to provide for mechanisms for alternative dispute resolution; and for connected purposes.

41. Section 1 of the Nairobi Centre for International Arbitration Act is amended by deleting the words "International Arbitration" appearing immediately after the words "Nairobi Centre for" and substituting therefor the words "Alternative Dispute Resolution". Amendment to section 1 of No. 26 of 2013.

42. Section 2 of the Nairobi Centre for International Arbitration Act is amended in the definition of the word "Centre" by deleting the words "International Arbitration" appearing immediately after the words "Nairobi Centre for" and substituting therefor the words "Alternative Dispute Resolution". Amendment to section 2 of No. 26 of 2013.

43. The title to Part II of the Nairobi Centre for International Arbitration Act is amended by deleting the words "INTERNATIONAL ARBITRATION" appearing immediately after the words "NAIROBI CENTRE FOR" and substituting therefor the words "ALTERNATIVE DISPUTE RESOLUTION". Amendment to the Title to Part II of No. 26 of 2013.

44. Section 4 of the Nairobi Centre for International Arbitration Act is amended in subsection (1) by deleting the words "International Arbitration" appearing immediately after the words "Nairobi Centre for" and substituting therefor the words "Alternative Dispute Resolution". Amendment to Section 4 of No. 26 of 2013.

45. Section 5 of the Nairobi Centre for International Arbitration Act is amended— Amendment to section 5 of No. 26 of 2013.

(a) by inserting the following new paragraph immediately after paragraph (a)—

(aa) promote, facilitate and encourage the resolution of disputes in accordance with this Act and the Alternative Dispute Resolution Act;

(b) by deleting paragraph (c) and substituting therefor the following new paragraph—

(c) facilitate public awareness and sensitization to ensure that alternative dispute resolution mechanisms are considered as the dispute resolution process of choice;

(c) by inserting the following new paragraph immediately after paragraph (d)—

(da) maintain a register of conciliators and mediators in accordance with Part II of the Alternative Dispute Resolution Act;

(d) in paragraph (e) by inserting the words "conciliators and mediators" immediately after the words "programs for arbitrators";

(e) in paragraph (h) by inserting the words "conciliation and mediation" immediately after the words "data on arbitration"; and

(f) in paragraph (m) by inserting the word "conciliators" immediately after the words "and accreditation for".

Amendment to section 17 of No. 26 of 2013.

46. Section 17 of the Nairobi Centre for International Arbitration Act is amended in subsection (1) by—

(a) inserting the word "conciliators," immediately after the words "training for" appearing in paragraph (c); and

(b) inserting the words "conciliation, mediation and" immediately after the words "of data on" appearing in paragraph (d).

Amendment to section 2 of Cap 21.

47. Section 2 of the Civil Procedure Act is amended by inserting the following new definition immediately after the definition of the term "Act" —

"Committee" means the Mediation Accreditation Committee established under section 59A;

48. Section 59A of the Civil Procedure Act is amended— Amendment to section 59A of Cap 21.

(a) by deleting subsection (1) and substituting therefor the following new subsection—

(1) There shall be a Committee to be known as the Mediation Accreditation Committee.

(b) in subsection (2) by—

(i) deleting the introductory clause and substituting therefor the following new introductory clause—

(2) The Committee shall consist of the following members appointed by the Chief Justice by notice in the *Gazette*—

(ii) deleting paragraph (a) and substituting therefor the following new paragraph—

(a) a judge of the High Court who shall be the chairperson;

(iii) inserting the following new paragraphs immediately after paragraph (a) —

(aa) the chairperson of the Rules Committee;

(ab) one magistrate nominated by magistrates;

(iv) deleting paragraph (d) and substituting therefor the following new paragraph—

(d) four persons nominated by the following bodies respectively—

(i) the Law society of Kenya;

(ii) the Kenya Private Sector Alliance;

(iii) the Federation of Kenya Employers; and

(iv) the Central Organisation of Trade Unions.

(c) by deleting subsection (3) and substituting therefor the following new subsection—

(3) The members of the Committee, other than the chairperson of the Rules Committee, shall serve for a term of three years renewable for one further term.

(d) in subsection (4) by inserting the following new paragraph immediately after paragraph (e) —

(e) maintain a register of—

(i) agreements registered in accordance with section 59D of this Act; and

(ii) settlement agreements registered in accordance with section 23(6) and section 30(2) of the Alternative Dispute Resolution Act.

(f) by inserting the following new subsection immediately after subsection (4)—

(5) The Chief Justice may, in consultation with the Committee, issue guidelines to ensure that the register maintained under subsection (4)(f) is kept confidential.

Insertion of new sections to Cap. 21.

49. The Civil Procedure Act is amended by inserting the following new sections immediately after section 59A—

Conduct of business and affairs of the Committee

59AA. The conduct of the business and affairs of the Committee shall be as provided for in the Schedule, but subject thereto the Committee may regulate its own procedure.

Vacation from office.

59AB. A person ceases to be a member of the Committee if—

(a) the person is absent from three consecutive meetings of the Committee without the permission of the chairperson;

(b) the nominating institution writes to the Chief Justice revoking the nomination;

(c) the person resigns in writing, addressed to the Chief Justice;

(d) the person is convicted of a criminal offence and is sentenced to a term of imprisonment of at least six months;

(e) the person is declared bankrupt;

(f) the person is unable to perform the functions of their office by reason of mental or physical infirmity; or

(g) the person dies.

50. Section 59C of the Civil Procedure Act is amended— Amendment to section 59C of Cap. 21.

(a) in subsection (2) by deleting the words "such procedure as the parties themselves agree to or as the Court may, in its discretion, order" appearing immediately after the words "be governed by" and substituting therefor the words "the Alternative Dispute Resolution Act"; and

(b) in subsection (3) by inserting the words "in accordance with the Alternative Dispute Resolution Act" immediately after the words "of the Court".

51. The Civil Procedure Act is amended by inserting the following new Schedule— Insertion of a new schedule to Cap. 21.

SCHEDULE (s. 59AA)

CONDUCT OF BUSINESS AND AFFAIRS OF THE COMMITTEE

1. (1) The Committee shall meet at least once every month to conduct its business. Meetings.

(2) The first meeting of the Committee shall be convened by the Chief Justice and the Committee shall meet subsequently at such a time as it shall determine.

(3) Notwithstanding the provisions of subparagraph (1), the chairperson shall, upon a written request signed by at least five members of the Committee, convene a special meeting of the Committee at any time where it is considered expedient for the transaction of the business of the Committee.

(4) A meeting of the Committee shall be presided over by the chairperson, in the absence of the chairperson by a member elected by the members of the Committee present.

(5) The Committee may invite any person to attend any of its meetings and to participate in its deliberations but such person shall not have a vote in any decision of the Committee

(6) The proceedings of the Committee shall not be invalidated by reason of a vacancy within its membership.

Quorum.

2. (1) Subject to subparagraph (2), the quorum of a meeting of the Committee shall not be less than half of the members.

(2) Whenever there is a vacancy in the Committee, the quorum of the meeting shall not be less than three members.

Decisions of the Committee.

3. Unless a unanimous decision is reached, a decision on any matter before the Committee shall be by a simple majority of the votes of the members present and voting and in the case of an equality of votes, the chairperson or person presiding over the meeting shall have a casting vote.

Conflict of interest.

4. (1) A member of the Committee who has a direct or indirect personal interest in any matter being considered or to be considered by the Committee shall, upon the relevant facts concerning the matter having come to their knowledge, disclose the nature of their interest to the Committee.

(2) A disclosure of interest made by a member of the Committee under subparagraph (1) shall be recorded in the minutes of the meeting of the Committee and the member shall not, unless the Committee otherwise determines—

(a) be present during the deliberation on the matter by the Committee; or

(b) take part in the decision of the Committee on the matter.

(3) A member of the Committee who makes a disclosure under subparagraph (1) shall not—

(a) be present in the meeting of the Committee held to determine whether or not the member should take part in the deliberations or decision of the Committee in relation to the matter; or

(b) influence any other member of the Committee in arriving at a particular decision in relation to the matter.

Rules of Procedure and minutes.

5. (1) Subject to the provisions of this Schedule, the Committee may determine its own procedure and the procedure for any subcommittee of the Committee.

(2) The Committee shall cause the minutes of all proceedings of its meetings to be recorded and kept, and

the minutes of each meeting shall be confirmed by the Committee at the next meeting of the Committee and signed by the chairperson or the person presiding at the meeting.

MEMORANDUM OF OBJECTS AND REASONS

Statement on the Objects and Reasons of the Bill

The principal object of the Bill is to put in place a legal framework for the settlement of certain civil disputes by conciliation, mediation and traditional dispute resolution. Resolution of disputes forms part and parcel of everyday life in any given society. Hence effective dispute resolution mechanisms in a country will guarantee peace, is an enabler of trade and investment, and contribute to economic, social and political development of the country.

Article 48 of the Constitution obligates the State to ensure access to justice, the ability of people to seek and obtain a remedy for grievances in line with human rights standards, for all persons. The Constitution under Chapter Ten provide for the Judiciary as one of the three arms of the National government whose mandate is to protect and serve justice. In Kenya, disputes are mainly resolved through the court process. This process is costly, takes longer for disputes to be resolved resulting in huge backlog in courts, parties are not in control of the outcome of a dispute and does not always result in reconciling the parties.

This Bill therefore seeks to implement Article 48 and 159(2)(c) of the Constitution with respect to enhancing access to justice and promoting the use of alternative dispute resolution mechanisms in resolving disputes.

Part I of the Bill provide for interpretations, the object, application and guiding principles of alternative dispute resolution. This law will apply to certain civil disputes including disputes where the government is a party. However, the law will not apply to disputes concerning interpretation of the constitution, claims for violation, infringement or denial of a fundamental right, disputes governed by the Arbitration Act, election disputes, and disputes involving public interest.

Part II of the Bill provide for accreditation and registration of conciliators and mediators. This is to ensure professionalism and to protect the citizens from quacks.

Part III of the Bill provide for conciliation and mediation. It sets how persons can use conciliation or mediation, the roles of the parties and the conciliator or mediator, and all the steps that must be taken right from the time parties begin the process up to the end.

Part IV of the Bill specifically provide for traditional dispute resolution. It outlines the competence of a traditional dispute resolver, submission to traditional dispute resolution, end of traditional dispute resolution and the effect of a settlement agreement.

Part V of the Bill provide for recourse to court, and recognition and enforcement of a settlement agreement. It sets out the duties of an advocate, stay of proceedings and also grounds for refusal to recognize a settlement agreement.

Part VI of the Bill provide for miscellaneous provisions. This Part gives parties power to suspend limitation period, sets out alternative dispute resolution costs and the power to make of rules and regulation for the better carrying into effect the provisions of the law. It also provides for consequential amendments. It amends the Nairobi Centre for International Arbitration Act and the Civil Procedure Act to comply with the provisions of the Bill.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill delegates restricted legislative powers to the Attorney General. It provides that the Attorney General may make rules of practice and procedure, and regulations generally for the better carrying into effect of any provisions of this Bill once enacted.

The Bill does not limit fundamental rights and freedoms.

Statement on how the Bill concerns county governments

The Fourth Schedule to the Constitution provides for the functional areas of both the National government and county governments. In the performance of these functions and exercise of powers, a county government may become a party to a dispute. This dispute can either be between a county government and another county government, a county government and the National government, or a county government and a private person. This Bill seeks to put in place a legal framework for the settlement of such disputes through alternative dispute resolution mechanisms.

The Bill therefore concerns county governments in terms of Articles 110(1)(a) of the Constitution in that it contains provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule to the Constitution.

Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution

The Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the 16th April, 2021.

SYLVIA MUENI KASANGA,
Senator.

The Long Title to No. 26 of 2013 that the Bill proposes to amend —

An Act of Parliament to provide for the establishment of regional center for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes

Section 1 of No. 26 of 2013 that the Bill proposes to amend —

1. Short title

This Act may be cited as the Nairobi Centre for International Arbitration Act, 2013.

Section 2 of No. 26 of 2013 that the Bill proposes to amend —

2. Interpretation

(1) In this Act, unless the context otherwise requires—

"Board" means the Board of Directors constituted under section 6;

"Cabinet Secretary" means the Attorney-General;

"Centre" means the Nairobi Centre for International Arbitration established under section 4;

"chairperson" means the chairperson of the Board appointed under section 6;

"Court" means the Arbitral Court established under section 21;

"Fund" means the General Fund established by section 17;

"Registrar" means the chief executive officer of the Centre appointed under section 9; and

"Rules" means the rules made under section 25.

(2) Despite subsection (1), until after the first election under the Constitution, references in this Act to the expressions **"Cabinet Secretary"** and **"Principal Secretary"** shall be construed to mean "Minister" and "Permanent Secretary", respectively.

The title to Part II of No. 26 of 2013 that the Bill proposes to amend —

PART II – THE NAIROBI CENTRE FOR INTERNATIONAL ARBITRATION

Section 4 of No. 26 of 2013 that the Bill proposes to amend —

4. Establishment of the Centre

(1) There is established a centre to be known as the Nairobi Centre for International Arbitration.

(2) The Centre shall be a body corporate with perpetual succession and a common seal and shall in its corporate name, be capable of —

(a) suing and being sued;

(b) taking, purchasing or otherwise acquiring, holding, charging, leasing or disposing of moveable or immovable property;

(c) borrowing money;

(d) doing or performing all such other acts necessary for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.

(3) The headquarters of the Centre shall be in Nairobi.

Section 5 of No. 26 of 2013 that the Bill proposes to amend —

5. Functions of the Centre

The functions of the Centre shall be to—

(a) promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act;

(b) administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices;

(c) ensure that arbitration is reserved as the dispute resolution process of choice;

(d) develop rules encompassing conciliation and mediation processes;

(e) organize international conferences, seminars and training programs for arbitrators and scholars;

(f) co-ordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation;

(g) maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives;

(h) in collaboration with other public and private agencies, facilitate, conduct, promote and coordinate research and dissemination of findings on data on arbitration and serve as repository of such data;

(i) establish a comprehensive library specializing in arbitration and alternative dispute resolution;

(j) provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties;

(k) provide advice and assistance for the enforcement and translation of arbitral awards;

(l) provide procedural and technical advice to disputants;

(m) provide training and accreditation for mediators and arbitrators;

(n) educate the public on arbitration as well as other alternative dispute resolution mechanisms;

(o) enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre to achieve its objectives;

(p) provide facilities for hearing, transcription and other technological services;

(q) hold, manage and apply the Fund in accordance with the provisions of this Act; and

(r) perform such other functions as may be conferred on it by this Act or any other written law.

Section 2 of Cap. 21 that the Bill proposes to amend—

2. Interpretation

In this Act, unless the context otherwise requires—

"**Act**" includes rules;

"**court**" means the High Court or a subordinate court, acting in the exercise of its civil jurisdiction;

"**decree**" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default:

Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

"**decree holder**" means any person in whose favour a decree has been passed or an order capable of execution has been made, and includes the assignee of such decree or order;

"**district**" means the local limits of the jurisdiction of a subordinate court;

"**foreign court**" means a court situate outside Kenya which has no authority in Kenya;

"**foreign judgment**" means the judgment of a foreign court;

"**impartial**" in relation to a dispute means being and being seen to be unbiased towards parties to a dispute, their interests and the options they present for settlement;

"**judge**" means the presiding officer of a court;

"**judgment-debtor**" means any person against whom a decree has been passed or an order capable of execution has been made;

"**legal representative**" means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

"**mediation**" means an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto;

"**mediation rules**" means the mediation rules made under this Act;

"**mediator**" means an impartial third party selected to carry out a mediation;

"**mesne profits**", in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

"**movable property**" includes growing crops;

"**order**" means the formal expression of any decision of a court which is not a decree, and includes a r. nisi;

"**pleading**" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant;

"**prescribed**" means prescribed by rules;

"**registrar**" includes a district registrar and a deputy registrar;

"**rules**" means rules and forms made by the Rules Committee to regulate the procedure of courts;

"**share in a corporation**" includes stock, debenture stock, debentures and bonds;

"**suit**" means all civil proceedings commenced in any manner prescribed.

Section 59A of Cap. 21 that the Bill proposes to amend—

59A. Establishment of Mediation Accreditation Committee

(1) There shall be a Mediation Accreditation Committee which shall be appointed by the Chief Justice.

(2) The Mediation Accreditation Committee shall consist of—

(a) the chairman of the Rules Committee;

(b) one member nominated by the Attorney-General;

(c) two members nominated by the Law Society of Kenya; and

(d) eight other members nominated by the following bodies respectively —

(i) the Chartered Institute of Arbitrators (Kenya Branch);

(ii) the Kenya Private Sector Alliance;

(iii) the International Commission of Jurists (Kenya Chapter);

(iv) the Institute of Certified Public Accountants of Kenya;

(v) the Institute of Certified Public Secretaries;

(vi) the Kenya Bankers' Association;

(vii) the Federation of Kenya Employers, and

(viii) the Central Organisation of Trade Unions.

(3) The Chief Justice shall designate a suitable person to be the Mediation Registrar, who shall be responsible for the administration of the affairs of the Committee under this Act.

(4) The functions of the Mediation Accreditation Committee shall be to—

(a) determine the criteria for the certification of mediators;

(b) propose rules for the certification of mediators;

(c) maintain a register of qualified mediators;

(d) enforce such code of ethics for mediators as may be prescribed; and

(e) set up appropriate training programmes for mediators.

Section 59C of Cap. 21 that the Bill proposes to amend—

59C. Other alternative dispute resolution methods

(1) A suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral.

(2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order.

(3) Any settlement arising from a suit referred to any other alternative dispute resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court.

(4) No appeal shall lie in respect of any judgment entered under this section.

REPUBLIC OF KENYA

TWELFTH PARLIAMENT | FIFTH SESSION

THE SENATE

INVITATION FOR PUBLIC PARTICIPATION AND SUBMISSION OF MEMORANDA

At the sitting of the Senate held on Tuesday, 6th July, 2021, the Bills listed at the second column below were introduced in the Senate by way of First Reading and thereafter stood committed to the respective Standing Committees indicated at the third column.

Pursuant to the provisions of Article 118 of the Constitution and Standing Order 140 (5) of the Standing Orders of the Senate, the Committees now invite interested members of the public to submit any representations that they may have on the Bills by way of written memoranda.

The Memoranda may be sent **by email** on the address: csenate@parliament.go.ke and copied to the respective Committee email addresses indicated at the fourth column below, to be received on or before **Friday, 23rd July, 2021 at 5.00pm**.

	Bill	Committee Referred To	Email Address
a)	The County Oversight and Accountability Bill (Senate Bills No. 17 of 2021)	Standing Committee on Devolution and Intergovernmental Relations	senatedevolution@gmail.com
b)	The National Cohesion and Peace Building Bill (Senate Bills No. 19 of 2021)	Standing Committee on National Cohesion, Equal Opportunity and Regional Integration	nationalcohesionc@gmail.com
c)	The County Boundaries Bill (Senate Bills No. 20 of 2021)	Standing Committee on Justice, Legal Affairs and Human Rights	senatejlahrc@parliament.go.ke
d)	The Preservation of Human Dignity and Protection of Economic and Social Rights Bill (Senate Bills No. 21 of 2021)	Standing Committee on Justice, Legal Affairs and Human Rights	senatejlahrc@parliament.go.ke
e)	The Heritage and Museums Bill (Senate Bills No. 22 of 2021)	Standing Committee on Labour and Social Welfare	senatecommittee.labour@parliament.go.ke
f)	The Coconut Industry Development Bill (Senate Bills No. 24 of 2021)	Standing Committee on Tourism, Trade and Industrialization	senatetourismandtrade@gmail.com
g)	The Kenya Citizenship and Immigration (Amendment) Bill (Senate Bills No. 33 of 2021)	Standing Committee on National Security, Defence and Foreign Relations	scnsdfr2021@gmail.com
h)	The Alternative Dispute Resolution Bill (Senate Bills No. 34 of 2021)	Standing Committee on Justice, Legal Affairs and Human Rights	senatejlahrc@parliament.go.ke
i)	The County Governments Grants Bill (Senate Bills No. 35 of 2021)	Standing Committee on Finance and Budget	scfinanceandbudget@gmail.com

The Bills may be found on the Parliament website at http://www.parliament.go.ke/the-senate/senate-bills.

J.M. NYEGENYE, CBS,
CLERK OF THE SENATE.

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

ADVISORY ON THE ALTERNATIVE DISPUTE RESOLUTION BILL, 2021

(SENATE BILLS NO. 34)

PRESENTED TO

THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS & HUMAN RIGHTS

SUBMISSION DATE: 26TH JULY 2021

Kenya National Commission on Human Rights (KNCHR)
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A. Introduction

1. The Kenya National Commission on Human Rights (KNCHR), is an independent National Human Rights Institution established under Article 59 of the Constitution of Kenya, 2010 and operationalized under the Kenya National Commission on Human Rights Act 2011.[1] It is the successor to the Kenya National Commission on Human Rights established in 2003 under the Kenya National Commission on Human Rights Act 2002.[2] KNCHR has a broad mandate to promote a culture of respect for human rights in Kenya. The operations of the National Human Rights Commission are guided by the United Nations Paris Principles on the establishment and functioning of Independent National Human Rights Institutions commonly referred to as the Paris Principles.
2. The National Commission is mandated under Article 249 to secure observance by all state organs of democratic values and principles and to promote constitutionalism. Article 10 of the Constitution requires all state organs to ensure they uphold constitutionalism and the rule of law whenever they make public policy decisions or interpret the Constitution. One of the strategies pursued by the National Commission to secure observance by all state organs of democratic values and principles is through the issuance of advisories.
3. It is in this regard that the Commission issues this advisory on the Alternative Dispute Resolution Bill, 2021.

B. General Comments

4. The Commission wishes to draw the Committee's attention to the Mediation Bill, 2020 (Kenya Gazette Supplement No. 92 (National Assembly Bills No. 17) dated 15th June 2020 sponsored by Hon. Adan Duale. The Bill seeks to provide for settlement of all civil disputes by mediation; provide for the establishment of the Mediation Committee and provide for the accreditation or registration of mediators and recognition and enforcement of

[1] Act No 14 of 2011 available at http://www.kenyalaw.org/lex//actview.xql?actid=No.%2014%20of%202011
[2] Act No 9 of 2002 (repealed). The History of the institution however dates further back in 1996 when the then His Excellency President Moi set up a Standing Committee on Human Rights (SCHR) vide a gazette noticeof June 1996.

settlement agreements among other things. As at submission of this advisory, the Mediation Bill, 2020 was first read in the National Assembly on 30th June 2020.

5. Alternative dispute resolution is recognized in the Constitution of Kenya, 2010 under Article 159(2) where the courts and tribunals, in exercising judicial authority the Courts are obligated to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Sustainable Development Goal 16 relating to promoting peaceful and inclusive societies for sustainable development provides for access to justice for all and building effective, accountable and inclusive institutions at all levels. The ADR Bill is a positive move towards realization of Article 48 and facilitating access to justice for all in the country.
6. On March 4, 2016 the Taskforce on Alternative Justice Systems was appointed to look at the various Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems). The Taskforce was charged with examining the legal, policy and institutional framework for the furtherance of the endeavor by the Judiciary to exercise its constitutional mandate under Article 159(2) and its plans to develop a policy to promote robust cooperation and harmony between AJS and the Court system and support communication policies and initiatives that mainstream Alternative Justice Systems (AJS). This is with a view to enhancing access to and expeditious delivery of justice which is part of the *Judiciary Transformation Framework*, the blueprint for transformation within the Judiciary during 2012-2016.

7. One of the key policy interventions captured in the AJS policy is that government shall recognize Alternative Justice Systems as an access to justice tool and ensure that there are safeguards that will recognize the rights of individuals who seek redress. This will be achieved by the State implementing legislation to give effect to the constitutional mandate that promotes the use of alternative justice mechanisms. The mediation Bill seeks to implement the provisions of the AJS policy. **The Commission urgesthat Parliament makes reference to the final document by the Taskforce and the policy**

recommendations to ensure that the legislation on this process is one that will be in consonance with the broad national policy framework on AJS (once adopted).

8. The Commission notes, at the very outset that the conceptualisation of alternative dispute resolution in the Bill is erroneous. The Bill as it reads proposes to change the current practice under the court annexed mediation by removing the same under the control of the Chief Justice / Judicial arm of the Government and moving it to the Attorney General / Executive branch of Government. The Attorney-General is the principal legal adviser to the government and is also constitutionally mandated to represent the national government in court 'in any other legal proceedings to which the national government is a party, other than criminal proceedings' (Article 156(4)). As observed by the Court of Appeal (later endorsed by the Supreme Court) in the case of ***MumoMatemu v. Trusted Society of Human Rights Alliance & 5 Others,*** **eKLR [2012],** ***"It is not in doubt that the doctrine of separation of powers is a feature of our Constitutional design and a per-commitment in our Constitutional edifice."***

9. The KNCHR wishes to point out that the constitutional underpinning of ADR under Article 159 is not to regulate but to promote the practise of ADR in the Country.
10. Article 48 of the Constitution provides for the right to access to justice while Article 50 relates to the right to a fair hearing. Curiously, the Bill proposes to have mediation supervised by the Office of the Attorney General, who is a party in all civil suits filed by or against the State as enshrined in Section 12 (1) of the Government Proceedings Act which reads Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be. Similar provisions are also etched in the Office of the Attorney-General Act, 2012(No. 49 of 2012)*(See sections 5(1) and 7).*

11. Having the alternative dispute resolution process supervised by the Office of the Attorney General is not only against the principle of separation of powers but also limits the right to a fair hearing by an independent arbiter since the Attorney General is a party to all civil

suits filed by or against the State. This does not help in perception independence let alone functional and institutional independence. On the other hand, retaining mediation under the Judiciary will uphold these rights and principles since the judiciary is an impartial entity.

12. For the foregoing reasons, the Commission therefore **strongly recommends that the Bill be amended to retain alternative dispute resolution under the supervision of the Judiciary and not under the Office of the Attorney-General in order to maintain the principle of separation of powers among the arms of Government and abide by the constitutional provisions as highlighted above.**

13. The Constitution grants powers to Article 15 Commissions to engage in conciliation, mediation and negotiation. In addition to the Constitutional provisions, there exists a number of legislations that allow institutions embrace ADR. Section 29 (2) of the KNCHR Act No. 14 of 2011 requires the Commission to endeavour to resolve any matter brought before it by conciliation, mediation or negotiation. Further, MDAs that have developed internal ADR mechanism to aid in disputes resolution.
14. The inclusion of Part IV on Traditional Dispute Resolution seems like an afterthought. In a Bill of 51 Clauses only 3 clauses specifically focus on TDRM and the other few 3TDRM is additional to or exempted from some benefits or processes which the mediation or conciliation systems seem to benefit or develop.
15. The Commission also notes with concern the attempt by the proposal to make ADR mandatory under Clause 31 of the Bill. The proposal makes it mandatory from an advocate to initiating judicial proceedings advice a party to consider ADR and goes on to put a hefty criminal penalty for one who fails to do so. By doing so, the Bill errs on many fronts: First; it purports to make ADR; an alternative mode of justice mandatory; secondly, it threatens to infringe on advocate/client confidentiality and lastly, the impugned Clause seeks to address the gap in civic education and access to justice in the country through a wrong intervention (by making advocates the duty bearer). Notably, such a move is unenforceable and/or nearly impossible to prove without an infringement of

advocate/client relationship and the provisions risks being rendered redundant. We urge the honourable House, in its oversight mandate, to ensure the full implementation of the National Legal Aid Service which would well mitigate the challenge of access to justice for the indigents.

C. Specific Comments

No.	Clause Title	Proposed recommendation	Justification
1.	2: interpretation	Definition of 'mediator', delete 'including employees and persons employed by that person '	This provision contracts the content of the Bill to the extent that mediators are required to be registered. Does the registration process allow institutions or individuals? How accountable will the process be if other employees are allowed to offer services? More particularly if they are not registered.
		Amend definition of alternative dispute resolution to alternative dispute resolution includes reconciliation, mediation, arbitration and traditional dispute resolution mechanism.	To align it with Article 159 (2) of the Constitution.
		Amend the definition of community to include language, ethnicity, work, education among others.	
		Amend definition of customary law to be broad due to its evolving nature to include rules of custom(s) that a community in a given locality acknowledge and view as enforceable	
		Amend definition of conciliator to include chapter 15 Constitutional Commissions and Independent Offices which are mandated to conduct ADR.	To align with Articles 249 (1) (a) (c) and Article 252 (1) (b) of the Constitution.

		Amend definition of party to include groups, community and non-state organs.	These entities are critical stakeholders and parties to a dispute.
2.	3: Object of the Act	Amend to include the objective of sustainable development to enhance social justice transformation in the community and the society.	
3.	4 (e) and (f): Application of the Bill	Amend to include human rights disputes and environmental or labour, safety and health issues.	All disputes have an element of human rights and the bill should therefore cover human rights disputes. Environmental and labour disputes are best resolved by alternative justice system mechanisms which have restorative and sustainable principles. In Northern Kenya, we have the Modogashe Declaration which was historically used as an AJS agreement to resolve land, water, boundary and pasture disputes where the common law courts had failed to bring peace, cohesion and development in the region.
4.	5: Guiding principles of alternative dispute resolution	Add the principles: That justice shall be done to all irrespective of status.	To align the clause with Article 159 (2) (a) of the Constitution.
		That the traditional dispute resolution mechanism shall not be used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality.	To align the clause with Article 159 (3) (b) of the Constitution.

		5 (f) the bill should provide for the criteria / threshold for the competency of a traditional dispute resolver. Alternatively, traditional dispute resolution practitioners should be exempt from the provisions of the Bills generally. More specifically on the requirements for Registrations in appreciation of the lived realities in communities that resort to them as the only means to access justice.	To cure any conflicting interpretations of the qualifications of a traditional dispute resolver.
5.	6: Requirement for registration	Bill be reviewed to exclude Constitutional Commissions and Independent Offices from the accreditation requirement including the application for accreditation (as ADR practitioners) and revocation of accreditation under Paras 8 and 10 of the Bill.	Provides for accreditation of ADR Practitioners to be conducted by the Alternative Dispute Resolution Committee. This does not factor the powers of Constitutional Commissions and Independent Office (CCIOs) holders under Article 252 (2) (b) of the Constitution. The said Article empowers the CCIOs to conduct conciliation, mediation and negotiations all of which are ADR mechanism.
6.	8: Revocation of registration	Insert, if the mediator or conciliator contravenes chapter six of the Constitution The revocation must be in writing	This provides a framework to enhance accountability and transparency in the process.
7.	9: Right of review and appeal against the decision of the Centre.	Insert a new subsection after clause 9 (2) to provide that once the appeal has been finalized and the aggrieved party has been cleared, he or she can apply to the Centre to be registered/ reinstated.	
8.	Clause 11 (2)(e(and (g): Referral of cases	Delete the exclusion on environmental matters as scope for ADR Define what amounts to delay that can exclude that matter from being handled by the mediators.	There are existing issues involving the government on environmental justice and climate change, hence the limitation on the scope is not justified. Additionally, all disputes have a human rights perspective. The exclusion of cases pertaining to human rights is not justified.
9.	14 (1): Role of the parties	Replace the word 'shall' appearing after 'dispute' with the word 'may'.	Mediation is a voluntary process that the parties, if they so wish, may choose to engage in. The Bill should

			clearly state that mediation is not a mandatory exercise and a party may opt to engage the courts directly.
10	17: Disclosure by a conciliator or mediator	Amend by merging 19 (1) and (2) so as to read: 17. (1) A mediator appointed to facilitate mediation process shall before accepting the appointment and during the mediation process, disclose to the parties any circumstance which may affect — (a) impartiality of the conciliator or mediator; or (b) the conduct of the conciliation or mediation process. As a consequence of the merger, 17 (3) to be numbered 17 (2) and amended to read: (2) The parties to conciliation or mediation process may substitute a conciliator or mediator who makes a disclosure under subsection (1).	Merging is necessary for coherence and to avoid repetition.
11	18 (2): Revocation of appointment of a conciliator or mediator.	Amend to clause 18 (2) read: A mediator appointed to facilitate mediation may resign upon giving prior notice to the parties.	It is prudent for the mediator to give notice if he wishes to resign in order for the parties to make appropriate alternative arrangements.
12	Section 19 on a request for Experts to the ADR process being subject to the approval of the other party	Amend to remove the requirement for consent by the other party	Fair trial and natural justice requirements prefer discretion on a party to choose in what manner that party adduces evidence.
13	20: Date, time and place	Insert virtual/online sessions	Recognizing the lessons learnt amidst Covid-19, it is important to have a provision on virtual or online meetings where appropriate.
14	22: Confidentiality	The entire clause introduces an adversarial nature of dispute resolution.	The intention of ADR is simplification of the process without linages to the court adversarial process. This provision will deter members of the public from seeking justice.

15	28 (4): Submission to traditional dispute resolution	Amend to expressly include "human rights".	To align it with Article 159 (3) (a) of the Constitution.
16	29: End of traditional dispute resolution	29 (2) (a) (i) and 29 (2) (b) (i) be amended to include an obligation on traditional dispute resolution mechanism practitioners to "cause the Agreements to be prepared"	This is in appreciation of the fact that not all such actors are schooled in the formal education system. The general recommendation however remains that TDRM Practitioners should be exempted from the provisions of the Bill.
17	31: Duty of advocate to advocate for alternative dispute resolution	Delete the penalty clause under clause 31 (2).	The Penalty creates an onerous task on the Advocates especially those in private practice who charge for services rendered. ADR is meant to facilitate easily accessible and more affordable justice. This is likely to increase the cost of legal services, a burden that would inevitably be passed on to those seeking justice. This is potentially unconstitutional as the Bill diverts the obligation to promote the use of ADR to private practitioners. The obligation is on the judiciary in line with Article 159 of the Constitution. It further seeks to penalize Advocates for practicing their profession in contravention of international best practices on the practice of the law. The intention of the Constitution is not that parties resolve their disputes through ADR and only resort to the courts when they are unable to resolve their disputes. Section 31 offends the spirt of the Constitution

18	38 (3): Alternative dispute resolution expenses	should be amended to delete the words *"proportionate to the importance of issue or issues at stake"*	ADR is meant to be a cheaper/more affordable and thus accessible justice mechanism and it should suffice that expenses be based on the amount of work done by the ADR Practitioners and customary practices in TDRM.
19	39: Rules and regulations	Amend to expressly incorporate the requirements of public participation in the development of the Rules.	To align it with Article 10 (2) (a) of the Constitution on participation of the people as a key principle of governance.
		Replace the words 'Attorney General' with **'Chief Justice.'**	Currently, mediation under the Court Annexed Mediation is supervised by the Judiciary and the same should apply in the Mediation Bill. This will uphold the principle of separation of powers between the judiciary and the Executive (office of the Attorney General).

SIGNED BY:

Dr. Bernard Mogesa, PhD, CPM

Secretary to The Commission/Chief Executive Officer

THE
COMMISSION ON ADMINISTRATIVE JUSTICE
"Office of the Ombudsman"

27 JUL 2021

Our Ref: CAJ/LEG/5

23rd July 2021

23 JUL 2021

Jeremiah Nyegenye, EBS
Clerk of the Senate
Parliament Buildings
P. O. Box 41842-00100
NAIROBI

THE SENATE
RECEIVED
26 JUL 2021
DEPUTY CLERK

(1) DCOM/DLS
Please deal
Deputy Clerk, Senate
Date 27/07/21

Dear Sir

RE: COMMENTS ON THE ALTERNATIVE DISPUTE RESOLUTION BILL, 2021

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

The above captioned Bill refers. The Commission has examined the Bill and noted its noble objects and purposes in the context of promoting the use of alternative dispute resolution (ADR) mechanisms as provided under Article 159(2)(c) of the Constitution. The Commission also takes cognizance of the existence of a National ADR Policy which was developed by the Nairobi Centre for International Arbitration (NCIA) in consultation with the relevant stakeholders as well as a Mediation Bill, 2020 gazetted by the National Assembly on 15th June 2020 which extensively deals with the regulation of mediation in Kenya. The Commission also notes that best practice on law making dictates that policy should ideally precede legislation.

In light of the above, the Commission is of the considered view that it would be important to consider a holistic approach involving both Houses of Parliament and all relevant stakeholders on all legislative proposals aimed at ensuring effective operationalization of Article 159(2)(c) of the Constitution. Nonetheless, the Commission makes the following submissions on the Bill for further review and consideration:

(2) CAI - JLSHR
Kindly deal 27/07/2021

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No.	Clause	Comment	Justification
1.	**27; Competence of a traditional dispute resolver**	Clause 27(2) appears twice in the Bill and ought to be corrected. The requirement that the NCIA should prepare and maintain a list of traditional dispute resolvers as far as is reasonably practicable in Clause 27(2) may not be practical.	For statutory harmony within the proposed law. Identification of traditional dispute resolvers may be become difficult since the most respected groups of elders within communities are increasingly becoming difficult to identify and ascertain who authoritatively speaks for a particular community.
2.	**31;Duty of advocate to advise on Alterative Dispute Resolution**	Clause 31 places an untenable burden on advocates to advice their clients to consider using ADR and further criminalizes failure to provide such advice which attracts a fine not exceeding Kshs. 500,000.	This is unfair since by the time clients are going to advocates most of the time they have already decided that they want to utilize the formal judicial court process and or ADR mechanisms have failed.

3.	**32; Confirmation that ADR has been considered**	The requirement in Clause 32 that parties and advocates shall file ADR certificates in the prescribed form at the point of instituting and commencing judicial proceedings and entering appearance goes against the very essence of ADR which is supposed to be an informal, voluntary process.	The introduction of bureaucracies through filing of forms is unduly formalizing an informal process and negates the voluntary aspect of ADR.
4.	**38; ADR Expenses**	The provision in Clause 38(3) that ADR expenses shall be reasonable and proportionate to the importance of the issue and work carries out by the conciliator, mediator or traditional dispute resolver may be abused since the determination and calculation of the amount payables will most likely be left to the discretion of the conciliator, mediator or traditional dispute resolver.	Checks needs to be introduced by setting out clear guidelines on the amount of the fees to be charged.
5.	**39; Rules and Regulations**	The duty of making rules and regulations as provided in Clause 39 should lie with the Cabinet Secretary at the time being in charge of matters relating to justice and human rights instead of with the Attorney General as currently provided,	This is to cater for instances where the government of the day has both a Ministry of Justice as well as an Attorney General as has been the case with previous dispensations.
6.	**48; Amendment to Section 59A of Cap. 21**	The removal of representatives of the Chartered Institute of Arbitrators(Kenya Branch), ICJ Kenya, ICPAK,ICPSK and Kenya Bankers' Association from being nominated as	The Committee needs to have wholesome and inclusive representation of all the key

		members of the Mediation Accreditation Committee in Clause 48(d) leaves out representation from key non-state actors and professional associations.	professionals in Kenya who also usually have the requisite expertise for accreditation as mediators or conciliators.

We thank you for your continued support and assure you of our highest regards.

Yours sincerely,

LEONARD NGALUMA, MBS
COMMISSION SECRETARY/CEO

REPUBLIC OF KENYA

THE JUDICIARY

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THE HON. MR. JUSTICE (PROF.) JOEL MWAURA NGUGI

23rd July, 2021

J. M. Nyegenye, CBS
Clerk of the Senate
NAIROBI

Dear Mr. Nyegenye,

RE: INVITATION FOR PUBLIC PARTICIPATION AND SUBMISSION OF MEMORANDA: THE ALTERNATIVE DISPUTE RESOLUTION BILL (SENATE BILL NO. 24 OF 2021).

We make reference to the advertisement in a local daily inviting members of the public to submit representations on several bills by way of written memorandum. We pleased to submit a memorandum by the National Steering Committee for the implementation of the alternative justice systems policy (NASCI-AJS Committee) on the Alternative Justice Bill 2021.

Yours Faithfully,

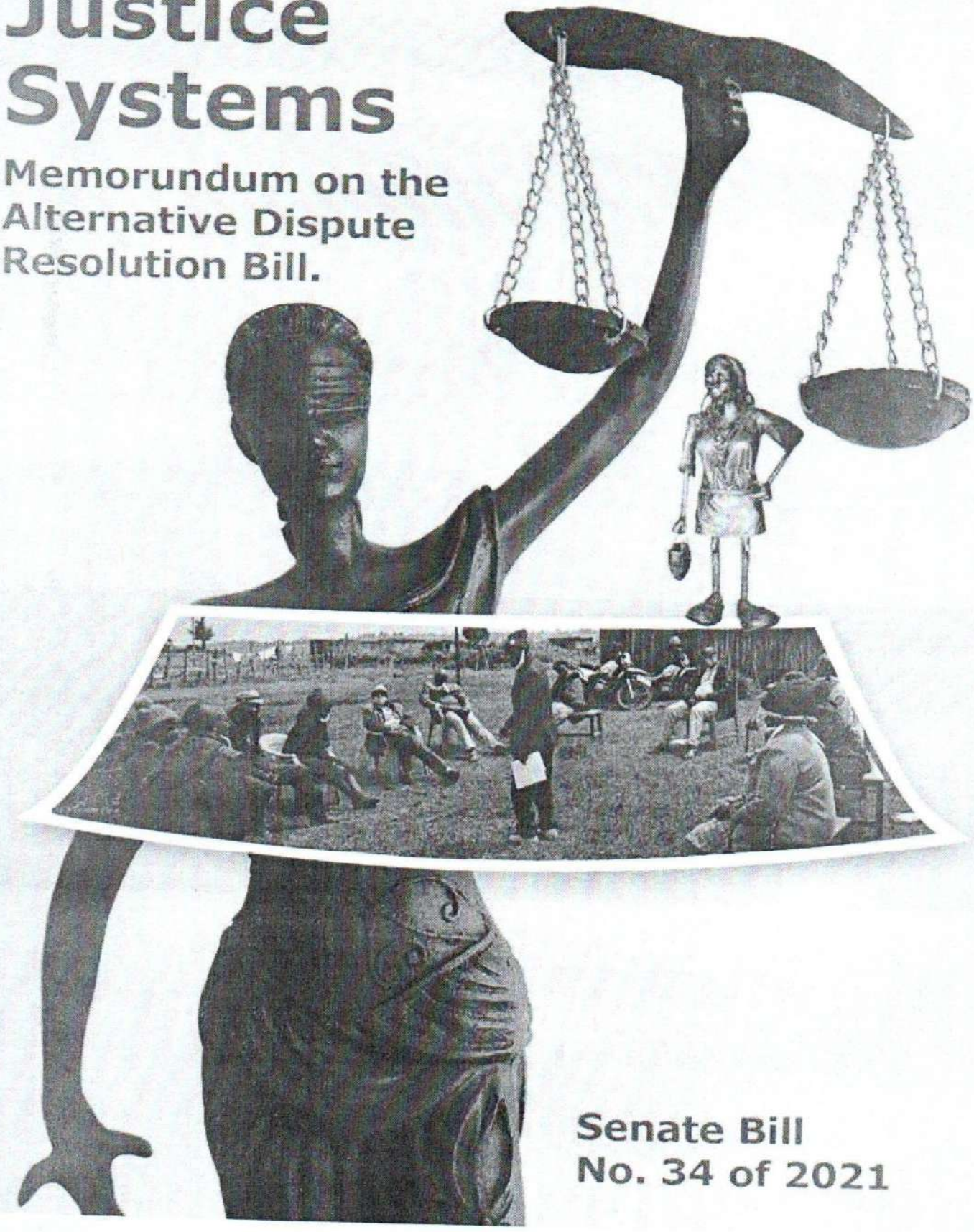
Joel Ngugi, LL.M, SJD, MBS
Presiding Judge, Nakuru High Court &
Chair, National Steering Committee for the Implementation of the Alternative Justice Systems Policy (NaSCI-AJS).

CC.

1. The Chief Justice and President of the Supreme Court.
2. The Deputy Chief Justice and Vice President of the Supreme Court.
3. The Chief Registrar of the Judiciary.

Alternative Justice Systems

Memorundum on the Alternative Dispute Resolution Bill.



Senate Bill No. 34 of 2021

COMMITTEE ON THE IMPLEMENTATION OF THE AJS POLICY (NaSCI-AJS) ON *THE ALTERNATIVE DISPUTE RESOLUTIONS BILL, 2021*

A. INTRODUCTION

1. On 27th August 2020, the Honourable Chief Justice of Kenya launched the Alternative Justice System (AJS) Baseline and Framework Policy. The AJS Policy seeks to mainstream into the formal justice system traditional, informal justice systems and other informal mechanisms used to ensure access to justice in Kenya. The development of the AJS Policy marks an important milestone in Kenya's efforts to ensure fulfillment, respect, and protection of human rights as outlined under Articles 10 and 48 of the Constitution.

2. The AJS Policy makes clear recommendations and viable options on how the judicial system and Alternative Justice Systems can interact in a manner that is mutually reinforcing and focused on an effective system of justice. The AJS Policy has also identified useful and immediate steps to be taken in order to animate this important aspect of the administration of justice. These steps include: identification of matters to be brought under AJS, regulation of practitioners of AJS, appropriate procedures and processes in AJS, appropriate interventions, and resource allocation to support the process. The AJS Policy is, therefore, an important guide on the operationalization of Alternative Justice Systems, not only to the Judiciary, but to all institutions in the justice sector.

3. As envisaged in the AJS Policy, on 9th December, 2020, the Honourable Chief Justice appointed the National Steering Committee for the Implementation of the Alternative Justice Systems (AJS) Policy (NaSCI-AJS), a multi-stakeholder team with the objective to ensure the mainstreaming, acceleration and policy support towards the implementation of AJS policy in Kenya. NaSCI-AJS' overall directive is to rally all sectors of Kenyan social, religious, judicial and cultural life to emphatically and continuously support AJS mechanisms and expand the pool of individuals and groups that access justice in Kenya.

4. Given its mandate, experience and expertise, NaSCI-AJS presents this Memorandum of views and observation on the Alternative Dispute Resolution Bill, 2021 to the Senate in respect of the provisions on a legal framework for the settlement of certain civil disputes by conciliation, mediation and traditional dispute resolution.

5. This Memorandum provides a general overview of the ADR Bill in the first part and then analyses select clauses in the Bill against the backdrop of the Constitution of Kenya 2010, existing national guidelines and policies, international human rights standards and principles in the second part.

B. OVERALL COMMENTS ON THE ADR BILL

6. NaSCI-AJS appreciates and lauds the spirit in which the ADR Bill has been developed: to animate the explicit constitutional commandment of encouraging alternative forms and fora of dispute resolution. The Constitution of Kenya, 2010 explicitly encourages alternative forms of dispute resolution. Indeed, in Article 159(2)(c), the Constitution commands the Judiciary, as the repository of delegated judicial authority, to promote "alternative forms of dispute resolution including reconciliation, mediation, arbitration and *traditional dispute resolution mechanisms.*"

7. This constitutional position merely matches the lived realities of most Kenyans who predominantly use alternative means of dispute resolution to resolve their disputes away from the Courts. Indeed, some studies show that as many as 90% of all cases are resolved away from the State-backed court system.[1] It is important to point out that while the prevalence of the use of AJS is probably higher in rural areas that are far in location from courts, there is ample evidence to show that AJS is utilized by many in the urban and peri-urban areas where courts can be easily be more accessed physically.

8. It is important to recognize at the outset that the spirit and object of the Constitution in Article 159 is ***not*** to regulate and constrain alternative forms and fora of dispute resolution. Instead, the clear purpose is to give the Judiciary the *categorical obligation to promote them*. *Any State law or Policy in this area must, therefore, have as its purpose the promotion and encouragement of alternative forms and fora of dispute resolution and not their constraint and limitation.* One of the main concerns about the current ADR Bill is that it takes the form of regulation rather than facilitation of the different forms of ADR including AJS. In this regard, ***three*** specific aspects of the ADR Bill need to be flagged out at the outset.

    a. *First,* sections 31 and 32 of the ADR Bill are potentially unconstitutional and strategically unwise. This is so for at least four reasons:

[1] See Justice Needs Survey by the Kenya Judiciary.

i. *One*, sections 31 and 32 are potentially unconstitutionally for reversing the obligation to promote ADR in Article 159 of the Constitution. The Constitution places that obligation on the Judiciary. However, the ADR Bill places it on advocates and disputants.

ii. *Two*, sections 31 and 32 of the ADR Bill also run afoul the articulated constitutional and judicial policy on ADR – including the police articulated in the AJS Policy in the form of Agency Theory: that policy is that parties are encouraged to utilize ADR, and where they choose to do so, the Courts must respect and enforce their choice to do so. The constitutional and judicial policy is not to require parties to utilize ADR and only resort to the court system where those attempts fail. In short, sections 31 and 32 of the ADR Bill violate the Agency Principle espoused in the AJS Policy and the principle of voluntariness which is inherent in Article 159(2)(c) of the Constitution.

iii. *Three*, sections 31 and 32 are un-strategic because they create the perception that ADR (including AJS) will be unable to resolve the majority of the cases presented to the Courts. It does this by anticipating that if all disputes are presented for ADR or AJS, there will still be a big percentage of cases which will end up in Court. The sections also do not distinguish cases which are not amenable for ADR or AJS resolution. This includes certain cases involving civil and human rights adjudication or disputes which, by law, must be determined in Court or before certain tribunals.

iv. *Four*, sections 31 and 32 are also un-strategic for imposing criminal sanctions on lawyers for doing that which they are trained and licensed to do: represent their clients in Court. Rather than pursue this route, the ADR Bill should provide incentives for parties and their lawyers to choose ADR or AJS. As presented, the Bill will merely trigger rabid, justified and potentially successful opposition from practicing lawyers.

v. *Fifth*, sections 31 and 32 do not take into account practical realities lawyers face before commencing suits on behalf of their clients – including the statute of limitations; the need for immediate Court protection or reliefs; the futility of pursuing

ADR or AJS for the specific dispute, etc. As drawn, therefore, and as enforced through criminal sanctions, the sections are potentially unconstitutional for being overbroad or vague.

vi. *Sixth*, for all the above reasons, sections 31 and 32 of the ADR Bill, which are the anchor sections of the Bill, might be described as regulatory rather than facilitative and, therefore, go against the letter and spirit of Article 159 of the Constitution.

b. *Second*, when looking at the sections of the ADR Bill which specifically deal with what the Bill calls "Traditional Dispute Resolution" (TDR), the following grave concerns arise:

i. *One*, section 27 makes reference to the use of "customary law" and seeks to impose a requirement that a "Traditional Dispute Resolver" shall be acquainted with "customary law." We find this limitation to be unwise and untenable. In the first place, our survey and field research in the area found that most Alternative Justice Systems do not solely use "customary law" in resolving dispute. Indeed, they often utilize a dialectical ken of normative principles drawn from anthropological, community, "modern", constitutional and other borrowed normative orders. AJS is distinguished not so much by the substantive law it applies but by the mode of justice it delivers and the ethos it espouses.

ii. *Two*, there is an additional danger associated with this attempt to limit the application of TDR to "customary law". It is the same danger long associated with the "Restatement Project" (led by Eugene Cotran). This is a Project which has long been criticized for its potential and impact in ossifying "customary law". This section risks the same fate.

iii. *Three*, Section 27(2) of the Bill requires the Center to prepare and maintain a list of traditional dispute resolvers. As the AJS Policy outlines, there are three different types of constitutionally-acceptable AJS categories. Under each, there are literally hundreds of thousands of AJS for a and mechanisms where disputes are resolved every day. To attempt to register all of them (especially the Autonomous AJS Mechanisms) might be viewed, in context, as impermissible

regulation. This section also, for this reason, runs afoul the AJS Policy.

c. *Third*, in attempting to capture all forms of ADR in a single Bill, the ADR Bill misses the complexity of AJS which is excellently captured in the AJS Policy. In particular, like its previous version, the Bill begins with an assumption that there is a closed category of ADR mechanisms which it seeks to capture and bring within the gaze of the law. The object of the Bill should be the opposite: to acknowledge, as the Constitution does, that there are many mechanisms of accessing justice outside Court and find ways to facilitate and promote them in a way which aggrandizes the values of the Constitution without undermining human rights.

Additionally, the Bill does not comprehend the complexity of the categories of AJS Mechanisms sensitively captured in the AJS Policy.

The AJS Policy revealed that the practice, regulation and legal application of AJS in different jurisdictions could be categorized into four main models, namely:

(i). Autonomous AJS Institutions
(ii). Third-Party Institution-Annexed AJS Institutions
(iii). Court-Annexed AJS Institutions
(iv). Regulated AJS Institutions

a) Autonomous AJS Institutions

Autonomous AJS refers to AJS processes and mechanisms run entirely by the community. The community selects and approves the third parties involved in resolving the disputes without any interventions or regulations from the State. The third parties selected resolve these disputes in accordance with the laws, rules and practises, which govern the community. These body of laws, rules and practices constitute the substance of customary law applied by the community. These AJS institutions do not have any involvement with the State. They mostly work relatively independently of any form of State regulatory mechanisms.

Examples of Autonomous AJS systems in Kenya which the Taskforce interacted with include the dispute resolution systems

within the Olposumaru village in Narok County; the Ebharasa among the Kuria; and the Rendille Community. Among the Rendille, dispute resolution is a function of the council of elders of each clan. The disputes are presented by the victims involved, a family, clan, or the community. The elders hear and determine the dispute. They then hand down binding decisions. Another example is this system, and which the TF interacted with, is the Ebharasa among the Kuria. The Ebharasa is the council of elders, which resolves disputes that arise within the community. Sessions are held usually under a tree. Members of the community can sit in during hearings. Once a dispute has been heard by these elders, they also issue binding decisions.

b) *Third Party Institution-Annexed AJS Institutions*

Third-party institution annexed AJS are processes that involve third-parties who are not necessarily members of the community. They are the ones who hear and held with the resolution of such disputes. These third-parties can be State sanctioned institutions like chiefs, the police, probation officers, child welfare officers, village elders under the County government, the chair of Nyumba Kumis, among others. They can also be non-state related institutions like churches, Imams and Sheikhs among Muslims, other religious leaders, social groups such as Chamas, NGOs and CSOs. The main characteristic in this model is that the state and non-state third parties are not part of any state judicial or quasi-judicial mechanisms.

Under this model numerous examples exist. These include the Kibera Legal Centre. Some of these forums usually refer matters to the local administration and CSOs for resolution. The Lang'ata Legal Aid Centre is another example. This forum is involved in dispute resolution at the community level. The dispute resolution is conducted by paralegals from the community who have undergone training by various institutions including the Legal Resource Foundation ('LRF'). CSOs such as the LRF offer capacity assistance to the Centre to assist in the resolution of disputes. In many informal settlements in urban areas and in rural areas chiefs are involved in dispute resolution. Disputes are brought before Chiefs who hears and acts as important third-parties for their resolution. There are also CSOs

who offer dispute resolution services such as Kituo Cha Sheria and FIDA. These also handle and determine disputes within communities.

c) *Court-Annexed AJS Institutions*

Court-Annexed AJS refers to AJS processes that are used to resolve disputes outside the court, although under its guidance and partial involvement. Like Court-Annexed Mediation, Court-Annexed AJS works closely with the court and court officers in the resolution of disputes. This is done through a standard referral system between the Court, Court Users Committees ('CuCs'), the AJS processes, and other stakeholders such as the ODPP, Probation Office, and Children's Office. The AJS mechanism are linked to the courts through the CuCs and receive the guidance of the court and its officers such as Office of the Director of Public Prosecutions ('ODPP'), probation officers and children officers in the resolution of disputes. This dispute resolution model mergers the community-based mechanisms and the formal justice system. The court can refer matters to the AJS mechanism and the AJS mechanism can refer the matter to the courts on a referral system.

Examples of this model include the Isiolo court-annexed AJS mechanism. The Isiolo Law Courts court-annexed AJS involves the council of elders of different clans in the resolution of disputes. The council of elders resolve disputes within the community. They also work closely with the court officers such as probation officers and children officers who may give direction on the requirement of the law when handling certain cases. The court may refer disputes to the elders where parties have agreed to the process or where it is determined that the elders are best placed to resolve the dispute. Similarly, elders refer disputes to the court. Other examples of Court-Annexed AJS Mechanisms now in existence include: Karatina Law Courts; Othaya Law Courts; and Kangema Law Courts.

d) *Regulated AJS Institutions*

These kinds of AJS involves practices where AJS mechanisms are created, regulated, and practiced either entirely or partially by State-based law or statute. These models include States that incorporate AJS mechanisms like traditional courts in their court systems as part of their judicial mechanism or local government structures. The creation and regulation through statute means that these AJS institutions are part of the State-based dispute resolution systems and the third-parties involved are in certain instances remunerated by the State. Examples of these practices of AJS can be found in South Sudan, South Africa, and to some extent Botswana as presented in the next section.

The AJS Policy categorically stipulates that only the first three categories of AJS Mechanism are permitted by the Constitution of Kenya, 2010. However, as aforesaid, there are sections of the ADR Bill which come close to instituting the fourth "province": Regulated AJS Institutions. These aspects of the Bill need to be reviewed.

C. THE MATRIX OF SPECIFIC COMMENTS IN DIFFERENT SECTIONS OF THE BILL

Section (Clause)	Observations	Recommendations
Section 2: Interpretation "**conciliator**" means an impartial person accredited and registered to facilitate conciliation and includes employees and persons employed by that person. "**mediator**" means an impartial person accredited and registered to facilitate mediation and includes employees and persons employed by that person.	Article 252 of the Constitution provides that "Each commission, and each holder of an independent office has the powers necessary for conciliation, mediation and negotiation" yet the definition of a conciliator or meditator under the bill is limited to "an impartial person accredited and registered to facilitate" conciliation or mediation. It overlooks these constitutional powers. It also overlooks negotiation as well as the substantive definition of conciliation, mediation and negotiation which are not limited to	The definitions of a conciliator and a mediator should factor in the constitutional powers of commissions and independent office holders.

Section (Clause)	Observations	Recommendations
	accreditation by the committee under the CPA.	
"**customary law**" means rules of custom that an indigenous people of a given locality view as enforceable.	Who are indigenous people? The Constitution defines an indigenous community as one that is marginalized and has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy. It should be noted that many of the communities that use Alternative Justice Systems (ADR) do not fall squarely within the bracket of indigeneity set by the Constitution. For example, we have the Luo Council of Elders, Njuri Ncheke Council of Elders who have a strong following of people who are neither marginalized nor hunters and gatherers.	We propose that the definition be redrafted as follows: "**customary law**" means rules of custom that a community of a given locality view as enforceable.

Section (Clause)	Observations	Recommendations
Section 3: Objective of the Bill The object of this Act is to— (a) give effect to Article 159 (2) (c) of the Constitution; (b) provide an effective mechanism for amicable dispute resolution; (c) promote a conciliatory approach to dispute resolution; (d) facilitate timely resolution of disputes at a relatively affordable cost; (e) facilitate access to justice; (f) enhance community and individual involvement in dispute resolution; and (g) foster peace and cohesion.	Article 10 (2) of the Constitution provides for national values and principles of governance. In addition to Article 159 (2), the ADR Act should also include the national values as an important part of ADR.	We propose the inclusion of a new objective- "give effect to article 10(2) of the Constitution" in the objectives of the Bill. This will then ensure the mainstreaming of the important national values and principles of governance, including human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, in all alternative dispute resolution frameworks in place.

Section (Clause)	Observations	Recommendations
Section 4: Application of the Act 4 (2)... this Act shall not apply to... (e) a claim for a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights or (f) disputes where public interest involving environmental or occupational health and safety issues are involved.	S. 4 (2) (e) and (f) limits possibilities to fast-track resource and land conflicts that will have an aspect of violated rights or of safety, environmental and health public interests. The reason of the bill itself is to ensure that there is no violation of the access to justice right institutionalized under Article 48 of the Constitution. Hence to remove such claims under the bill's mandate is to remove the very purpose of its enactment.	Perhaps it should have been framed "a claim processing causing a violation of public interest involving..." i.e. a violation of the bill of rights. Otherwise, a dispute is caused by a violation of rights.
Section 19: Attendance and representation in conciliation or mediation (4) A request for the services of an expert may be made by the conciliator or mediator, or by a party with the consent of the other party.	This clause limits a party's request for expert witnesses to the other party's consent.	It is part of fair administrative rules as to how a party chooses to present their evidence.

Section (Clause)	Observations	Recommendations
Section 29: End of traditional dispute resolution (1) A traditional dispute resolution process ends when— (a) the parties reach an agreement or (b) a traditional dispute resolver, upon consultation with the parties, determines that further traditional dispute resolution is not feasible. (3) Except where a dispute was referred for resolution through traditional dispute resolution by a court or at the request of the parties, a settlement agreement need not be in writing.	The AJS is already implementing a third-party annexation which has not been captured in the bill.	S. 29 (1) (2) (a) (ii), (b) (ii) and (3) of the bill should contemplate third party annexation as documented under the ADR policy whose implementation by NASCI – AJS is ongoing.

Section 30: Effect of settlement agreement. (2) A party to a settlement agreement may, for the purpose of record and enforcement, register the agreement with the Committee.	The recording envisaged under S. 30 (2) can only be restricted to mediation but not to other forms of ADR e.g. The National Land Commission and other independent offices and commissions have under Article 252 of the Constitution devised their claim processing and recording mechanisms. Some have not been appealed against. Some of these decisions by quasi-judicial state organs have been adopted as judgments by courts.	There is need to provide for referral mechanisms from ADR to Traditional Dispute Resolution (TDR) and vice versa as there are legally recognized and enforceable forms of alternative dispute resolutions that are not TDR. Courts have taken cognizant of these legislative forms which are in most cases condition precedent to resulting to judicial proceedings. **For example:** • S. 39 (2) of the Community Land Act provides that "Any dispute arising between members of a registered community, a registered community and another registered community shall, at first instance, be resolved using any of the internal dispute resolution mechanisms set out in the respective community by-laws"; • S. 31 of the Intergovernmental Relations Act provides that "The national and county governments shall take all reasonable measures to— (a) resolve disputes amicably; and (b) apply and exhaust the mechanisms for alternative dispute

Section (Clause)	Observations	Recommendations
		resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189 (3) and (4) of the Constitution." We have had matters referred to ADR by court under this section where county and national governments as well as communities were parties. Sometimes NLC as a party on behalf of the government in these proceedings had to invoke TDR where community land is not yet registered but held in trust on behalf of the government. The TDR decision can be referred to the ADR process and then adopted in court; • Indeed S. 32 (1) (a) of the Intergovernmental Relations Act contemplates "Any agreement between the national government and a county government or amongst county governments shall— include a dispute resolution mechanism that is appropriate to the nature of the agreement" These mechanisms under this and other legislation must be recognized in the bill as possibilities of referral systems.

Section (Clause)	Observations	Recommendations
31. (1) An advocate shall, prior to initiating judicial proceedings, advice a party to consider resolving the dispute by way of alternative dispute resolution (2) An advocate who contravenes subsection (1) Commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings.	The section changes the conceptual basis of arbitration/mediation /conciliation. The architecture of ADR is to make it consensual and not mandatory. This brings a criminal element. may not achieve the desired objectives. This also presumes that all matters can be successfully subjected to ADR, including criminal cases and all civil cases.	This section should be withdrawn.
Section 38: Alternative dispute resolution expenses (3) The alternative dispute resolution expenses shall be reasonable and proportionate to the importance of the issue or issues at stake and to the amount of work carried out by the conciliator, mediator or traditional dispute resolver.	Expenses for TDR cases should be agreed according to the customary of the parties involved in the dispute.	This section must take cognizance that expenses shall be agreed by the parties in accordance to the customary law in respect to TDR

Section (Clause)	Observations	Recommendations
Section 39: Rules and regulations (1) The Attorney General may, in consultation with the Centre, make rules of practice and procedure, and regulations generally for the better carrying into effect of any provisions of this Act.	S. 39 (1) of the Bill on referral to the rules and procedures where the center is involved are limited to mediation, conciliation and arbitration. S. 27 (2) of the bill wrongly gives the center the role of preparing and keeping TDR resolvers while its role is limited to commercial arbitration.	Annexation might be a better process.

D. FURTHER OBSERVATIONS

ADR and TDR Policy is not Externally Enforceable

In house policy of existing ADR organs can mainstream ADR/AJS annexed processes. This must evolve from the practical experience of their in-house success and failures in enforcing their mandates. Hence:

a) Adoption of a decision or recommendation is constitutionally or legislatively mandated to a court or to a *quasi-judicial* state or national organ or committee or legislative organization. The mandated state or legislative organs would be supported as they work within the Judiciary to formulate rules and regulations under S. 39 of the bill.

b) Rules and regulations cannot be formulated for TDR as this is based on customary law unique to the relevant community (Community as defined under Community Act). The supporting organization such as NASCI AJS or NLC in land related disputes under Article 67 (2) (f) supports the distillation of best practices and ensures adherence to Article 159 of the constitution.

c) Many Institutions with constitutional and legislative mandate for ADR are not included under S. 48 of the bill.

d) Mediation Accreditation Committee under S. 59A, CPA does not provide for the adoption contemplated under S. 23 (7) of the bill. Moreover, the

committee work under CPA is only limited to mediation annexed practitioners of commercial and family issues.

e) The functions of the Mediation Accreditation Committee is limited to mediation accreditation and shall be to—" (a) determine the criteria for the certification of mediators; (b) propose rules for the certification of mediators; (c) maintain a register of qualified mediators; (d) enforce such code of ethics for mediators as may be prescribed; and (e) set up appropriate training programmers for mediators" What about accreditation of conciliation, negotiation and other forms of dispute resolution? What about all the other processes of ADR not covered by the committee?

f) One of the big wins of CUC forums has been S. 50 C of the CPA. S. 50 of the bill should not restrict the parties to ADR Act while the courts have taken cognizant of many unique forms of ADR including other alternative legislative procedures additional to ADR. The choice on where to refer a matter is unique to part or whole of the procedural and substantive issues and cannot be restricted to ADR Act.

E. CONCLUSIONS

Given our comments and observations above, NaSCI-AJS strongly recommends that the ADR Bill should be withdrawn at this time and that it be subjected to more robust and wider engagement with stakeholders. At the very least, NaSCI-AJS strongly recommends that all references to AJS and TDRM in the Bill be removed.

THE MEDIATION ACCREDITATION COMMITTEE

Supreme Court Building (Room 35), City Hall Way

REPUBLIC OF KENYA

P.O BOX 30041-00100, Nairobi TEL: 0730181600 / 700 / 800

MAC 3/2018

mediationaccreditation@gmail.com ,mediationaccreditation@judiciary.go.ke

23rd JULY, 2021

MEMORANDUM ON THE PROPOSED ADR BILL – MEDIATION ACCREDITATION COMMITTEE – JUDICIARY OF KENYA

The Mediation Accreditation Committee (MAC) is a Statutory Committee created under Section 59 of the Civil Procedure Act (Cap 21 Laws of Kenya.) The Committee is mandated with the task of, among others, accrediting mediators for the Court Annexed Mediation Program, enforcing a Code of Conduct for the Mediators, and recommending appropriate mediation training criteria. It was gazetted in February 2015 and since its launch, it has accredited over 850 mediators who are currently taking part in the Court Annexed Mediation Program (CAMP) that has been run by Judiciary for the past five years. As a committee that has been at the centre of mediation practice in the Judiciary in Kenya, the proposed ADR Bill directly affects most of its activities. The Committee has therefore interacted with the provisions of the proposed Bill and wishes to tender the following recommendations on the same:-

1. **Section 4:** The scope and application of the Act should be expanded beyond Civil Disputse alone, considering that CAMP currently applies to Environment and Land; Employment and Labour; Children; and Divorce Disputes.
2. The proposed Bill is not clear on the exact roles to be played by MAC and the Centre. Its not clear whether a mediator intending to practice as such would require to be accredited by both MAC and the Centre, and /or either of them. It is also not clear

whether a practitioner whose application for accreditation has been declined by the Centre or whose accreditation status has been revoked by the Centre may still continue to practice under CAMP. The proposed Bill does not state whether the applicable Code of Conduct to practitioners under CAMP shall be the one published by the Centre or the one published by MAC.

3. Considering the provisions for the Nairobi Centre for International Arbitration Act that establishes the Centre, the proposal by the Bill to have the Centre be the Central Body that accredits ADR practitioners is in appropriate and likely to cause confusion amongst the different ADR practitioners i.e mediators, arbitrators, conciliators, and traditional dispute resolution practitioners. It is proposed that a new centre be created for that purpose.
4. **Section 9(2):** It is proposed that the appeal be made before a Magistrate's Court.
5. **Part IV:** It is proposed that the entire part be deleted and that the application of the proposed Bill to Traditional Dispute Resolution Mechanisms be removed from the Bill altogether.
6. **Section 31(2):** The section be deleted as it is not easy to enforce and its likely to cause advocate apathy against ADR . Section 32(2), (3), and (4) adequately cover the concerns raised under Section 31.
7. **Section 36(a)(iii)and (iv)** be deleted as they are likely to encourage parties to renege on a settlement agreement that they will have participated in only on account of improper notice.
8. **Section 38(1):** The Bill to clarify whether this Section applies to CAMP.
9. **Section 48 (b)(ii)(a):** Delete the words 'of the High Court'.
10. Retain the membership of MAC as it is save for the proposal under Sections 48(b)(ii)(a) and 48(b)(iii)(ab).

11. Retain **Section 59(A)(3)** that establishes the office of the Registrar for the day to day running of the activities of the Committee and its secretariat.
12. **Section 48(e)** to be deleted. The function of maintaining a register to be carried out by the Court and not MAC.

MAC wishes to extend its appreciation for the good work that the Senate has done in coming up with the Bill.

Yours faithfully

Registrar

Mediation Accreditation Committee

CC: Chairman

Mediation Accreditation Committee

Chartered Institute of Arbitrators

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CIArb
evolving to resolve
Kenya Branch

23rd July 2021

J.M. Nyegenye, CBS
The Clerk of the Senate
Parliament Building
Parliament Road
P.O. Box 41842
NAIROBI

RE: MEMORANDA- COMMENTS AND VIEWS ON THE ALTERNATIVE DISPUTE RESOLUTION BILL 2021

We refer the above subject and wish to submit the comments of the Chartered Institute of Arbitrators Kenya Branch.

The Chartered Institute of Arbitrators Kenya Branch, established in 1984, is one among branches of the chartered Institute of Arbitrators founded in 1915 with headquarters in London. It promotes and facilitates the determination of disputes by arbitration, mediation adjudication and other forms of alternative dispute resolution (ADR). The Institute has over 20,000 members spread out in about 90 countries in the world with branches in Africa, Europe, Asia, middle east, North America and south America. It has affiliations with arbitration bodies and institutions in other countries across the world and with the London Court of International Arbitration and the ICC's International Court of Arbitration in Paris. The Institute is not for profit organization and gained charitable status in 1990.

The Kenya Branch with over 1,200 registered members from such diverse fields as architecture, engineering, quantity surveying, law, insurance, accounting, doctors, environmentalist, actuarial scientists, and property valuation, maintain a register of knowledgeable and experienced arbitrators, mediators, construction adjudicators and expert and facilitates their appointment as dispute resolvers.

THE ALTERNATIVE DIPSUTE RESOLUTION BILL 2021

The Branch has considered the bill and would wish to note that there is definitely need for some form of regulation. As lawmakers and stakeholders look to regulate mediation, conciliation and traditional dispute resolution as mentioned in the Bill, care must be taken not to turn the process into a technical and rigid profession, considering the scope of senior citizen at the local and community level who may offer conflict resolution.

There is need to consider the practicality to regulate traditional dispute resolution process and process to certify dispute resolver under customary law. On accreditation, there is need to explore and recognize institutions that train and accredit dispute resolvers. Additionally, the issue of code of conduct and how complaints should be address.

We also wish to highlight that adjudication as a dispute resolution process has not been considered as a mechanism in dispute resolution and the Amendment of Nairobi Centre for International Arbitration does not encompass Traditional Dispute Resolution Processes and Construction Adjudication. This aspect needs to be considered and addressed accordingly.

We also recognize that the there is in place a multi sectoral taskforce set up by the office of the honorable the attorney general to finalize the National ADR Policy from which policy documents could include regulations, codes and even statutes and care must be taken into consideration not to cause overlap and inconsistencies caused by multiplicity of efforts to address the same subject.

From the above, the Branch has considered the Bill and we hereby submit our inputs on the Bill, for consideration by the relevant committee and the Leadership of the National Assembly. We remain at your disposal for any assistance and clarification as may be required.

Yours sincerely,

Dr. WILFRED MUTUBWA, C.Arb., FCIArb
Chairman

cc. Chairman, Legal Subcommittee, Chartered Institute of Arbitrators, Kenya Branch

COMMENTS ON THE ALTERNATIVE DISPUTE RESOLUTION BILL, 2021

PART	PROPOSED SECTIONS FOR CONSIDERATION	PROPOSAL
PART I PRELIMINARY	AN ACT of Parliament to provide for the settlement of civil disputes by conciliation, mediation and traditional dispute resolution mechanism to set out the guiding principles applicable; and for connected purposes.	Considering that other forms of disputes other than civil disputes e.g. family, succession andconstitutional matters are amenable to and can be resolved using mediation. Mediation is not just to achieve settlement (which sometime may involve/imply compromise/dealing with the dispute at hand) but also may relate to resolution of conflict by addressing underlying issueto avoid recurrence in future. **Proposed: AN ACT of Parliament to provide for the settlement and/or resolutionof ~~CIVIL~~ disputes by conciliation, mediation and traditional dispute resolution mechanisms; to set out the guiding principles applicable; and for connected purposes**
PART II - ACCREDITATION AND REGISTRATION OF CONCILIATORS AND MEDIATORS.	6. (1) A person shall not practice as a conciliator or a mediator under this Act unless that person has been accredited and registered as a conciliator or mediator by the Centre.	Mediation is fluid and widely used and the Bill cannot seek to regulate of forms of mediation including mediation of family, boundary, land & other disputes that are done by elders, court users committees, national & county government administration, religious leaders and others, as part of their everyday work. Is the Centre the only institution allowed to provide accreditation? What happens to the other centres currently providing accreditation? The section should differentiate between the centres approved for training, accreditation and registration.

PART	PROPOSED SECTIONS FOR CONSIDERATION	PROPOSAL
		We also propose the recognition of Chartered Institute of Arbitrators as one of the Institute to provide accreditation. In the rules that are to be formulated by the Attorney General, a list of approved centres of training should be included.
	7. (1) **A person who intends to practice as a conciliator or a mediator shall submit an application in the prescribed form together with the application fees to the Centre for accreditation and registration.**	The forms and fees must be provided in the rules that the Attorney General in consultation with the Centre will formulate. In order for this section to become effective and operational, The wording of **section 39** will have to change to make it mandatory for the Attorney General to formulate the Rules within a specified period. If this is not done, there will be no rules guiding accreditation and registration thus bringing about challenges when it comes to how and who should be accredited and registered as a mediator or a conciliator.
	Section 8 (1) The Centre may revoke the registration of, or suspend a conciliator or a mediator if the conciliator or mediator- (c) is in breach of the code of conduct and hasbeen found guilty.	The body given mandate to deal with issues of breach is not a court of law or quasi- judicial tribunal and the word guilty should be deleted from the Bill. Amend: c) **is found to be in breach of the code of conduct.**
	Section 9. (1) A person whose application for accreditation has been declined or whose registration has been revoked or suspended may make an application to the Centre, within seven days of receipt of the reason for refusal of application for accreditation and registration, or	Seven (7) days is too short. We suggest thirty (30) days. Amend 9 (1) : **A person whose application for accreditation has been declined or whose registration has been revoked or suspended may make an application to the Centre, within thirty seven days of receipt of the reason for refusal of application for**

PART	PROPOSED SECTIONS FOR CONSIDERATION	PROPOSAL
	revocation or suspension of registration, for review of the decision of the Centre.	**accreditation and registration, or revocation or suspension of registration, for review of the decision of the Centre.**
	Section 9 (2) A person who is dissatisfied with the decision of the Centre under subsection (1) may appeal to the High Court within seven days of receipt of that decision.	7 days is too short. Some conciliators and mediators will be lay people needing legal representation, without a High Court near them and this may be a fetter of the right of access to justice. Make it within 30 days; no prejudice is suffered by anyone. Amend 9 (2): **Appeal to the High Court within 30 days of being notified of such decision.**
	Additional Paragraph	Is there intention to pursue this appeal to the Supreme Court or is there need to make the High Court or Court of Appeal the final stop? Introduce 9 (3): **An appeal to the High Court under Section 9 (2) shall be final.**
	Section 10 (1) The Centre shall publish a code of conduct for conciliators and mediators.	No time limits provided. We propose that the Centre publishes the code within Ninety (90) Days of the effective date of the Act. Amend 10. (1): **The Centre shall publish a code of conduct for conciliators and mediators within Ninety (90) days of the commencement of this Act.**

PART	PROPOSED SECTIONS FOR CONSIDERATION	PROPOSAL
PART III **CONCILIATION AND MEDIATION**	11. (3) A court shall specify the time within which a Report on the referral shall be filed with the court.	The Act should prescribe the time period within which a report on the referral shall be filed with the court. Amend 11. (3) A report on the conciliation or mediation proceedings should be filed with the court within Fourteen Days of conclusion of the proceedings.
	12. (3) A party to an agreement which has not made provision for submission of a dispute to alternative dispute resolution or a dispute covered under this Act may, with the consent of the other party to the agreement, submit a dispute arising out of that agreement for determination through conciliation or mediation.	What is the meaning of submit in this section? Does it mean a resolution by the parties between themselves to have the matter determined by way of conciliation or mediation or does it mean submitting the dispute to the Centre for determination through conciliation or mediation. If the latter is the case, the section should specify to whom the dispute is being submitted to and in what form or format. **The concern is on the issue of formality of the process.**
	15. (3) Where parties fail to agree on the appointment of a conciliator or mediator, each party shall appoint their preferred conciliator or mediator. (4) Where the parties appoint more than one conciliator or mediator, the conciliators or mediators shall act jointly.	Does having two mediators and conciliators poses a risk for bias in handling the process? **We propose one mediator or conciliator ONLY.** **Prescribe the mode of appointment and appointing authority**

PART	PROPOSED SECTIONS FOR CONSIDERATION	PROPOSAL
	Section 23 (6) A party to a settlement agreement may, for the purpose of record and enforcement, register the agreement with the Committee.	Introduce a paragraph after (6) as follows: Failure to register the settlement agreement under (6) will render the settlement agreement unenforceable in court in accordance with Section 35 (3).
	Section 26 (1) A conciliator or mediator is not liable for any act or omission in the performance of his or her role under this Act unless the conciliator or mediator is proven to have acted fraudulently, negligently or in bad faith.	Acting 'negligently or in bad faith" could be subjective and may cause dispute in interpretation. Amend: Amend 26 (1): **A conciliator or mediator shall not be liable for any act or omission in the performance of his or her role under this Act unless the conciliator or mediator is proven to have acted fraudulently, negligently or in bad faith.** Introduce 26 (2): **Subsection (1) shall apply to a servant or agent of a conciliator or mediator in respect of the discharge or purported discharge by such a servant or agent, with due authority and in good faith, of the functions of the conciliator or mediator.**
PART IV **TRADITIONAL DISPUTE RESOLUTION**	The entire Part (Section 27 to 30)	What is the practicability of traditional dispute resolvers and parties abiding by the processes and procedures laid out in the Act vis-a- vis abiding by their traditions and cultures that have always been applied?
PART V **RECOURSE TO COURT AND**	**Section 31 (1)** An advocate shall, prior to initiating judicial proceedings, advice a party to consider resolving the dispute by way of alternative dispute resolution.	It is wrong to impose an obligation upon an advocate to advice a party to consider mediation prior to initiating judicial proceeding. This is interfering with a party's right to determine the mode of dispute resolution to adopt.

PART	PROPOSED SECTIONS FOR CONSIDERATION	PROPOSAL
RECOGNITION AND ENFORCEMENT OF SETTLEMENT AGREEMENTS	**Section 31 (2)** An advocate who contravenes subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings.	In any event, who will police this and how? **Proposal is to delete the section.**
	Section 32 (1) A party shall file with the court an alternative dispute resolution certificate in the prescribed form, at the time of commencing judicial proceedings, stating that alternative dispute resolution has been considered. **Section 32 (2)** A party entering appearance shall file with the court an alternative dispute resolution certificate in the prescribed form, at the time that party enters appearance or acknowledges the claim, stating that alternative dispute resolution has been considered. **Section 32 (3)** An advocate shall file with the court an alternative dispute resolution certificate in the prescribed form, at the time of instituting judicial proceedings or entering appearance, stating that the advocate has advised a party to consider alternative dispute resolution.	This is an unnecessary addition to the bureaucracy of litigation. Whether or not conciliation or mediation has been considered, is of no consequence. It would only be of importance if mediation had been attempted and outcome disclosed, a party should not be entitled to a benefit on the issue of costs simply because of a mediation certificate. The party may lie about having considered mediation just to derive this benefit. **Proposal is to delete the section.**

PART	PROPOSED SECTIONS FOR CONSIDERATION	PROPOSAL
	Section 32 (4) A court may take into account the fact that a party has considered or participated in alternative dispute resolution when making orders as to costs, case management or such orders as the court determines.	
	33. A party may apply to the High Court or the court that referred the dispute for resolution through an alternative dispute resolution process – (a) for an interim measure of protection (b) to challenge jurisdiction of the alternative dispute resolution (c) to challenge the appointment or impartiality of the conciliator, mediator or traditional dispute resolver (d) to challenge referral of the dispute to alternative dispute resolution or (e) to challenge the settlement agreement.	The section is a copy and paste of the Arbitration Act. Applications to the courts curtails the spirit of alternative dispute resolution. There should be solutions from the ADR mechanisms.
PART V – CONSEQUENTIAL AMENDMENTS	45 (c) Section 5 of the Nairobi Centre for International Arbitration Act is amended by inserting the following new paragraph immediately after paragraph (d)— (da) maintain a register of conciliators and mediators in accordance with Part II of the Alternative Dispute Resolution Act.	Will there be a concurrence with the register already created by MAC?

PART	PROPOSED SECTIONS FOR CONSIDERATION	PROPOSAL
	48. (d) Section 59A of the Civil Procedure Act is amended— (iv)deleting paragraph (d) and substituting therefor the following new paragraph— (d) four persons nominated by the following bodies respectively— (i) the Law society of Kenya (ii) the Kenya Private Sector Alliance (iii) the Federation of Kenya Employers and (iv) the Central Organisation of Trade Unions.	The amendment ought to include members from bodies that have experience and knowledge in matter mediation and conciliation such as the Chartered Institute of Arbitrators (CIArb).

Further Comments/Questions to be addressed by members.

1. How practicable is the regulation of the Traditional Dispute Resolution Processes?
2. How does one certify that one is acquainted with customary law to be applied?
3. Under the NCIA Act, NCIA trains as well as provide accreditation. Other institutes provide training but it now seems that accreditation will be centered with NCIA. In accreditation, is there a possibility that trainees from other institutions will be discriminated in favour of NCIA trainees?
4. Who shall hear and determine complaints with respect to the code of conduct?
5. The Amendments to the Nairobi Centre for International Arbitration does not encompass Traditional Dispute Resolution Processes and Construction Adjudication.

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(2)

THE SENATE
RECEIVED
30 JUL 2021
CLERK'S OFFICE

COUNCIL OF GOVERNORS

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Ref: COG/6/10 Vol. 10 (20)

29th July, 2021

THE SENATE
RECEIVED
30 JUL 2021
DEPUTY CLERK

Mr. Jeremiah Nyegenye, CBS (1) ✓
The Clerk of the Senate
Parliament Buildings
NAIROBI

DCOM/DLS
Please deal
Deputy Clerk, Senate
Date 02/08/21

Dear Mr. Nyegenye,

LETTER FORWARDING THE LEGISLATIVE MEMORANDUM ON THE ALTERNATIVE DISPUTE RESOLUTION BILL, 2021

The above matter refers.

The Council of Governors appreciates that in realizing the objects of Devolution, the principles of consultation and cooperation under Article 6(2) and Article 189 of the Constitution are inevitable.

Based on these principles, the Council of Governors has reviewed The **ALTERNATIVE DISPUTE RESOLUTION BILL, 2021** and would like to forward for your consideration the following legislative memorandum attached herewith.

Please be assured of our highest esteem and consideration.

(2) Clerk Assistant
Legal Affairs Committee
Kindly deal
02/08/2021

Yours sincerely,

Mary Mwiti
Ag. Chief Executive Officer

02 AUG 2021

COUNCIL OF GOVERNORS

LEGISLATIVE MEMORANDUM TO THE SENATE STANDING COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS ON THE ALTERNATIVE DISPUTE RESOLUTION BILL, 2021

FROM

THE COUNCIL OF GOVERNORS

MEMORANDUM ON THE ALTERNATIVE DISPUTE RESOLUTION BILL, 2021

The Council of Governors,

In recognition of Article 1(4) of the Constitution of Kenya, that sovereign power of the people is exercised at the national level and the county level;

In further recognition of Article 6 (2) that governments at the national and county levels are distinct; and

Aware of the need for coordination and consultation between the National Government and County Governments to ensure that legislation responds to the key issues facing devolution, and further reflects the spirit and objects of devolution.

The Council hereby notes as follows on the Alternative Dispute Resolution Bill, 2021 (the Bill):

A. General Comments

The Council of Governors was part of an inter-agency team that came up with the Intergovernmental Relations (Alternative Dispute Resolutions) Regulations, 2019. These Regulations provide a framework for the resolution of disputes between the two levels of Government and between County Governments as envisioned in Article 189 (3) of the Constitution and Section 30 of the Intergovernmental Relations Act. These Regulations were tabled before the Summit on 22nd June, 2018 which directed the inter-agency team to further consult the Council of Governors on the Regulations which would be adopted during the preceding Summit meeting. The Council

was then consulted and the Regulations finalized and approved by the Summit on 21st February, 2020 for introduction to the Senate.

Noting that the long title of the Intergovernmental Relations Act provides that the Act seeks to "... *establish a framework for consultation and co-operation between the national and county governments and amongst county governments; establish mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the Constitution...*". The ambit of this provision as elucidated further in the Act is that for matters relating to intergovernmental relations, and in tandem disputes, between and amongst different levels of government, the provisions of the Intergovernmental Relations Act would apply. To derogate from these constitutional and statutory provisions in consideration of this Bill would therefore result in legislative ambiguity, non-conformity and inevitably defeat the constitutional provisions in Article 189, sections 3(f), 6(c), 30, 31, 32, 33, 34, 35 and 38(2)(c) of the Intergovernmental Relations Act and the consequent Intergovernmental Relations (Alternative Dispute Resolution) Regulations, 2019.

The title of the Bill suggests that the Bill provides for a dispute resolution alternate to the Court process. However, the Bill concentrates only on Conciliation, Mediation and Traditional Dispute Resolutions, yet there are other methods including negotiation, arbitration and Med-Arb among others.

The Bill limits itself to Disputes where the National Government, County Governments and State organs are parties, leaving out individuals and members of the Private Sector yet does not state in the objectives the limitation. This infringes on an individual's right to Access to Justice as envisioned in Article 48 of the Constitution.

Further, the Council is aware the Judiciary in collaboration with the Nairobi Centre for International Arbitration finalized the Alternative Dispute Resolution Policy and shared with the Attorney General in December, 2020.

Best practice dictates that policy precedes legislation. We therefore recommend that the Senate holds on to the Bill to ensure it is in conformity with the Policy when finalized by the Attorney General.

Finally, there is, before the Senate, a Mediation Bill, 2020 which, provides for mediation specifically as a mode of Alternative Dispute Resolution. The Council proposes that the two Bills are amalgamated and refined to align to the Constitution of Kenya, 2010 instead of piece-meal laws on Alternative Dispute Resolution.

B. Specific Comments

Section of the Bill	Provision of Section in the Bill	Proposed Amendment	Rationale for Amendment and Recommendation
4 (2)	Despite subsection (1), this act shall not apply to – (a)disputes subject to arbitration under the Arbitration Act (b)disputes where a tribunal established under written law has exclusive jurisdiction (c) election disputes (d) disputes involving the interpretation of the Constitution	Insert a new provisions as follows; (g) disputes under the Intergovernmental Relations Act.	Article 189(3) of the Constitution and Section 30 of the Intergovernmental Relations Act provides for a framework for the alternative dispute resolution between Governments. Further, regulations to the Intergovernmental Act are ready and are awaiting Summit approval which further give provisions on the dispute resolution process between governments.

	(e) a claim for a violation, infringement, denial of a Right or fundamental freedom in the Bill of Rights (f) disputes where public interest involving environmental or occupational health and safety Issues are involved.		

C. Recommendations:

The Senate to await the outcome of the Policy to align the Bill to the Policy.

Nairobi Centre for International Arbitration

Our Ref: NCIA/NSC/ADRP/1/VOL. 1

17 July 2021

Jeremiah M. Nyengenye, CBS
The Clerk of the Senate/Secretary
Parliamentary Service Commission
Parliament Buildings
NAIROBI

RE: SUBMISSION OF MEMORANDA ON THE SENATE ALTERNATIVE DISPUTE RESOLUTION (ADR) BILL 2021

I refer to the above matter and the invitation to interested members of the Public to submit memoranda on the Senate Alternative Dispute Resolution (ADR) Bill, 2020 pursuant to Article 118 (1) (b) of the Constitution to the Senate.

The Nairobi Centre for International Arbitration has compiled comments on the Bill for consideration by the respective House Committee with a view to making contribution to debate on the proposals made by the Bill.

Among the comments are observations on the just concluded work of the Steering Committee whose part mandate is to propose appropriate reforms to the legal and institutional framework for ADR in addition to proposing appropriate amendments to legal instruments with a view to harmonize the practice, standards for accreditation, training and provision of alternative dispute resolution services. The Committee has concluded its mandate and is awaiting submission of its final report to the Hon Attorney General.

We have also highlighted the overlap in the proposed Bill and the Mediation Bill, 2020 before the National Assembly. These overlaps can be attributed to lack of integration of the Policy Proposals into the legislative process and this does not represent a wholistic approach to the ADR Practice. We have also highlighted in great detail the need to retain the name of the Nairobi Centre for International Arbitration and outlined the reasons thereof.

I hereby submit a memoranda & tabular summary of the Centre's comments on the Bill for consideration by your good office.

Muiruri Ngugi L.
REGISTRAR/ CEO

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Nairobi Centre for International Arbitration

MEMORANDUM ON THE ALTERNATIVE DISPUTE RESOLUTION BILL, 2021

SUBMITTED TO THE SENATE COMMITTEE ON JUSTICE LEGAL AFFAIRS & HUMAN RIGHTS

23rd JULY, 2021

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REMARKS BY THE REGISTRAR/CHIEF EXECUTIVE OFFICER

The Chairperson,

Honourable Members of the Committee

I take this opportunity on behalf of the Nairobi Centre for International Arbitration (NCIA), to convey our gratitude for the invitation to engage with your esteemed Committee. We consider it a privilege to share our views on the Alternative Dispute Resolution Senate Bill, 2021.

The Nairobi Centre for International Arbitration, commonly referred to the NCIA is a statutory body established by the Nairobi Centre for International Arbitration Act, No 26 of 2013 as a Centre for promotion and administration of international commercial arbitration and other forms of dispute resolution mechanisms in Kenya.

In particular Section 5 of the NCIA Act mandates the Centre to coordinate and facilitate in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation.

Chairperson

In this regard, we have noted with interest the publication by the Senate of the Alternative Dispute Resolution Bill, 2021. We have submitted a written commentary on the Bill for consideration by this Committee.

Chairperson

Firstly, the Right of Access to Justice has been embraced as a key enabler of sustainable development with adoption of the Sustainable Development Goal (SDG) 16.3 to ***promote the rule of law at the national and international levels, and ensure equal access to justice for all***. The imperative has been enshrined in Article 48 of the Constitution of Kenya which states ***'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'*** and the Vision 2030.

There is a renewed focus in contemporary thinking on "effective" access to justice which places emphasis on approaches that secure the widest reach and empower the public to become aware of the existence and possess the ability to easily access processes and procedures for justice. It is with this background that the design of forms and practices touching on access to justice should enunciate global ideals of SDG 16.3 as articulated in Article 48 of the Constitution of Kenya. These may be pursued through the more institutionalized and state-centric judicial or administrative approaches or the non-judicial approaches.

The use of non-judicial means for settlement and resolution of disputes has thus been recognized as an integral component of an effective legal system. The models for non-judicial means for settlement and resolution of disputes encompass a broad spectrum of mechanisms variously referred to as alternative dispute resolution (ADR). There are in our humble submission three critical elements that should underpin good practice in policy and legislative interventions for alternative dispute resolution.

These are;

1. Recognition that ADR envisages a milieu or a broad spectrum of processes for resolving disputes.
2. Maintaining the elementary principles and features that are basic for the essential functioning of each process.
3. Flexibility in design as there are no one size fits all models to implement ADR.

Secondly, as noted by the Former US Chief Justice Warren Burger: *"The obligation of the legal profession is to serve as the healers of human conflicts. To fulfil this traditional obligation of our profession means that we should provide the mechanisms that can produce an acceptable result in the shortest possible time with the least possible expense and with a minimum of stress on the participants. That is what a system of justice is all about."*[1]

The observation by the Honourable Chief Justice poses useful tenets that articulate the desirable impact for design of mechanisms aimed at producing an effective and responsive system of justice. That is, the mechanisms;

1. *can produce an acceptable result;*
2. *in the shortest possible time;*
3. *with the least possible expense, and*
4. *with a minimum of stress on the participants.*

[1] https://www.lawreform.ie/_fileupload/consultation%20papers/cpADR.pdf Burger —Isn't There a Better Wayll (March, 1982) 68 American Bar Association Journal 274 - 277 at 274

Chairperson

We have confidence in the collective wisdom of this Committee that in evaluating the efficacy of the Alternative Dispute Resolution Bill, 2021 due consideration will be given to these critical elements in design and the desirable impact of a legislation on ADR.

Chairperson and Honourable Members,

Thirdly, the Nairobi Centre for International Arbitration Act No 26 of 2013 was promulgated with the purpose for the establishment of regional center for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes.

The proposed amendment seeks to rename the **Nairobi Centre for International Arbitration** to Nairobi Centre for Alternative Dispute Resolution. The objects of the amendment are indicated to be deleting the words "International Arbitration" appearing immediately after the word "Nairobi Centre for" and substituting it with the words "Alternative Dispute Resolution".

Chairperson,

We humbly and respectively submit that whereas the naming of an institution may change or evolve over time, the historical origin/context should inform the decision to alter, change or retain a name and the timing of either action.

The naming Nairobi Centre for International Arbitration can be traced back to a consensus amongst Asian and African countries to establish regional arbitration centres under the framework of Asia Africa Legal Consultative Framework (AALCO). Kenya is a member state of this international organization consisting of 48 Members states of African and Asian countries. The consensus was entered into in 2007 where the Government of Kenya and the AALCO concluded a Host Country Agreement.

The broad objectives of the framework include other mechanisms for dispute resolution a factor incorporated in the NCIA Act No. 26 of 2013 under Section 5 and the long title.

Chairperson and Honourable Members,

Fourthly, the Constitution of Kenya gave the blue-print for ADR both as a stand-alone or hybrid mechanism in resolution of disputes under Article 113, 189 for example or as an integrated mechanism under Article 159 (2) (c). In formulating an implementation policy and legislation there is an imperative to consolidate these overarching principles contained in the Constitution.

For this reason, the NCIA in discharge of its mandate embarked on a consultative and participatory process for formulation of a National Alternative Dispute Resolution Policy. The process informed by a national baseline survey developed a stakeholder Zero-Draft National Alternative Dispute Resolution Policy. The Hon Attorney General appointed a National

Steering Committee for the formulation of the National ADR Policy. The Committee

As part of the mandate of the Committee, it was required to;

a) provide guidance and oversee the process for formulation of a national policy institutional framework on alternative dispute resolution;
b) propose appropriate reforms to the legal, and institutional framework for alternative dispute resolution;
c) propose appropriate amendments to legal instruments with a view to harmonize the practices, standards for accreditation, training and provision of alternative dispute resolution services;

Chairperson

We laud the lead taken by this August House in considering a legislative proposal on ADR. And whereas we do not wish to second-guess the work of this Honourable Committee we have as a fraternity an historic and unparallel opportunity to sequence policy formulation in advance of legislation. The Committee will no doubt appreciate the unequalled benefits of this wholistic approach. As such we take the opportunity to invite you to give a consideration for conclusion of the process for formulation of a proposed National Alternative Dispute Resolution Policy to precede legislation on ADR.

We are of the humble view that observations in the proposed policy will provide instructive insight from users that can fertilize discussions on the present Bill and other future legislation on ADR. The aspirations of the ADR

family for resolution of the present fragmentation in the sector will be realized and we could collectively midwife an integrated framework. This will allow for flexibility, dynamism in legislative and non-legislative intervention. Ultimately, we will support a broad spectrum of diverse mechanisms thus facilitate co-existence and avoid relegation of any of the approaches.

The policy framework and proposed legislation developed by the National Steering Committee for the Development of the National ADR Policy, now awaiting consideration by Office of the Attorney General will address gaps in the sector to give a more comprehensive solution to the development of ADR

Finally, we have before the Honourable Committee, comments of the Nairobi Centre for International Arbitration on select articles in the Alternative Dispute Resolution, Bill 2021.

Mr. Chairperson, Honourable Members I humbly submit.

Tabular Comments on the Alternative Dispute Resolution Bill, 2021

SECTION	COMMENT	PROPOSAL
Section 2 definition of **"Nairobi Centre for International Dispute Resolution"**	1. The Dispute Resolution Bill, 2020 defines the Nairobi Centre for International Dispute Resolution as follows: *"Centre" means the Nairobi Centre for International Dispute Resolution established under Section 4 of the Nairobi Centre for International Dispute Resolution Act;*	1. This definition assumes the proposed amendment under Sections 40 - 45 of the ADR Bill, 2021 which seeks to amend the *Nairobi Centre for International Arbitration Act No. 26 of 2013.* 2. The proposal vide section 40 - 45 to amend existing long title and the name of the Centre overlooks the foundational framework of the Nairobi Centre for International Arbitration Act No 26 of 2013 (the Act). 3. The Act was promulgated with the purpose for the establishment of regional center for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes. 4. The proposed amendment seeks to rename the Nairobi Centre for International Arbitration to Nairobi Centre for Alternative Dispute Resolution. The objects of the amendment are indicated to be deleting the words "International Arbitration"

		appearing immediately after the word "Nairobi Centre for" and substituting it with the words "Alternative Dispute Resolution". 5. Respectfully, whereas the naming of an institution may change or evolve over time, the historical origin/context should inform the decision to alter, change or retain a name and the timing of either action. 6. The naming Nairobi Centre for International Arbitration can be traced back to a consensus amongst Asian and African countries to establish regional arbitration centres under the framework of Asia Africa Legal Consultative Framework (AALCO). Kenya is a member state of this international organization consisting of 48 Members states of African and Asian countries. 7. The consensus was entered into in 2007 where the Government of Kenya and the AALCO concluded a Host Country Agreement. 8. The broad objectives of the framework include other mechanisms for dispute resolution a factor incorporated in the

NCIA Act No. 26 of 2013 under Section 5 and the long title.

9. A comparison of the naming norms of regional Centres established under the framework of AALCO indicates a comity amongst the nations. There is a consistency of naming to reflect the intention of the member states for a common identifier. The five existing centres are:
    i. Asia International Arbitration Centre – Malaysia - AIAC
    ii. Cairo Regional Centre for International Commercial Arbitration -CRCICA
    iii. Lagos Regional Centre for International Arbitration - LRCIA
    iv. Tehran Regional Arbitration Centre - TRAC
    v. Nairobi Centre for International Arbitration - NCIA
10. The common denominator is, "Centre for International Arbitration". The objectives of each of these Centers are broad enough to cover alternative dispute resolution.

		11. The renaming of the Nairobi Centre for International Arbitration will be a departure from a long-established heritage that transcends the AALCO framework. The global practice for international arbitration (which includes ADR) has developed practices that have acquired trade usage. Such is the case with naming of institutions for international arbitration. Examples include: i. London Court of International Arbitration - LCIA ii. Kigali International Arbitration Centre - KIAC iii. Singapore International Arbitration Centre - SIAC iv. Lagos Court of Arbitration – LCA 12. To place NCIA in the global map and elevate the stature of Nairobi into a regional hub for international arbitration, it behooves us to identify with the competition. The alternative is to risk being relegated to a purely national institution without a prospect of engaging the wider international market. To retain the name will achieve the objective of reaching the international market without compromising in the domestic practice of ADR.

13. In actual practice, the Centre has advanced both international and domestic arbitration and mediation through its Arbitration and Mediation Rules, 2015 (Revised 2019).

14. Secondly, the Centre has acquired a market identity marker that is now incorporated into agreements and contracts, domestic and international. In the process the Centre has managed disputes with a value of over USD 200,000,000 under its Rules. This reflects an acceptance of NCIA brand as a significant player in both domestic and international arbitration.

15. In the SOAS arbitration survey 2020, the NCIA was ranked:
    - Among the top five best arbitral Centers in Africa regarding the quality of support facilities and administrative staff;
    - 8th among the top ten arbitral Centres in Africa based on the number of arbitration cases administered and Memorandums of Understanding (MoUs)

		concluded with other arbitration Centres; ▪ Among the top five arbitral Centers in Africa that users indicated they would recommend. "The top five arbitral centers in Africa as chosen by the respondents are AFSA, CRCICA, Kigali International Arbitration Centre (KIAC), Lagos Court of Arbitration (LCA), and Nairobi Centre for International Arbitration (NCIA)."; and ▪ "The top five arbitral centres with the best support facilities as chosen by the respondents are: AFSA, CRCICA LCA, NCIA, and CCJA" "Users of African arbitral centres will recommend the following centres: CRCICA, AFSA, KIAC, NCIA, CCJA". 16. To introduce a major shift in the identity of the Centre at this point of its existence will possibly dent the claim of legitimacy, credibility, and longevity in a highly competitive sector. This crisis has afflicted one Centre established in a

		jurisdiction in Southern Africa. After the pull-out of its Europe-based partner, the promoters of the Centre have struggled to resuscitate the Country as a destination for international arbitration.
Section 2 definition of and "mediator"	1. As a non-judicial process mediation is intended to be voluntary giving parties' choice of a mediator. 2. The definition of mediator by the Bill might be an impediment for non-judicial mediation. 3. The creation of a new definition for an existing term will create confusion in application of the Act.	1. The requirement of registration and accreditation should be omitted from the definition.
Section 2 "report"	1. It is unclear whether the Bill is intended to complement Court Annexed Mediation or operate outside of the court. 2. What purpose would a report serve at the conclusion of a non-judicial mandated dispute process and to whom would it be submitted? 3. The inclusion of the need of the report presupposes literacy and sophistication of parties and therefore does not cater to the all disputes that can be addressed through mediation. 4. The expectation should be an agreement that reflects the parties' intentions for enforceability, if need be.	i. If the intention is to complement the Court Annexed Mediation, then proposals can be made to bolster that process under the Civil Procedure Act and Rules. ii. However, if it is intended to be separate, then the report is superfluous.

Section 4	Without clarity on the scope of disputes covered there is a potential ambiguity created under this section as follows; 1. Does 'civil disputes' include investment disputes to which governments are parties? 2. Does Section 4 apply to international mediation, conciliation et al? 3. Does Section 4 extend to domestic mediators, conciliators in non-judicial mandated ADR? 4. Is Section 4 compatible with the **United Nations Convention on International Settlement Agreements** resulting from **Mediation**[1] which entered into force on 1st September 2020? 5. If the Bill encompasses mediation in its broad sense it will be useful to incorporate elements in the emerging international trends/best practices that promote Kenya as a viable destination for dispute settlement.	i. As we develop Kenya as viable destination for dispute resolution a distinction should be made in the application of the Bill between domestic disputes and international disputes. The intention being to curve out international disputes from the application of the Bill. ii. The latter will be more adequately covered after due consideration of convention and practices to which Kenya is signatory or reflective of prevailing international best practices.
PART II	**ACCREDITATION AND REGISTRATION OF CONCILIATORS AND MEDIATORS**	
Section 6 & Section 7	1. The section introduces mandatory registration as a pre-condition for practice of mediation and conciliation.	Mandatory registration should not be imposed.

[1] *https://uncitral.un.org/en/texts/***mediation/conventions/***international_settlement_agreements*

	2. The utility value of mandatory registration ought to be assessed before adaption. 3. Mediation happens every-where in every-day life and only a small percentage is formalised. Comparable jurisdictions such as Ireland, Canada and Australia have a hybrid model of national norms and principles and decentralised practice formations to enhance quality and promote free enterprise. These decentralised centres train, employ codes of conduct and maintain panels of mediators with flexibility to accommodate the features of mediation in a field of practice. Incentives and disincentives are applied through self-regulation along the broad national principles. 4. It is counter-intuitive to impose mandatory accreditation or registration for mediators operating within the format of guilds, familial affinity, or the ad hoc commercial setting and similar formations. Self-recognition norms exist in these formations without the formal registration regime. 5. Section further creates duplicity of roles in reference to Section 13 (1) of the Mediation Bill, 2020 before the National Assembly.	
Part IV	**CONCILIATION AND MEDIATION**	
	There is existing legislation within the Civil Procedure Act and Rules on reference of matters to Mediation.	It is preferable that changes be made to the Civil Procedure if the provision therein are inadequate.
PART III	1. There is diversity of culture in mediation. To some the parties and not the mediator prepares the agreement, the	All options for concluding a mediation settlement agreement should be provided.

	parties (and their advisors do) with guidance if required. To others a mediator does point out possible options for the settlement. In some jurisdictions that distinction may be what separates mediation from conciliation. 2. This unique diversity should not be collapsed into the one method as proposed in Part III.	
PART VI	**MISCELLANEOUS PROVISIONS**	
Section 39	**1.** Section 39 (1) The Attorney General may, in consultation with the Centre, make rules of practice and procedure, and regulations generally for the better carrying into effect of any provisions of this Act.	1. The requirement of the Attorney General to make rules of practice and procedure encompassing mediation and conciliation is contradictory to Section 5 (d) and Section 25 (d) of the NCIA Act 2. The Nairobi Centre for International Arbitration further to the performance of its statutory mandate promulgated the Centre's NCIA Mediation Rules, 2015. LN no.253 of 2015. 3. Parties to contracts that have incorporated these NCIA Mediation Rules globally have a legitimate expectation that the Rules will operate in perpetuity and that changes will not be made to supplant the choice to have their disputes mediated under the Rules.

		4. This role has further been entrenched with the anticipated entry into force of the Singapore Convention on Mediation. This framework will inform to a great extent the practice of mediation by international institutions such as the Centre. 5. The policy framework and proposed legislation developed by the National Steering Committee for the Development of the National ADR Policy, now awaiting consideration by Office of the Attorney General will address gaps in the sector to give a more comprehensive solution to the development of ADR **6.** Any amendments to existing legislation should await the adoption of the policy to allow for integration of the Policy Proposals into the legislative process thus giving opportunity to a wholistic approach to the ADR Practice, Mediation & Conciliation included. It will also forestall potential conflict for mediation practice due to the parallel provisions in the Mediation Bill, 2020 now before the National Assembly.
PART VII	**CONSEQUENTIAL AMENDMENTS**	

Sections 40, 41, 42, 43 and 44	Section 40 - *The Nairobi Centre for International Arbitration Act is amended by deleting the long title and substituting therefor the following new long title— AN ACT of Parliament to provide for the establishment of a center for alternative dispute resolution and international commercial arbitration; to provide for the establishment of an Arbitral Court; to provide for mechanisms for alternative dispute resolution; and for connected purposes.* Section 41 - *Section 1 of the Nairobi Centre for International Arbitration Act is amended by deleting the words "International Arbitration" appearing immediately after the words "Nairobi Centre for" and substituting therefor the words "Alternative Dispute Resolution".* Section 42 - *Section 2 of The Nairobi Centre for International Arbitration Act is amended in the definition of the word "Centre" by deleting the words "International Arbitration" appearing immediately after the words "Nairobi Centre for" and substituting therefor the words "Alternative Dispute Resolution".* Section 43 - *The title to Part II of the Nairobi Centre for International Arbitration Act is amended by deleting the words "INTERNATIONAL ARBITRATION" appearing immediately after the words "NAIROBI CENTRE FOR" and substituting therefor the words "ALTERNATIVE DISPUTE RESOLUTION".*	1. These proposed amendments should be omitted/deleted from the Bill. 2. These amendments in the ADR Bill, 2021 seeks to amend the *Nairobi Centre for International Arbitration Act No. 26 of 2013.* 3. The proposal vides section 40 - 45 to amend existing long title and the name of the Centre overlooks the foundational framework of the Nairobi Centre for International Arbitration Act No 26 of 2013 (the Act). 4. The Act was promulgated with the purpose for the establishment of regional center for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes. 5. The proposed amendment seeks to rename the Nairobi Centre for International Arbitration to Nairobi Centre for Alternative Dispute Resolution. The objects of the amendment are indicated to be deleting the words "International Arbitration" appearing immediately after the word

	Section 44 - *Section 4 of the Nairobi Centre for International Arbitration Act is amended in subsection (1) by deleting the words "International Arbitration" appearing immediately after the words "Nairobi Centre for" and substituting therefor the words "Alternative Dispute Resolution".*	"Nairobi Centre for" and substituting it with the words "Alternative Dispute Resolution". 6. Respectfully, whereas the naming of an institution may change or evolve over time, the historical origin/context should inform the decision to alter, change or retain a name and the timing of either action. 7. The naming Nairobi Centre for International Arbitration can be traced back to a consensus amongst Asian and African countries to establish regional arbitration centres under the framework of Asia Africa Legal Consultative Framework (AALCO). Kenya is a member state of this international organization consisting of 48 Members states of African and Asian countries. 8. The consensus was entered into in 2007 where the Government of Kenya and the AALCO concluded a Host Country Agreement. 9. The broad objectives of the framework include other mechanisms for dispute resolution a factor incorporated in the NCIA Act No. 26 of 2013 under Section 5 and the long title.

		10. A comparison of the naming norms of regional Centres established under the framework of AALCO indicates a comity amongst the nations. There is a consistency of naming to reflect the intention of the member states for a common identifier. The five existing centres are: i. Asia International Arbitration Centre – Malaysia - AIAC ii. Cairo Regional Centre for International Commercial Arbitration -CRCICA iii. Lagos Regional Centre for International Arbitration - LRCIA iv. Tehran Regional Arbitration Centre - TRAC v. Nairobi Centre for International Arbitration - NCIA 11. The common denominator is, "Centre for International Arbitration". The objectives of each of these Centers are broad enough to cover alternative dispute resolution. 12. The renaming of the Nairobi Centre for International Arbitration will be a

		departure from a long-established heritage that transcends the AALCO framework. The global practice for international arbitration (which includes ADR) has developed practices that have acquired trade usage. Such is the case with naming of institutions for international arbitration. Examples include: v. London Court of International Arbitration - LCIA vi. Kigali International Arbitration Centre - KIAC vii. Singapore International Arbitration Centre - SIAC viii. Lagos Court of Arbitration – LCA 13. To place NCIA in the global map and elevate the stature of Nairobi into a regional hub for international arbitration, it behooves us to identify with the competition. The alternative is to risk being relegated to a purely national institution without a prospect of engaging the wider international market. To retain the name will achieve the objective of reaching the international market without compromising in the domestic practice of ADR.

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16. In the SOAS arbitration survey 2020, the NCIA was ranked:
    - Among the top five best arbitral Centers in Africa regarding the quality of support facilities and administrative staff;
    - 8th among the top ten arbitral Centres in Africa based on the number of arbitration cases administered and Memorandums of Understanding (MoUs) concluded with other arbitration Centres;

		▪ Among the top five arbitral Centers in Africa that users indicated they would recommend. "The top five arbitral centers in Africa as chosen by the respondents are AFSA, CRCICA, Kigali International Arbitration Centre (KIAC), Lagos Court of Arbitration (LCA), and Nairobi Centre for International Arbitration (NCIA)."; and ▪ "The top five arbitral centres with the best support facilities as chosen by the respondents are: AFSA, CRCICA LCA, NCIA, and CCJA" "Users of African arbitral centres will recommend the following centres: CRCICA, AFSA, KIAC, NCIA, CCJA". 17. To introduce a major shift in the identity of the Centre at this point of its existence will possibly dent the claim of legitimacy, credibility, and longevity in a highly competitive sector. This crisis has afflicted one Centre established in a jurisdiction in Southern Africa. After the pull-out of its Europe-based partner, the promoters of the Centre have struggled

		to resuscitate the Country as a destination for international arbitration. 18. An alternative of the Brand Name for the Nairobi Centre for International Arbitration will impact on the positioning of Nairobi as a hub. This will claw back on gains in accessing a larger market share of the global dispute resolution. 19. Finally, the Centre continues to devote significant resources and funds on domestic arbitration, mediation, and other forms of ADR. Extensive work on a draft National Policy on ADR was completed by the National Steering Committee for Formulation of the Alternative Dispute Resolution Policy. 20. The policy framework and proposed legislation now awaiting consideration by Office of the Attorney General will address gaps in the sector to give a more comprehensive solution to the development of ADR. 21. We observe the amendments proposed in Sections 40, 42, 43, and 44 are consequential to the proposal for amendment contained in Section 41.

		22. As such we respectfully urge a consideration in favor of retaining the name Nairobi Centre for International Arbitration and hence propose that these proposed amendments be dropped.

24 AUG 2021

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0720 904983

24 AUG 2021

MEMORANDUM
TO
THE CLERK
OF THE SENATE

ON

THE

ALTERNATIVE DISPUTE RESOLUTION BILL
(SENATE BILL NO: 35 OF 2021)

AUGUST, 2021

① D(am ✓
DL>
Kindly deal.
24/08/21

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② CAT - JLAHR
Please Deal
24/08/2021

The Alternative Dispute Resolution Bill (ADR BILL)

The Law Society of Kenya

The Law Society of Kenya is a statutory professional organization established by the Law Society of Kenya Act Chapter 18 of the Laws of Kenya, with a membership of over 18,000 Advocates. One of its statutory objects as provided in section 4 of the Act is to assist the Government and the courts in all matters affecting legislation and the administration and practice of law in Kenya.

Pursuant to the statutory mandate, to advise the government and the public on the law, the Law Society of Kenya makes presentations on the Alternative Dispute Resolution Bill.

GENERAL COMMENTS

Although the principal object of the Bill is to put in place a legal framework for the settlement of certain civil disputes by conciliation, mediation and traditional dispute resolution, the Law Society has identified issues with the bill and we make our presentation as provided herein under:

Unconstitutional Clauses

The object of this Act defeats the purpose of Article 159 (2) (c) as the Act does not allow the process to be optional. Clause 32 (1) and (2) makes it mandatory when one wishes to initiate a judicial process. The Bill makes the ADR process mainstream and the judicial Court process alternative. This goes against the spirit and letter of Articles 159.

This Bill makes it Criminal for an Advocate not to refer or explain to a party the ADR alternative. Clause 31 (1) and (2) is unconstitutional. An Advocate is not a party in the dispute and holding one criminal liable is an excess of the powers and against an Advocate mandate under the Advocate Act.

Contradictory and Exceptional Clauses

The Exceptional Clauses at Clause 4 and 11 are not comprehensive enough and should include cases initiated by Advocates on a probono basis and matters where the prospective clients are not capable of paying sums upfront as Clause 38 contemplates that parties have the capability to pay for the process. This is the reason why the ADR process should be optional as the bottom line is the conciliator would require to be paid.

The entire Bill is contradictory. Clause 5 gives the guiding principles of the Bill which particularly state at clause 5 (a) that it was voluntary participation yet clause 32 (1) and (2) makes it mandatory for a party to submit to the ADR process prior to initiating a judicial process.

The Court has a process where the Courts refer the matter to mediation through Court annexed mediation Court annexed mediation requires screening of the matters.

With Part III Clause 11 (1) having the Court again refer the matters to mediation will contradict clause 32 (1) and (2) where an ADR Certificate is required prior to commencing judicial process. Is this a double process meant to delay finalization of the process and exhaust litigants?

(i) Clause 13 (1) contradicts clause 32 which make submission to ADR mandatory prior to filing judicial proceedings.

(ii) The Advocates already issue demand notices before filing suit in line with clause 13 (3). The demand notices are sufficient notices for a party to start an ADR process.

(iii) Clause 14 is mandatory and defeats the purpose of ADR and further goes against the dictates of Article 159. Any party should be able to approach the Court without restrictions.

(iv) Clause 33 in our view just makes the entire judicial process most cumbersome and costly.

(v) Clause 37 part VI overrides the provision of the Limitation Act and other statutes that have a limitation period. This is not possible.

(1) CLAUSES THAT DO NO TAKE INTO ACCOUNT OUR SOCIO-ECONOMIC SITUATION

(i) Clause 38 will not work in this economy unless the parties are of an equal economic standing.

(ii) Clause 38 has no breakdown on costs and is ambiguous and arbitrary.

(iii) Clause 38 does not allow for parties to agree with the conciliator on costs prior to commencement of the conciliation process.

(iv) If the conciliation process fails, parties will be subjected to a double taxation. Hence parties will be required to know what kind of arrangements they will enter into economically.

SPECIFIC COMMENTS ON THE ADR BILL

Provision of the bill	Issue	Proposal
Clause 4 (2) Application of the Act	The supervisory jurisdiction of the High Court should be excluded.	
Clause.6 Accreditation and Registration	The change of role of the Nairobi Centre for International Arbitration to the Nairobi Centre for Alternative Dispute Resolution is fundamental and needs to be rationalized.	
Clause. 6 (2) Qualifications	These will be set by a body known as the Nairobi Centre for International Dispute Resolution	It is vital that the qualifications are set out in the Act. This should not be delegated to a Centre to arbitrarily set. The complex and technical disputes ought to be referred to conciliators with the requisite technical expertise
Clause. 10 (2) (d) Code of Conduct	Dispute resolution is a sector inherently vulnerable to corruption, conflict of interest, bias, etc. A code of conduct is not sufficient to mandate disciplinary action. This must be set out in the law with clear powers vested in an independent disciplining body.	
Clause. 25 (a) conciliator or mediator acting for the parties in judicial proceedings	This is an outright conflict of interest and an abuse of the position since the ADR practitioner will be privy to confidential and potentially prejudicial information pertaining to the non- client.	
Clause. 31 and 32 mandatory referral by Advocates	The clause is discriminatory against Advocates and it impinges on the right to access to justice. It introduces punitive measures that are out of touch with reality.	

Part V	This Part is drafted as though ADR is arbitration. These are two different mechanisms. Provided the ADR can be imposed, it ought not to be treated as arbitration which is anchored on the willingness of the disputants as expressed in the arbitration agreement.	
General – court's judicial review mandate	The doctrine of exhaustion in the exercise of the court's supervisory jurisdiction should not be applied or objections raised on the mere ground that parties did not refer their matters to ADR first.	An amendment to clause 9 (4) of the FAAA will be required to ensure harmonisation of the law.

From the foregoing, the Law Society of Kenya requests that these comments would be adopted.

Collated Comments on the Alternative Dispute Resolution Bill as presented by:
(The Law Society of Kenya Law Reform and Devolution Committee)

REPUBLIC OF KENYA

THE SENATE - FIFTH SESSION

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21st July 2021

FEDERATION OF WOMEN LAWYERS (FIDA-KENYA) SUBMISSIONS ON THE ALTERNATIVE DISPUTE RESOLUTION BILL, 2021 (SENATE BILLS, 2021)

NO.	CLAUSE (AS IT IS IN THE Bill)	PROPOSED AMENDMENT	JUSTIFICATION
1.	**Purpose of the Bill** 'A Bill for AN ACT of Parliament to provide for the settlement of civil disputes by conciliation, mediation and traditional dispute resolution mechanism; to set out the guiding principles applicable; and for connected purposes'	The proposed title be amended to incorporate other ADR mechanisms and read as follows: "AN ACT of Parliament to provide for the settlement of civil and criminal disputes by **diversion**, conciliation, mediation, negotiation and **arbitration**.	The proposed Alternative Dispute Resolution Bill does not recognize conclusively other mechanisms of ADR such as negotiation, diversion and arbitration The title of the bill which spells out its purpose and scope does not incorporate ADR in prosecution of criminal cases. It is noteworthy that the Directorate of Public Prosecution has incorporated alternatives to criminal prosecution through the National Prosecution Policy and the Diversion Policy.

2.	**Clause 2: Interpretations** 'Alternative Dispute Resolution" means conciliation, mediation, traditional dispute resolution or any other mechanism of resolving disputes in which a person assist parties to resolve a dispute otherwise than through the normal judicial process or arbitration;	This definition of Alternative Dispute Resolution should include **diversion** as particularize in clause (1) above. It should also include arbitration as it is a form of ADR but direct that where a party seeks to resolve dispute through arbitration, they refer to the Arbitration Act as stipulated under Section 4 (2)(a) of the proposed Bill.	The term Alternative Dispute Resolutions refers to and incorporates all forms of resolution of disputes outside the court system which include negotiation, mediation, conciliation, arbitration as well as inquiry The Kenyan Constitution. Article 159 of the Constitution enjoins courts and judicial authorities in the exercise of judicial authority aimed at promoting all forms of alternative dispute resolution that include mediation, reconciliation, arbitration as well as traditional dispute resolution mechanisms. The Diversion Policy was introduced in 2015 by the National Prosecution Policy. The proposed alternatives to prosecution include plea negations and agreement, diversion and alternative and traditional dispute mechanisms. It also contemplates waiver of prosecution, discontinuing proceeding conditionally or unconditional or diverting cases from the formal justice considering the rights of victims and suspects. It is encouraging especially where matters relate to children in conflict with the law on the basis of the principle of the best interest of the child and need to rehabilitate such children.
3.	4. (1) This Act shall apply to certain civil disputes including a dispute where the	This section be amended to extend the scope of application of the Act to	The term Alternative Dispute Resolutions refers to and incorporates all forms of

	National government, a county government or a State organ is a party.	criminal disputes where the ODPP or any other person exercising the delegated powers makes a decision on diversion of a matter.	resolution of disputes outside the court system which include negotiation, mediation, conciliation, arbitration as well as inquiry The Kenyan Constitution. Article 159 of the Constitution enjoins courts and judicial authorities in the exercise of judicial authority aimed at promoting all forms of alternative dispute resolution that include mediation, reconciliation, arbitration as well as traditional dispute resolution mechanisms. The Diversion Policy was introduced in 2015 by the National Prosecution Policy. The proposed alternatives to prosecution include plea negations and agreement, diversion and alternative and traditional dispute mechanisms. It also contemplates waiver of prosecution, discontinuing proceeding conditionally or unconditional or diverting cases from the formal justice considering the rights of victims and suspects. It is encouraging especially where matters relate to children in conflict with the law on the basis of the principle of the best interest of the child and need to rehabilitate such children.
4.	5. Guiding principles of alternative dispute resolution a) voluntary participation in the alternative dispute resolution process and a	The proposed Bill should be amended in Section 5 to include compliance with the Constitution and the bill of rights in decisions made.	Art. 2(4) of the Constitution provides that any law including customary law that is inconsistent with the Constitution is void to the

	party may withdraw from alternative dispute resolution process at any time; b) the right to information including the right to be informed of the existence of an alternative dispute resolution process prior to the commencement of process of determining a dispute; c) confidentiality except in the case of traditional dispute resolution; d) determination of disputes in the shortest time practicable taking into account the nature of the dispute; (e) impartiality in the determination of a dispute under this Act by the conciliator, mediator or traditional dispute resolver and disclosure of any conflict of interest that may arise; (f) a conciliator, mediator or traditional dispute resolver shall facilitate disputes which he or is competent to facilitate; and (g) the parties may use more than one alternative dispute resolution mechanism in an attempt to resolve a dispute.	The proposed Bill should be amended in Section 5 to include the principle of equality of the parties during the process. The Bill should be amended in Section 5 to include the principle of accessibility and flexibility.	extent of the its inconsistency and any act or omission in contravention of the Constitution is invalid. In all the ADR mechanisms, the independent third party is required to treat all parties to the dispute as equal during the process of resolution of the dispute. The state is obligated to ensure access to justice. This means that the ADR mechanism adopted or used in civil and criminal cases should be easily accessible to the parties at minimal costs.
5.	11(2)(c). Referral of cases to conciliation or mediation. 'The clause making provision for alternative dispute resolution of the agreement, contract or any arrangement entered into by the parties is	The proposed Bill should be amended in Section 11, "*the subtitle* to read "***Referral of cases to court annexed conciliation or mediation processes,***"	The proposed Bill recognizes 3 forms/methodologies of referral to conciliation and or mediation. Under Section 11 reference is made to conciliation and/or mediation through the court process while Section 12(1)

	Inoperative, incapable of being performed or void'		refers to parties' voluntary initiative to approach conciliation/mediation mechanisms as a form of resolving their dispute while Section 12(2) and (3) refers to referral of parties to a conciliation/ mediation mechanism arising from an agreement entered into by both parties.
6.	12(3). Submission to conciliation or mediation '(3) A party to an agreement which has not made provision for submission of a dispute to alternative dispute resolution or a dispute covered under this Act may, with the consent of the other party to the agreement, submit a dispute arising out of that agreement for determination through conciliation or mediation.'	This provision should be amended to require that the consent to submit to conciliation or mediation should be reduced in writing.	This consent should be reduced into writing since it is essential to ascertain the autonomy and equality of parties during the conciliation and mediation process. It may also be easily enforceable as the party autonomy and voluntariness is essential in ADR.
7.	16. Obligations of a mediator or conciliator	The proposed Bill be amended to include the requirement for the mediator or conciliator to be guided by the principles as stipulated in Section 5 of the Act The proposed Bill be amended to include the requirement of the mediator or conciliator to treat both the parties equally during the proceedings.	This inclusion is necessary to ensure that the mediator or conciliator facilitates the mechanism in the proper manner and that the mediator or conciliator is bound by the principles of the respective mechanism. It also holds the mediator or conciliator to a specified standard. This should be included as party equality is a foundational requirement of ADR mechanisms. This addition would also ensure that the mediator or conciliator carries out his actions to a required standard.
8.	24. End of conciliation or mediation	The proposed Bill should be amended to include the requirement that a	The Bill should in addition to the already recognized

		mediation or conciliation may end where the mediator or conciliator resigns or on account of non-payment of prescribed deposit by the parties or one party.	circumstance where the ADR process ends, include resignation or non-payment to ensure that the mediator or conciliator is also protected as he discharges his duties.	
9.	29(1). End of traditional dispute resolution	The proposed Bill should be amended to two additional means of ending traditional dispute resolution: a) Parties jointly decide to end the traditional dispute resolution or, Where one party wishes to end the traditional dispute resolution.	These additions are necessary as one of the most fundamental principles of ADR mechanisms is that they are party driven and voluntary. Therefore, where either party or both parties collectively do not wish to continue the process, they should have an opportunity to terminate them. This option has also been recognized above in Clause 24(1) and there is no evident fundamental difference as to why it would not be included for traditional dispute mechanisms. Further, it also recognizes the ability of the party to terminate the process ahead in Clause 29(2)(b) with no prior provision.	

Law Society of Kenya Nairobi Branch

LAW SOCIETY OF KENYA

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OUR REF: ADM/01/CMBBC/21 **YOUR REF:** **DATE: 23rd July, 2021**

J.M. Nyegenye, CBS
Clerk of the Senate,
Parliament Building, Parliament Rd,
NAIROBI.

Dear Sir,

RE: MEMORANDUM ON THE ALTERNATIVE DISPUTE RESOLUTION BILL, 2021

Receive the highest regards from LSK Nairobi Branch.

The Court Annexed Mediation Bar Bench Committee reviewed the Alternative Dispute Resolution Bill, 2021 and had the following suggested amendments and general comments: -

1. **General**

The Committee suggested:

i. That if the bill was to be an all-inclusive ADR bill, it should focus on giving general policies and governance direction. This would create consistency and allow specific and dedicated bills such as AJS Bill and Mediation and Conciliation Bill to be enacted thereafter either in the rules or in Acts specific to each type of dispute resolution. This is because, the different ADR methods require a lot of specificity and one framework may be unable to cover them all. In the alternative, the current bill be transformed to a Mediation and Conciliation Bill as opposed to its current reference which is a term with an extremely wide scope.

ii. The Part IV on Traditional Dispute Resolution be discarded, given the competence of traditional dispute resolvers cannot be ascertained as customary rules are not coded. It is close to impossible to legislate on TDR. Further, there is no provision for registration of the traditional dispute resolvers and their regulation.

iii. That attention be paid to the fact that the Bill refers to conciliation whereas Article 159 talks of reconciliation. Within the ambit of ADR conciliation and reconciliation are two different processes. The Bill ought to specify which process is being referred to.

iv. Being the first ADR Bill, the Bill should acknowledge the forms of ADR and give definitions and general guidelines, but not go into the nitty-gritties such as accreditation and registration. This will be best covered in Rules.

v. Provisions in the ADR Bill and the Mediation Bill should be harmonised to avoid duplication and conflict.

vi. That the Bill does not take note of the difference between court annexed mediation and self-referred mediation all through different provisions. This is a recipe for confusion.

PART I – PRELIMINARY

2. Section 2 – Interpretation

i) Delete *'employees and persons employed by that person'* in the definition of conciliator and mediator to ensure liability remains with the person assigned the role (actual mediator or conciliator).

ii) Provide definitions for both a mediator and accredited mediator to make the mediation processes inclusive of even community based mediators such as chiefs, Nyumba Kumi and elders.

iii) Delete definition of "Traditional Dispute Resolver "as the existing definition excludes community based resolvers who may not use traditional customs in line with the previous recommendation to delete the reference to traditional dispute resolvers.

iv) Definition of all forms of ADR be given as the Act covers all of them

v) The definition of Alternative Dispute Resolution clause creates confusion given that the proposed legislation covers a wide range of ADR mechanisms.

3. Section 4 – Application

(i) S. 4 (1) delete '*civil* ,' because ADR should not be exclusive to Civil disputes since some criminal matters can be settled through ADR

(ii) Delete s. 4 (2) (b) because these tribunals have similar jurisdiction to the Magistrates Court and thus ADR should be applicable to those disputes. Cases should be screened on other bases in line with the provisions in the Bill.

(iii) Include definition of a 'dispute' and retain exclusions except exclusion in s. 4 (2)(b)

4. Section 5 – Guiding principles

(i) s. 5 (a) delete that '*a party may withdraw from ADR*,' since the entire process is voluntary, the parties are free to withdraw therefrom at any time. Expressly allowing the parties to withdraw will make the process prone to abuse and misuse.

(ii) S. 5 (c) delete '*except in the case of traditional dispute resolution'* as there should not be exception on confidentiality for whichever form of ADR.

(iii) S. 5 (d) delete *'in the shortest time practicable'* 'and replace with *'within 60 days'* to give more specific timelines for certainty

(iv) S. 5 (f) Delete '*competent*' and replace with '*accredited*' since the competence cannot be ascertained especially for traditional dispute resolvers

(v) S. 5 (g) Delete entire clause because it will be prone to abuse.

PART II ACCREDITATION AND REGISTRATION OF CONCILIATORS AND MEDIATORS

5. Section 6 – Requirement for registration

(i) 6 (1) Add '*accredited and registered as a conciliator or mediator by the centre and the Mediation Accreditation Committee*,' to avoid conflict with the already existing accreditation structures.

6. Section 10 - Code of conduct

(i) Look out for duplication and conflicts as the Mediation Accreditation Committee already has a code of conduct for court annexed mediators and conciliators

PART III CONCILIATION AND MEDIATION

7. Section 11 – Referral of cases

(i) S. 11 (1) Add a '*court / tribunal*'
(ii) S. 11 (2) Add a '*court / tribunal*'
(iii) 11 (2) (a) Add a '*court / tribunal*'
(iv) s. 11 (2) (b) change of wording to '*the dispute is incapable of resolution through conciliation or mediation,*' to create avenues for more cases to be referred to ADR and reduce backlogs in courts and tribunals.
(v) Delete sub-sections 11 (2) (d, e, f, g, h and i) as they are too broad. Instead the rewording of 11 (1) (a, b and c) to give the judicial officer discretion to make the decision.

8. Section 13 - Commencement of conciliation or mediation

(i) S. 13 (2) delete '*period specified in the invitation*' and retain 7 days for certainty of duration

9. Section 14 - Role of the parties

(i) S. 14 (2) (c) Delete 'documents,' as this is covered by 'relevant information;' and to avoid over-formalizing the processes. There needs to be a distinction between the court process and the ADR process.

10. Section 15 - Appointment of a conciliator or mediator

(i) s. 15 (1) Add subsection that for Court Annexed Mediation the Mediation Registrar to appoint the dispute resolver

11. Section 16 - Obligations of a conciliator or mediator.

(i) 16 (2) (b) delete '*provide a written statement*' and replace with '*provide information*' to avoid over-formalizing the process
(ii) Delete '*at least one day before*' and replace with '*shall at the commencement of the ADR process,*'
(iii) S. 16 (2) (h) delete the word '*authenticate*' and replace with '*ensure parties execute*' to avoid ambiguity
(iv) S. 16 (2) (h) for this section, the term '*may*' rather than '*shall*' is preferred since in certain instances parties or representative of parties prepare the agreement and present it for authentication and execution.
(v) S. 16 (3) (b) delete entire clause since mediation does not always lead to a settlement

12. Section 20 - Date, time and place of conciliation or mediation

(i) Make express provision allowing for virtual proceedings

13. Section 21- Identification of issues in dispute

(i) S. 21 (1) replace '*statement of issues*,' with '*case summary*,' to avoid over-formalizing the process and making it appear complex for parties

(ii) S. 21 (1) Delete *'period when such parties may agree*,' and retain 7 days to ensure certainty

(iii) S. 21 (1) Replace '*party shall*' with '*party may*' to give discretion to mediator/conciliator to decide if it is important

(iv) S. 21 (2) be deleted as it makes mediator seem to have a position in the case rather than being impartial. It presupposes that the mediator may be the one making the decision. It leans towards arbitration rather than mediation and conciliation.

14. Section 23 – Settlement Agreement

(i) S. 23 (1) is in conflict with roles of mediator. A conciliator may in some cases formulate terms of a possible settlement but a mediator does not formulate terms.

(ii) S. 23 (2) Replace '*shall*' with *'may'* to give room to situations where one of the parties representatives prepares the settlement

(iii) S. 23(5) delete '*authenticate*' and replace with '*ensure parties execute*,' to avoid ambiguity

(iv) S. 23 (6) delete '*committee*' and replace with *'court'*

(v) S. 23 Be cognizant of virtual proceeding where parties do not physically meet mediator/conciliator to execute

15. Section 24 - End of conciliation or mediation.

(i) In drafting this section, it should be noted that sometimes there is a partial settlement or no settlement at all.

16. Section 26 - Exclusion of liability.

(ii) Resolve typo given there is no subsection 2 but subsection 1 has been stated.

PART IV – TRADITIONAL DISPUTE RESOLUTION

Delete entire part as it is close to impossible to legislate on TDR as customary law in Kenya is not coded.

17. Section 27

(i) Delete S. 27 (1) as Customary law is not coded such that the centre may not be able to ascertain the section. The competence of the traditional dispute resolver cannot be attested to.

(ii) Resolve typo; 27 (2) stated twice.

PART V—RECOURSE TO COURT AND RECOGNITION AND ENFORCEMENT OF SETTLEMENT AGREEMENTS

18. Section 31- Duty of advocate to advise on alternative dispute resolution.

(i) Delete s. 31 (2) because section is in contravention of the Advocates Constitutional duty to advice the client on legal issues including but not limited to the best forum for resolution of a dispute if any. The danger of such a proposition is that it opens up Advocate-Client confidentiality as it seeks to examine the advice given to establish the commission of an offence

(ii) The stated failure to advise is cannot constitute an offence as the offending action would be failure to give Advice and will further amount to punishment of an Advocate in the discharge of his professional duties outside the scope contemplated by the Advocates Act.

(iii) There is a danger that this clause will water down the independence of the legal profession. The fine imposed is extremely steep.

(iv) The Section also criminalizes access to justice and elevates the place of Alternative Dispute Resolution Mechanism over Courts which is patently unconstitutional. It negates the Spirit of Art 159 (2) which calls on the Courts to encourage use of alternative forms of dispute resolution subject to the same not being in conflict with the Constitution, bill of rights or in a manner that is repugnant to justice and morality.

(v) The section also negates the powers of courts and tribunals to refer disputes to ADR upon determination that such disputes are best determined in such for a.

(vi) The entire section should be deleted.

19. Section 32 - Confirmation that alternative dispute resolution has been considered.

(i) S. 32 (1) should be deleted as such a confirmation it is provided for in the pre-trial conference forms as a checklist to determine the suitability or otherwise of referring the matter to ADR before the Court/Tribunal can consider it. Further it seeks to make participation in ADR mandatory which infringes on the rights of parties to seek justice as set out in Article 48 of the Constitution.

20. Section 33 - Resort to judicial proceedings

(i) S. 33 Replace entire section with '*A party whose matter was referred to ADR may apply to the High Court or referring Court,*' to avoid verbosity.

(ii) Delete sections 33 (b, c, d, e) given the previous sections underscores the voluntary nature of ADR.

21. Section 34 - Stay of proceedings.

(i) Deletion of S. 34 (2, 3 and 4) as they are unnecessary given parties can request for ADR at any point in the proceedings. The provision is also available in the Civil Procedure Act.

22. Section 35 - Recognition and enforcement of a settlement agreement.

(i) S. 35 (1) Insert '*where a court referral,*' since the section seems to be limited to Court referral

(ii) S. 35 (4) Delete '*High Court,*' and replace with *'the court'* and define court as court that has referred a case to ADR.

23. Section 36 - Grounds for refusal of recognition or enforcement of a settlement agreement

(i) Deletion of s. 36 on account of the voluntary nature of the process. All these should be raised before the ADR processes commences.

PART VI – MISCELLANEOUS PROVISIONS

24. Section 38 – Alternative dispute resolution expenses.

(i) We suggest that the bill makes provision for formulation and development of scale of payment of mediators through regulations or rules, payment of fees in Court Annexed Mediation and payment of advocate fees for cases referred to ADR.

25. Section 39 - Rules and regulations.

(i) S. 39 (1) and s. 39 (2) Reference should be to the '*CJ and the Rules Committee*,' and not the '*Attorney General*,' as Article 169 envisioned this mandate to be under the judiciary.

PART V – CONSEQUENTIAL AMENDMENTS

(i) Correct typo – this should be Part VII not Part V

The members commended the drafters for their trial in making the Nairobi Centre for International Arbitration a centre for ADR in Kenya. The following recommendation was made.

Members proposed amendments to the National Center for international Arbitration Act should be made in a bill specifically designed to amend that Act as opposed to amending it herein.

26. Section 48 – Constitution of the Mediation Accreditation Committee

Our recommendation is that there is no need to reconstitute the Mediation Accreditation Committee. The members tabled concern that the proposed amendments to the constitution of the committee would lead to formation of a non-inclusive committee. They also stated that it was not clear from the Bill whether this is a creation of a new committee or merging of committees with the existing one whose mandate is yet to expire. The functions proposed to be given to the committee are also not supported by the provisions in the body of the Act.

We look forward to your response concerning the comments and suggested amendments to the Alternative Dispute Resolution Bill, 2021 and confirm availability for further discussions on the bill should you deem it necessary.

Yours faithfully,
LSK NAIROBI BRANCH

ERIC THEURI, CHAIRMAN

CC:

1. Sen. Mogeni Erick Okong'o,
   Chairperson,
   Standing Committee on Justice, Legal Affairs and Human Rights,
   Parliament Building, Parliament Rd,
   NAIROBI.

2. Hon. Kenneth Lusaka,
   Speaker of the Senate,
   Parliament Building, Parliament Rd,
   NAIROBI.

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OUR REF: MLS/GEN2019-2021 **DATE**: 23RD July 2021
YOUR REF: T.B.A.

The Hon. Clerk of the Senate
And
The Standing Committee on Justice,
Legal Affairs and Human Rights of the Senate
NAIROBI.

Your Honour,

RE: INVITATION TO PUBLIC PARTICIPATION AND SUBMISSION OF MEMORANDA ON THE ALTERNATIVE DISPUTE RESOLUTION BILL (SENATE BILLS NO. 34 OF 2021)

Greetings from the Mombasa Law Society!

The Mombasa Law Society is the oldest Bar in the East and Central African Region and it currently comprises over 500 (Five hundred) advocates who ordinarily practice in Mombasa and the Coast Region.

The History the Legal Fraternity can be traced back to 1911 when Advocates practicing at Mombasa formed the Mombasa Law Society. This later led to the formation of the Nairobi Law Society for the Advocates who migrated to the hinter land. In 1922 the two Societies merged to form the Law Society of Kenya. This has in turn grown into the current Kenyan Bar as we know it.

We refer to the Hon. Clerk of the Senate's call to submit written memoranda on the Alternative Dispute Resolution Bill (Senate Bills No. 34 of 2021) and make this general observation of the Bill that the same is not in conformity with the provisions of Article 159 of the Constitution. The Constitution is clear that judicial authority is vested in the Judiciary by the sovereign people of our country. While alternative

dispute resolution is encouraged in Article 159(2) (c), this Bill now comes in to make the judicial process its alternative and pushes it to the periphery.

The role of the Judiciary in the manner envisaged in the Constitution must be upheld. Any legislation that seeks to emphasize a scenario where citizens cannot approach the court directly, as this Bill provides, undermines their right to access the judiciary which is the fundamental method of dispute resolution as per the constitution and further erodes the independence of the judiciary which must be upheld. Further, it is noted that the Bill as drafted has not taken into consideration the provisions of Article 27, 28, 32 and 48 of the Constitution which safeguard equality and freedom from discrimination, human dignity, freedom of conscience, religion, belief and opinion, and access to justice.

More specifically, we find the following provisions of the Bill of concern;

1. The preamble to the Bill should include that the Act is for the provisions as set out **where the parties to the dispute agree** to the mechanisms set out in the Bill. As it were, the same makes the entire process of alternative dispute resolution compulsory as opposed to **voluntary**;

2. Definition of 'alternative dispute resolution' at Section 2 (1) – this should refer to the constitutionally compliant processes and methods and should be confined to the provisions of the Constitution;

3. Definition of 'alternative dispute resolution clause; - there ought to be a fixed period that can be extended by parties;

4. Section 5 (a) is at variance with the provisions of Section 31. The submission to the process of alternative dispute resolution is in the first instance made voluntary and later on made compulsory. The same ought to be a voluntary process by the parties to a dispute entirely;

5. Section 19 (2) provides that a part may be represented by an advocate, an expert or such other person as the party may consider appropriate. While the duties nad responsibilities of an advocate are well set out in the Advocate's Act, there needs to be clear provisions on the duties of the expert or such other person as the party may consider appropriate primarily because a party may be reliant on their advise in the dispute. It is proposed that while such persons may appear, they be led by an advocate whose conduct is prescribed by law for the safeguard of the client;

6. Section 25 (a) – it ought to be expressly provided that a conflict of interest would arise where a conciliator or mediator acts as an arbitrator, representative or advocate of a party in judicial proceedings in respect of a dispute he/she facilitated;

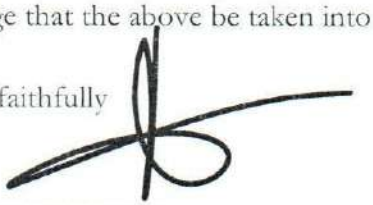
7. Section 31 and Section 32 (3) of the Bill offends advocate-client privilege which may only be waived by the client and no legislation should require an advocate to provide privileged information; Further, the imposition of criminal sanction against the Advocate seeks to criminalize provision of advice and unfairly target advocates.

8. Section 37 – suspension of the Limitation of Actions Act should be a judicial determination on a case by case basis and should not be legislated;

9. Traditional dispute resolver- which mechanisms are in place on the appointment as such and which body would supervise such appointees? This needs further clarity especially in light of our diverse social backgrounds; in addition how do you ensure that such resolvers will not resort to methods against justice and morality.

We urge that the above be taken into consideration during its deliberation.

Yours faithfully



MARY KIRURITI
SECRETARY GENERAL – MOMBASA LAW SOCIETY

ICMC INSTITUTE OF CHARTERED MEDIATORS AND CONCILIATORS

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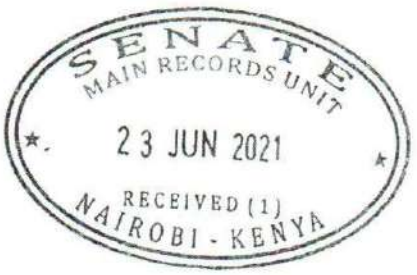
TO THE SPEAKER
Thru' THE CLERK
SENATE
PARLIAMENT BUILDING
NAIROBI.



Dear Sir,

RE: MEMORANDUM OF COMMENTS ON THE PROPOSED ALTERNATIVE DISPUTE RESOLUTION BILL 2021

Receive greetings from the Institute of Chartered Mediators and Conciliators (ICMC).

The Institute of Chartered Mediators and Conciliators is the professional body of dispute resolution practitioners with the mandate to regulate the practice of Mediation, train prospective candidates, and encourage organizations and institutions to adopt Mediation and Conciliation as the primary means for addressing disputes.

Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation. In respect to the proposed Alternative Dispute Resolution Bill, 2021 currently in the Senate, as an Institution we have taken a keen and close look at the bill and hereby wish to submit comments and objections as per the attached Memorandum.

We pray that you give prominence to our comments and critiques and take them into consideration before the second reading.

Yours Sincerely

MANGERERE JAMES
Patron
Institute of Chartered Mediators
and Conciliators

MEMORANDUM OF COMMENTS OF COMMENTS ON THE PROPOSED ALTERNATIVE DISPUTE RESOLUTION BILL 2021 SUBMITTED BY THE INSTITUTE OF CHARTERED MEDIATORS AND CONCILIATORS (ICMC)

(Under Article 118(1)(b) of the Constitution of Kenya, 2010 and Section 5 of the Statutory Instruments Act No. 23 of 2013, Laws of Kenya)

TO: THE SPEAKER
Thru' THE CLERK
SENATE
PARLIAMENT BUILDING
NAIROBI.

The Institute of Chartered Mediators and Conciliators (ICMC) was incorporated in the year 2012 as a Company limited by guarantee. ICMC is affiliated to MTI International East Africa. It works closely with other International Mediation Institutes to drive transparency and high competency standards into mediation practice across all fields, worldwide. ICMC aims to set, promote and achieve high standards of mediation through professionalization, research and innovation. ICMC also purposes to apply and enforce world-class standards of mediation, to provide impartial information about mediation, to make tools available to parties to make basic decisions about mediation and to promote mediation education and awareness.

ICMC DRAWS the attention of the House to the following:

1. The Constitutional obligation of Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees under Article 118(1)(b) of the Constitution of Kenya 2010;

2. Section 5 of the Statutory Instruments Act, 2013 on the requirement for consultation before making statutory instruments and in particular where the proposed legislative instrument is likely to have a direct or a substantial indirect effect on business or restrict competition;

3. The obligation by Parliament to make appropriate consultations with persons who are likely to be affected by the proposed instrument under section 5 of the Statutory Instruments Act.

4. The need to ensure that the provisions of the Constitution and statute are complied with in line with mediation practice in Kenya.

WHEREAS there is proposed, for a second reading of the Alternative Dispute Resolution Bill 2021, which purpose is to provide for settlement of civil disputes by

conciliation, mediation and traditional dispute resolution mechanisms; to set out the guiding principles applicable; and for connected purposes, the same in our view is **OUT OF ORDER**. The following are instances thereto: -

A. General Observations:

1) The Bill is intended to regulate **ALL** alternative dispute resolution mechanisms in Kenya yet it is limited to Mediation, Conciliation and Traditional Dispute Resolution Mechanisms thereby neglecting other forms of Alternative Dispute Resolution Mechanisms like Arbitration and Negotiations.

Whereas it is appreciated that there is an existing Arbitration Act with its entire system up and running, if the Bill seeks to address ADR then it must take arbitration under its umbrella to avoid doubt and multiplicity of legislation likely to cause chaos and confusion in practice.

2) The Bill appears to have been drafted without consultation with and in participation of mediation, conciliation and traditional dispute resolution mechanisms practitioners and other professionals in the field.

3) There are other agencies of the State are also involved in mediation, especially agencies in the security sector who are involved in community mediation practice. Are these exempt from the Bill? Will they be held accountable for conducting mediation otherwise than as per the Bill? Who will enforce sanctions against them? How will this be done?

4) If the intention is to regulate Alternative Dispute Resolution practice in Kenya, the Bill requires inclusive participation of relevant stakeholders to broaden the scope for proper administration of the Alternative Dispute Resolution practice.

5) The Bill purports to confer NCIA the powers to advance the practice of Alternative Dispute Resolution, oversee practice and set desirable standards in line with international best practices. NCIA is a preserve of Arbitration. The Centre as is not properly constituted and it lacks crucial expertise in all Alternative Dispute Resolution practices. It is also not clear under what circumstances the centre was elected for purposes of mediation practice in Kenya. It is a constitutional prerogative that public service be inclusive and nominees thereto be appointed by a fair, open and competitive process.

B. Specific Observations

1) Section 2 of the Bill purports to make reference to the "Nairobi Centre for International Dispute Resolution" which does not exist. Legal Notice Number 26 of 2013 refers to the Nairobi Centre for International Arbitration. Consequential to

passing of the Bill, there is a proposal to have the Centre be renamed the Nairobi Centre for Alternative Dispute Resolution. ICMC observes that the constitutional principles and values required in public service seem to have been ignored in the making of this proposal. Membership of the Centre is not inclusive as pertinent stakeholders in the field of ADR appear to have been completely left out.

2) Section 4 of the Bill limits the scope of application to civil matters yet there are instances when ADR is suitable in criminal and quasi-criminal cases.

3) Section 5(g) of the Bill gives a party the right to use more than one Alternative Dispute Resolution Mechanisms to resolve a dispute. Without a proper qualification, this implies the possibility of the same dispute being instituted in multiple ADR fora concurrently, thereby having the same effect as the principle of *res subjudice*.

4) Section 14(1)(d) erroneously refers to Section 30 of the Bill instead of Section 22 of the bill.

5) Section 23(6) of the Bill gives Parties the powers to register a Settlement Agreement with the "committee" for the purposes of record and enforcement. The only Institution in Kenya with the powers to enforce Settlement Agreements is the Court.

6) Sections 31 and 32 are inconsistent with legislated law, specifically the Advocates Act, Cap 16 Laws of Kenya. The duties of an Advocate are matters of professional ethics already provided for by the Advocates Act, which also makes offences of omission or commissions such as that contemplated in the Bill.

7) The role of the Attorney General contemplated under section 39 of the Bill is unconstitutional. Judicial authority lies in the Judiciary while the AG remains the Chief Government Advisor. Mediation, being a quasi-judicial function, is therefore more suited to be administered by the Judiciary than the OAG.

C. RECOMMENDATIONS

In view of the foregoing, ICMC makes the following recommendations:

1) The Bill ought to establish an independent Institution to oversee the ADR practice in Kenya, with a properly constituted and representative Council to oversee the implementation of the Bill, exercise such powers as may be conferred by the Bill and ensure that members in leadership are appointed via a fair, competitive and open process. Funding to be determined as per the terms of the Bill or otherwise.

2) The scope of the Bill to be expanded to criminal and quasi-criminal cases such as in the cases of assault, trespass or destruction of private property.

3) Section 5(g) to include a proviso that Parties are at liberty to deploy multiple ADR mechanisms provided that not more than one method may be used at any given time. The principle of graduation from a minor to a major method, escalating into a court matter is desirable.

4) In Section 23(e), replace the word "Committee" with the word "Court".

5) Sections 31 and 32 of the Bill to be expunged in their entirety.

6) Section 39 of the Bill to be amended to permit the Council as per recommendation (C-4) herein to make rules and regulations under the Bill, with the approval of the Chief Justice.

DATED at NAIROBI this 23rd day of July 2021

	Name	Signature
1		
2	JAMES MANGERUA	
3		
4	Nelson Peters	
5	Pamela Kemboi	
6	CHUKA ELITAN CITEN	
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6) Section 39 of the Bill to be amended to permit the Council as per recommendation (C-1) herein to make rules and regulations under the Bill, with the approval of the Chief Justice.

DATED at **NAIROBI** this ....23rd....day of ....July.... 2021

Name	Signature
1. CHARLES KARIUKI	
2.	
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TYBA
THE YOUNG BAR ASSOCIATION

WOODLANDS RD, OFF LENANA RD,
OPP. WOODLANDS OFFICE PARK
P. O. BOX 2167 - 00100
NAIROBI, KENYA
TEL: (254) 713 896 280

MEMORANDUM ON THE ALTERNATIVE DISPUTE RESOLUTION BILL (SENATE BILLS NO. 34 OF 2021)

The Young Bar Association **[TYBA]** sends its regards to the Senate of the Republic of Kenya. As the Senate debates the Alternative Dispute Resolution Bill, 2021, TYBA has set out certain recommendations in this memorandum pursuant to the principle of public participation in the constitution[1] and the invitation by senate to submit representations on the Bill by way of written memoranda.

Introduction

Until now, Alternative Dispute Resolution has existed in Kenya as an option that disputants have for the resolution of their disputes. The Civil Procedure Act provides that courts may on their own motion or on the application of a party refer a commercial dispute to ADR Mechanisms.[2]The possible passage of the Alternative Dispute Resolution Bill will herald a new era in litigation in Kenya considering it is poised to make ADR a first recourse for disputants in certain cases.[3] The ramifications of the passage are many and mightily impactful. Below is a rundown of the consequences of the passage of the Bill as well as recommendations for amendment before the Bill is tabled for discussion.

1. **Replication of Functions**

   ADR should supplement, not supplant, the law and the work of lawyers. But that is what the ADR Bill exactly does as it effectively makes conciliation and mediation a disputant's first recourse, providing that a party to a dispute shall take reasonable measures to resolve the dispute through alternative dispute resolution before resorting to a judicial process[4]. The requirement has the potential to significantly alter the legal practice landscape as it marks conciliation and mediation as the first interface of a disputant and the legal process.

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[1] The Constitution of Kenya, Article 10 (2) (b)
[2] The Civil Procedure Act, Section 59B (1)
[3] The Alternative Dispute Resolution Bill, 2021, Section 14(1)
[4] The Alternative Dispute Resolution Bill, 2021, Section 14(1)

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Granted, our courts are plagued by a debilitating backlog of cases,[5] and perhaps a requirement that parties to a conflict submit themselves to mediation before lodging their matters in courts is aimed at alleviating that problem. That said, it is quite a stretch to suppose that mandating away the right of disputants to a proper judicial forum is the magic bullet that will make the sluggishness in our courts go away. The first flaw with such an intervention is that it forces to a round table people whose interests may be adverse to each other that only a full-on litigation can resolve. Introducing another layer to insulate the court system from perceived public frivolity and litigiousness will not altogether halt unwarranted litigation but only delay it because while the parties may actually submit to mediation, they might not see it as the end, but as a stage of the process they have to dispense with as they seek to lodge their matters in court.

Ultimately, most of these cases will actually end up in court, and at a point when a lot of resources have already been expended trying to resolve the issues by mediation. Therefore, in the larger scheme of things, making Alternative Dispute Resolution a mandatory first recourse for disputants only serves to draw-out the conflict rather than solve it with any finality.

2. The Competence of Conciliators and Mediators

Section 6 of the ADR Bill provides for the requirements for one to become a conciliator or mediator. Those requirements include compliance with Chapter Six of the Constitution; and other educational and professional qualifications to be determined by the Nairobi Centre for International Dispute Resolution.

While it is perfectly within parliament's remit to delegate the duty of prescribing the competencies that would be required of conciliators and mediators, it would have been helpful to from the outset set out the requisites.

[5] Kemboi, Leo Kipkogei, The Case Backlog Problem in Kenya's Judiciary and the Solutions (April 20, 2021). Available at SSRN: https://ssrn.com/abstract=3841487

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We will go out on a limb and lay it out outright that the work of conciliation and mediation is in the wheelhouse of Advocates. Arbitration of disputes is a science requiring skills that only lawyers are tooled with. We must proceed from the premise that legal disputes arise from infringements of rights and dereliction of duties. That being the case, the arbitration of these disputes, whether through the traditional channels of litigation, or through the nascent recourses that ADR presents, can only be carried out competently by someone with a background in legal training and legal philosophy.

This ties in with the earlier point that ADR should not be presented as supplanting the law and the work of lawyers in the areas it will apply. Unfortunately, that is how it has been presented thus far, especially if you consider the provisions of the ADR Bill that make ADR a system of first recourse for disputants, and the section that leaves open the determination of the competencies of conciliators and mediators.

Lastly, on this point, the composition of the Law Society of Kenya is arguably a cross-sectional representation of the Kenyan Nation. Its members are drawn from diverse regions and communities. Therefore, in addition to being equipped with legal knowledge and competencies, they are arguably possessed of traditional wisdom. Therefore, the legal profession and legal practice does not suffer from any gaps in traditional knowledge and wisdom so much that ADR Conciliators have to be sourced from outside the profession.

3. **Stymying the Progressive Function of the Law**

Now that the educational competencies of conciliators and mediators are left open to be determined by the Nairobi International Dispute Resolution Centre, it is reasonable to expect that even non-lawyers will be eligible to be accredited as conciliators and mediators. While we hope against hope that such won't come to pass, we must address how ill-advised it would be to make the practice of mediation a free-for-all play.

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The law, and the stakeholders thereof, play a critical function in the evolution of norms in society. Lawyers, by representing clients and conducting litigation, get to midwife change in society as they help create the law by setting precedents.

If cases with precedential value are prosecuted before ADR tribunals and never get to court, then it is possible that we will have stymied the progressive function of the law. For instance, if the *Wambui Otieno*[6] case had been concluded at an obscure tribunal in a backwater village in rural western, then we wouldn't have much of the changes it ushered in Kenya.

While it can be argued that decisions before the ADR tribunals can make their way to the annals of legal history as precedents, that can be true only in theory since the quality of arguments advanced in ADR tribunals by professionals from other fields may not rise to the level capable of making precedent. The other reason why that may be the case owes to the fact that mediation and conciliation resolutions may be wildly inconsistent and unpredictable.

Moreover, the bulk of cases that the ADR Bill recommends be referred to mediation and conciliation by traditional mediators are precisely the cases based on issues for which progress is required. These cases will likely span matrimonial problems, succession, retrogressive practices such as FGM, and suchlike cases in respect of which there is plenty of traditional wisdom, which is not necessarily progressive.

The courts are presumably the refuge of the weak, the oppressed, the marginalized, and the downtrodden. In societies such as ours that feature communities smarting from centuries of oppressive traditions, referring certain sensitive cases to the council of elders, or experts of certain cultures, for arbitration could be tantamount to refoulement.

A proper Alternative Dispute Resolution mechanism is one that works alongside cultural institutions with a view to reforming them and not deferring to their judgment of issues that may be of a cultural nature. It should be the court's

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[6] Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another (1987) eKLR

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discretion to determine whether to refer a case to mediation, conciliation, or arbitration, and it should do so on a case-to-case basis, without legislators fettering that discretion with hard and fast rules like the ones the ADR Bill proposes.

Moreover, submission to Alternative Dispute Resolution should be voluntary. Imposing the requirement to submit to ADR to disputants who would otherwise elect to prosecute their matters in court for one reason or the other could in itself be viewed as an attempt to limit access to justice contrary to the constitution.[7] Article 50 of the Constitution provides for the right to a fair hearing.[8] The right to a fair hearing presupposes a right to an appropriate forum with adequate and fair remedies. For that matter, it is completely unfair to rail-road litigants to ADR mechanisms when they could elect to prosecute their disputes through court.

4. **Prioritization of Resources: Thinking of a Multi-Door Courthouse**

Proceeding from the assumption that one of the major reasons the legislators are deliberating on enacting the Alternative Dispute Resolution Bill owes to the issue of backlog of cases, we feel that the problem cannot be solved by mounting a somewhat parallel judicial system, but by revamping the judiciary and outfitting the extant systems with the resources necessary to carry out their mandate.

If there were more courts, more magistrates and judges, more lawyers, and an efficient, fast, and convenient filing system in the judiciary and its registries, then we can ensure a faster resolution of disputes.

The resources committed to setting up the Alternative Dispute Resolution systems can be channeled towards re-equipping the judiciary with human resource capacities, relevant technology, and infrastructure to enable it to dispense justice speedily.

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[7] The Constitution of Kenya, 2010, at Article 48 provides for the right of access to justice.
[8] 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.

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5. **The Duty to Inform**

The ADR Bill prescribes onerous penalties for advocates who do not inform their clients of their Alternative Dispute Resolution options. There is much to be said about that duty to inform, but what really stands out is how hefty the penalty is. That you can fine an advocate Kshs. 500,000 for not telling a client that they have options smells of a legislature that is overplaying the law. It is unconscionable, unreasonable, and unacceptable. It is obvious that cost-conscious Kenyans, who are the majority, will opt for mediation, considering it cheaper when compared to litigation, even when their interests will be better protected by full-on litigation.

An advocate is well-equipped legally, ethically, and professionally to understand their client's problem and devise an efficient, cost-effective, and convenient strategy for its resolution. The End-Means Principle in legal practice anticipates that whatever avenue an advocate opts for the resolution of their client's problem is one that is best placed to attain the desired ends conveniently, cost-effectively, and efficiently.

Therefore, the least that the legislature could do is desist from attempting to force the advocate's hand. It must trust the advocate to be empathetic, understanding, and wise enough to advise and guide the client appropriately. Most importantly, if it has to penalize advocates for doing their job, then it should not be so onerously.

6. **Our Recommendations.**

That said, the following are our recommendations so as to bring the bill in line with the law and the best interests of all stakeholders:

i. Make submission to ADR mechanisms voluntary instead of making it mandatory.

ii. Allow lawyers the discretion to devise the best strategies for the resolution of client's problems without strong-arming them to direct clients to ADR.

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iii. Provide for legal training to be the primary qualification for conciliators and mediators in addition to any other competencies that the Nairobi International Centre for Dispute Resolution may deem fit.

iv. Redirect the resources committed to mounting a court-independent ADR system to developing a court-connected ADR system.

DATED at NAIROBI this 23rd day of July, 2021.

Signed on behalf of the Young Bar Association

Onsomu Hosea Manwa
Chairperson, The Young Bar Association (TYBA)

Memorandum on the Proposed Alternative Dispute Resolution Bill No. 34 of 2021

The Women in ADR (WADR) is a special interest group of the Chartered Institute of Arbitrators (CIArb) Kenya Branch comprised of ADR practitioners keen on enhancing the capacity of Women in ADR practice and achieving the diversity pledge seeking to increase appointment of African women as ADR practitioners.

The ADR bill no. 34 of 2021 before the Senate was first introduced in Parliament in 2019 whereafter it was withdrawn and redrafted given stakeholder feedback. This memo has been prepared to respond to the call for submission of comments on the Bill by the Justice and Legal Advisory Committee of the Senate.

The attention of JLAC is drawn to the following issues on the Bill;

1. The definition of terms contrary to the provisions of the Interpretations and General Provisions Act Cap no 2 of the Laws of Kenya.
2. The drafting clarity and style of the Bill contrary to the provisions of the Statutory Instruments Act No. 23 of 2013 of the Laws of Kenya.
3. The lack of a Comprehensive policy on ADR to guide the drafting and enactment of legislation on ADR such as the proposed bill.
4. An inadequate assessment on the Impact of the Bill on enhancing access to justice and its impact on the practice of ADR in Kenya.

Specifically, WADR seeks to bring to the attention of the Senate on the following provisions of the Proposed bill that are in conflict with existing laws and best practice of ADR;

No	SECTION OF BILL	CURRENT PROVISION	RECOMMENDATION
	The Preamble	Generality in application of Bill to Civil Disputes	Specification of disputes referred to as Civil disputes
			Gap in definition of Good Offices as a means of resolution for trade related disputes.

	Section 2 definition of "mediation"	The Dispute Resolution Bill, 2022 defines mediation as follows: *"mediation" means a facilitative and confidential structured process in which parties attempt by themselves, on voluntary basis, to reach a mutually acceptable settlement agreement to resolve their dispute with the assistance of an independent third party called a mediator;*	The provision is in conflict with the current definition under the Civil Procedure Act: "mediation" *means an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto;* (a) The definition has to be aligned with existing statutory provision.
	Section 2 definition of "conciliation"	Definition of Conciliation "means an advisory and confidential structured! process in which an independent third party, called a conciliator, actively assists parties in their attempt to reach, on a voluntary basis, a mutually acceptable settlement agreement to resolve their dispute"	The provision requires alignment with the Labour Relations Act.
	Section 2 "report"	inclusion of the need of the report presupposes formality, literacy and sophistication of parties and therefore does not cater to the all disputes that can be addressed through mediation.	This provision offends the confidential nature of mediation which only requires that a settlement agreement be drafted by parties
	Section 4(1)	This section is on the generality of the application of the ACT to civil disputes	This provision offends provisions of the following legislations which define disputes; • Inter-Governmental Relations Act; • the Governments Proceedings Act • The Civil Procedure Act and Rules Further , generality of the Act creates an assumption that trade related disputes under the AfCFTA can be resolved under the ACT through

			mediation/conciliation instead of Good Offices mechanism **The definition of Civil Disputes to be expounded and clarified**
	PART II	**ACCREDITATION AND REGISTRATION OF CONCILIATORS AND MEDIATORS**	
	Section 6 (1)	1. The section introduces mandatory registration as a pre-condition for practice of mediation.	Mandatory registration should not be imposed. Further, the registration fee to be charged should be recommended if adopted to ensure affordability. The bill does not take into account Registration processes of trained mediators by institutions other than the Nairobi Centre for International Arbitration. (NCIA) The Bill should have reviewed Sec. 5 of the NCIA Act to align the provisions for registration and accreditation. The bill fails to take into consideration the operational capacity of NCIA in registration and accreditation of Mediators in Kenya. The bill reduces fair competition and diversity in training of mediators by creating NCIA as a sole registration and accreditation institution. The provisions of accreditation and registration by the Centre conflict with the statutory mandate of MAC under the Civil Procedure Act. Which the bill has also failed to align.

			Recommendation; the role of Accreditation of professional mediators can be ascribed to NCIA, however registration of mediators should not be mandatory.
		2. Registration and accreditation of conciliators	This provision does not take into account the committee of conciliators appointed by the Ministry of Labour
		3. Registration of TDRM providers by the Centre	TDRMs are not within the objective or mandate of the NCIA and should not be subjected to formalisation through registration by an institution.
	Section 9 (1)	The provision on review and appeal.	The provisions on appeal should be reviewed and aligned with the civil procedure Act and Rules and international best practice as recommended under the Singapore Convention
	Part IV	**CONCILIATION AND MEDIATION**	
	Section 31	Provision of a fine for failure to advise on ADR	Does not take into account provisions of CPA on institution of suits and the Advocates Act on conduct of Advocates.
	Section 35	Recognition and enforcement of ADR outcomes	Does not take into account the form of conciliation outcomes ; the conciliator's opinion may be useful in enabling the court to make a decision even when not adopted by the parties. Clarity in the provision of s.35 to allow for consideration of outcomes from ADR processes instead of disregarding them where there is no agreement,
		TDRM	
	Section 27	Qualifications of TDRM Provider	This provision does not take into account what constitutes customary knowledge; or what will be used to

			measure competence in customary laws and practices.
	PART VI	**MISCELLANEOUS PROVISIONS**	
	Section 38 & 39	1. The requirement of the Attorney General to make rules of practice and procedure encompassing mediation and conciliation is contradictory to Section 5 (d) and Section 25 (d) of the NCIA Act. And Section 59 of the CPA	Exclude/delete the role of the Attorney General.

LEGAL RESOURCES FOUNDATION
Haki Itawale

COMMENTS ON THE ADR BILL, 2021

SUBMITTED BY LEGAL RESOURCES FOUNDATION TRUST

JULY 23, 2021

LRF
1st Floor Flamingo Towers Mara Rd Upper Hill
info@lrf-kenya.or.ke

LEGAL RESOURCES FOUNDATION TRUST COMMENTS ON THE ADR BILL, 2021

1. INTRODUCTION

The Legal Resources Foundation is a national civil society organization. Legal Resources Foundation Trust (LRF) promotes access to justice through human rights education, research and policy advocacy. LRF's mission is to be a resource for justice, equity, resilience in communities through holistic participatory interventions and strategic partnerships.

LRF presents this Memorandum on reflections on the Alternative Dispute Resolution Bill, 2021 to the Senate in respect of the provisions on a legal framework for the settlement of certain civil disputes by conciliation, mediation and traditional dispute resolution.

The following are general observations

a) The Bill in its design is an affront to the constitution for the following reasons;
   (i) The Bill undermines the Judiciary in a way that endangers the principle of separation of powers by shifting role of the judiciary as envisaged under Article 159 of the Constitution of Kenya on promoting ADR to legal practitioners, advocates.
   (ii) It creates an institution to oversee application of ADR in dispute resolution outside of the framework contemplated under Chapter 10 of the Constitution.
   (iii) Where do we house such an institution of mediation, if it overlaps the three known arms of government?

b) The Bill, by seeking to regulate through registration traditional dispute resolvers offends succinct recommendations in the recently launched AJS Policy. Launched on 27th August 2020 by the

Chief Justice and for which National Steering Committee on Implementation of Alternative Justice Systems (AJS) Policy has already been put in place.

Here below find specific comments on select clauses of the Bill;

Section or Clause	**Comment**	**Recommendation**
Summary objects of the bill A Bill for an act of parliament to provide for the settlement of civil disputes by conciliation, mediation and traditional dispute resolution mechanism; to set out the guiding principles applicable; and for connected purposes	The objects narrow the scope of alternative dispute resolution mechanisms contemplated under Article 159 (2)(c) CoK by excluding arbitration. The Arbitration act is yet to be appraised against the Constitution 2010	The summary of the bill should state that it seeks to give effect to Article 159 (2) (c) of the Constitution of Kenya. In this respect Arbitration should be included as a mechanism of alternative dispute resolution.
Section 2 Interpretation "alternative dispute resolution clause" means a contract clause within a written contract or a	Arbitration is often included in contracts as a first stop in resolving any dispute arising from fulfillment or non-fulfillment of obligations therein. It	Include provisions on Arbitration in the Bill

separate written agreement entered into by the parties agreeing to submit to alternative dispute resolution a dispute which may arise between them in respect of a defined legal relationship	follows then that arbitration cannot be excluded in an ADR Bill	
"customary law" means rules of custom that an indigenous people of a given locality view as enforceable	This definition narrows meaning of customary law in view of dynamic human relations	Redraft the definition as follows "customary law" means rules that a group of people of a given locality or interest view as enforceable
Meanings of the terms "conciliator" and "mediator" and "traditional dispute resolver"	The constitution in Article 67 (2)(f), 113, 189(4) and 252 (1)(b) make provision for constitutional commissions to use conciliation, mediation and traditional dispute resolution	Revise the definition to take into account the constitutional provisions for Chapter 15 commissions and institution envisaged under Article 113, 189(4) CoK

	mechanisms. These institutions will therefore not require accreditation or registration. Equally commissioners and staff have an obligation to use the alternative dispute resolution mechanisms in their work.	
Section 3 Objects of the Act	The objects narrow the scope of alternative dispute resolution mechanisms contemplated under Article 159 (2)(c) CoK by excluding arbitration. The Arbitration Act 1995 is yet to be appraised against the Constitution 2010 Will the repugnancy doctrine be applied to	The summary of the bill should state that it seeks to give effect to Article 159 (2) (c) of the Constitution of Kenya. In this respect Arbitration should be included as a mechanism of alternative dispute resolution. Draft provisions in the objects on the test to be applied with a

	stifle use of TDRMs and Customary law? How will application of the law engage with the repugnancy doctrine in so far as customary law and TDRMs are concerned?	particular focus on voluntariness of parties and public interest
Section 4 Exclusion of (e) a claim for a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights or (f)disputes where public interest involving environmental or occupational health and safety are involved	Disputes of this nature do not necessarily invite long drawn litigation as parties may in due course determine that ADR is the best route to a resolution. The reason of the bill itself is to ensure that there is no violation of the access to justice right institutionalized under Article 48 of the Constitution	Redraft section to provide instances where ADR may be used in the interest of justice. The judiciary has obligation to promote ADR in all disputes

Section 7 A person shall not practice as a conciliator or a mediator under this Act unless that person has been accredited and registered as a conciliator or mediator by the Centre.	This provision creates an additional layer for professional certification for Advocates whose nature of practice is that they have to apply alternative dispute resolution through "demand letters before instituting proceedings" The centre may very likely become a gate keeping entity as opposed to facilitating ADR	Redraft the section to exclude advocates and persons working in institutions (constitutional commissions already mandated to apply ADR by the constitution and statute
Section 27 (2) The Centre may, in as far as is reasonably practicable, prepare and maintain a list of traditional dispute resolvers.	The provision's attempt to centralize traditional dispute resolution practitioners is contrary to Article 1 CoK which protects exercise of undelegated power to resolve disputes in	Delete reference to registration of traditional dispute resolvers

	enjoyment of rights protected under Article 44	
Section 31 (1) An advocate shall, prior to initiating judicial proceedings, advice a party to consider resolving the dispute by way of alternative dispute resolution. (2) An advocate who contravenes subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings.	The provision criminalizes aspect for legal practice yet advocates act on instructions of clients. Advocate client confidentiality will be breached. Advocates will be sent to jail for filings claims or suits against Government. How can an ADR law create a criminal offence, for which it has been created to omit.	Replace the word "shall" with "may" Delete Section 31(2)
Section 32 **32.** (1) A party shall file with the court an alternative dispute resolution certificate	The section elevates ADR above the courts which runs afoul to Article 159 (2) obligating the	Delete the entire section

in the prescribed form, at the time of commencing judicial proceedings, stating that alternative dispute resolution has been considered. (2) A party entering appearance shall file with the court an alternative dispute resolution certificate in the prescribed form, at the time that party enters appearance or acknowledges the claim, stating that alternative dispute resolution has been considered. (3) An advocate shall file with the court an alternative dispute resolution certificate in the prescribed form, at the time of	judiciary to promote alternative dispute resolution. Its operationally impossible to promote an aspect that is already functionally above.	

instituting judicial proceedings or entering appearance, stating that the advocate has advised a party to consider alternative dispute resolution. (4) A court may take into account the fact that a party has considered or participated in alternative dispute resolution when making orders as to costs, case management or such orders as the court determines.		
Section 38: Alternative dispute resolution expenses (3) The alternative dispute resolution expenses shall be	Expenses for TDRM cases are often determined based on the customary laws of the parties involved in the dispute.	Redraft the section to take cognizance that expenses in TDRMs shall be agreed by the parties in accordance with the applicable customary law

reasonable and proportionate to the importance of the issue or issues at stake and to the amount of work carried out by the conciliator, mediator or traditional dispute resolver.		
Section 48 Section 59A of the Civil Procedure Act is amended	The Bill amends Section 59 of CPA in relation to mediation Accreditation Committee yet it takes away poser to register mediators for the court annexed mediation to the Centre for Arbitrations	It needs to be clear who has overall responsibility to register mediators

Legal Resources Foundation Trust

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DCSM/DLS
Please deal
Deputy Clerk, Senate
Date 02/08/2021

Thursday, 15 July 2021

THE SENATE
RECEIVED
29 JUL 2021
DEPUTY CLERK

Clerk of the Senate,
Parliament Buildings,
P.O Box 4182 00100
Nairobi, Kenya.

Dear Sir,

REF: THE PROPOSED ALTERNATIVE DISPUTE RESOLUTION BILL 2021

The Kenya Christian Professionals Forum (KCPF) brings together Christian Professionals from various denominations sharing common values on Life, Family, Religion, Value- Based education and Governance. We provide professional and technical support in influencing the development of a legal and social environment that is supportive of biblical values.

The following is the philosophical foundation of our opposition to the bill:

Definition of a centre:

The definition of a centre as it is in the proposed ADR bill ""Centre" means the Nairobi centre for International Dispute Resolution established under Section 4 of the Nairobi Centre for international Dispute Resolution Act." This definition has a limiting effect in nature in that:

a) It excludes the possibility of the formation of any other Alternative Dispute Resolution centre other than the one stated in the bill

b) It excludes the registration and recognition of any other existing dispute resolution centre

We prefer a more wholistic definition of a centre that would create room for the creation and registration of more Alternative Dispute Resolution centres even as the country endeavours to make justice more accessible outside the normal court processes. A definition like ""Centre" means a registered alternative dispute resolution centre, registered according to the requirements provided for in this Act" would be more accommodative.

The registration and recognition of new ADR centres

02 AUG 2021

(2) Clerk Assistant
Legal Affairs Committee
Kindly deal
02/08/2021

The bill is silent on the issue of registration of other alternative dispute resolution Centres, we propose that provisions on how other ADR centres can be registered be incorporated in the proposed bill.

We therefore oppose this Bill and call for its withdrawal and writing of a new bill that will have an accommodative definition of a centre as well as provide room for the establishment of other Alternative Dispute Resolution Centres.

Attached to this letter, kindly find our detailed concerns on the Bill and recommendations.

Yours Sincerely,

VINCENT KIMOSOP
SECRETARY

MEMERANDUM TO THE SENATE

ON

THE PROPOSED ALTERNATIVE DISPUTE RESOLUTION BILL 2021

Presented by

Kenya Christians Professionals Forum
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July 2021

THE ADR BILL 2021

PART 1- PRELIMINARY

Section 2:

"Centre" means the Nairobi centre for International Dispute Resolution established under Section 4 of the Nairobi Centre for international Dispute Resolution Act.

"Customary law" means rules of custom that an indigenous people of a given locality view as enforceable.

Current Text	Our recommendation	Reasoning
Section 2: "Centre" means the Nairobi centre for International Dispute Resolution established under Section 4 of the Nairobi Centre for international Dispute Resolution Act.	"Centre" means a registered alternative dispute resolution centre, registered according to the requirements provided for in this Act	• By the definition of centre being limited to Nairobi Centre for international Dispute Resolution established under Section 4 of the Nairobi Centre for International Dispute Resolution Act, it implicitly makes it impossible for creation and registration of other Dispute Resolution Centres in the future.

		• The definition should be changed to allow for registration of other Dispute Resolution Centres in the future.
Section 2 "Customary law" means rules of custom that an indigenous people of a given locality view as enforceable.	"Customary law" means rules of law that an indigenous people of a given locality view as enforceable so long as those rules are not repugnant to justice and morality and they are not in contravention of any written law in Kenya.	• This is to prevent rules that are not in line with other laws in the country from finding their way into the Kenyan justice system
NIL	A Section providing for the procedure, necessary mandatory requirements and other relevant provisions for the registration of a centre as an Alternative Dispute Resolution centre.	This is to facilitate the registration and recognition of other Alternative Dispute Resolution Centres that may be established in the future apart from the currently established Nairobi Centre for International Dispute Resolution.

COMMENTS FROM KENYA NATIONAL COUNCIL OF ELDERS IN A MEETING HELD ON THE 20TH JULY AT SAROVA STANTLEY

1. Qualification is to high for elders.they have experience.what is professional experience ?The bill to state exactly the needed qualification that leaving it to the center to determine
2. The name traditional dispute resolver is not desirable for elders.Why is the bill presenting a separate sections for elders? They should be treated as mediators too
3. The bill states that matters handled by resolvers will not be confidential.Seems there is little trust for elders.cluase for confidentiality and non should be equal and accords boards
4. Elders need to be part of the mediation accreditation as committee atleast one member
5. The cases should be solved with atleast two mediators to avoid corruption
6. Definition of mediators is limiting
7. The modalities are too procedural for them
8. A case can't be resolved in 3days it's not practical
9. They need to participate and validate the Bill. they have never been involved
10. Council of elders should be registered as whole and not individuals
11. Need security provision just like judges who resolve issues

V.N. OKATA & CO. ADVOCATES
Commissioner for Oaths & Notaries Public

Victoria N. Simiyu - Okata | LL.B (Hons) Dip. Law (K.S.L) C.P.S (K)

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YOUR REF:

OUR REF:

DATE: 21st July, 2021

"By Email"

To the Senate
12th Parliament/5th Session
Nairobi

Dear Sir/Madam,

RE: MEMORANDA ON THE ALTERNATIVE DISPUTE RESOLUTION BILL (SENATE BILLS NO. 34 OF 2021)

I, Victoria N. Simiyu – Okata, Advocate of the High Court of Kenya wish to submit on the Alternative Dispute Resolution Bill, 2021 and object to the following clauses;

(1) UNCONSTITUTIONAL CLAUSES

(i) The object of this Act defeats the purpose of Article 159 (2) (c) as the Act does not allow the process to be **optional.**

Clause 32 (1) and (2) makes it mandatory when one wishes to initiate a judicial process. The Bill makes the ADR process mainstream and the judicial Court process alternative. This goes against the spirit and letter of Articles 159.

(ii) This Bill makes it Criminal for an Advocate not to refer or explain to a party the ADR alternative. Clause 31 (1) and (2) is unconstitutional. An Advocate is not a party in the dispute and holding one criminal liable is an excess of the powers and against an Advocate mandate under the Advocate Act.

(2) CONTRADICTORY AND EXCEPTIONAL CLAUSES

(i) The Exceptional Clauses at Clause 4 and 11 are not comprehensive enough and should include cases initiate by Advocates on a probono basis and matters where the prospective clients are not capable of paying sums upfront as Clause 38 contemplates that parties have the capability to pay for the process. This is the reason why the ADR process should be optional as the bottom line is the conciliator would require to be paid.

(ii) The entire Bill is contradictory. Clause 5 gives the guiding principles of the Bill which particularly state at clause 5 (a) that it was **voluntary participation** yet clause 32 (1) and (2) makes it mandatory for a party to submit to the ADR process prior to initiating a judicial process.

(iii) The Court has a process where the Courts refer the matter to mediation through Court annexed mediation Court annexed mediation requires screening of the matters.

With Part III Clause ii (1) having the Court again refer the matters to mediation will contradict clause 32 (1) and (2) where an ADR Certificate is required prior to commencing judicial process. Is this a double process meant to delay finalization of the process and exhaust litigants?

(iv) Clause 13 (1) contradicts clause 32 which make submission to ADR mandatory prior to filing judicial proceedings.

(v) The Advocates already issue demand notices before filing suit in line with clause 13 (3). The demand notices are sufficient notices for a party to start an ADR process.

(vi) Clause 14 is mandatory and defeats the purpose of ADR and further goes against the dictates of Article 159. Any party should be able to approach the Court without restrictions.

(vii) Clause 33 in my view just make the entire judicial process most cumbersome and costly. Also in my view does Clause 33 contradict, overrides, or complement order 40 of the Civil Procedure Rules, 2010 which deals with injunctions?

(viii) Clause 37 part VI overrides the provision of the Limitation Act and other statutes that have a limitation period. This is not possible.

(3) CLAUSES THAT DO NO TAKE INTO ACCOUNT OUR SOCIO-ECONOMIC SITUATION

(i) Clause 38 will not work in this economy unless the parties are of an equal economic standing.

(ii) Clause 38 has no breakdown on costs and is ambiguous and arbitrary.

(iii) Clause 38 does not allow for parties to agree with the conciliator or costs prior to commencement of the conciliation process.

(iv) If the conciliation process fails, parties will be subjected to a double taxation. Hence parties will be required to know what kind of arrangements they will enter to economically.

(4) In my humble view this Act should be limited to commercial matters concerning Bank contracts, buildings contracts, Architects and Engineers as an ADR process for the common man on the street is not a viable option economically.

Yours faithfully,
V. N. OKATA & CO. ADVOCATES

VICTORIA N. SIMIYU OKATA

Comments on the ADR Bill

General Comments

- For ease of readability, please consider defining the term *alternative dispute resolution* as *ADR*. Further, please consider capitalising the defined terms in the Bill so that it is clear when a defined term is used in a clause.
- Clause 4(2) states that disputes subject to arbitration are excluded. In this regard, the definition of the term *alternative dispute resolution* in clause 2(1) should also specifically exclude *disputes subject to arbitration for the purposes of the Bill.* This is because, as further explained below, the term alternative dispute resolution is used interchangeably with mediation and conciliation and it is not clear whether the application is also to arbitration. However, for the purposes of clauses 31, the reference to arbitration may be retained since at the initial point there is no dispute subject to arbitration as there is no arbitration agreement.

Accreditation and Registration of Conciliators and Mediators

- It should be confirmed as to whether these clauses have retrospective application with respect to persons who have already received accreditation and are practising mediators. Clarity to be provided here.
- How will the Committee work with the NCIA in accrediting practioners? The NCIA is the only body that may accredit and register mediators. The NCIA should provide an approved list of training institutions to ensure that a person who has invested in mediation/conciliation training is not denied registration.
- If registration is denied, then the NCIA should also recommend to the person, where appropriate, steps that may be to obtain approval.
- Clause 8(c) to specify the code of conduct(s) applicable, is it the one referenced in clause 10 – if so then there should be a cross reference. Please confirm whether the Centre is the one responsible for issuing a guilty body or whether these are other disciplinary bodies.
- Clause 9 – Please confirm whether the review and accreditation will be by an independent appellate body that did not undertake the initial review within the Centre.

Conciliation and Mediation

- 11(1)(a) is not clear how the matter will *provide for ADR.* Is it where the parties have agreed to ADR. Perhaps consider revising the language.
- 11(1)(b) – consider saying the *law requires that the nature of the dispute be settled.....*
- 11(1)(d) – does this mean with the consent of all the other parties to the group or only one party? Perhaps consider revising the language.
- 11(2)(c) – since there is a definition of alternative dispute resolution clause, consider using the defined term here. Alternatively, consider revising the reference to *of the agreement* with *in the agreement* and including the words *written* before the words *any arrangement.* Also, is this a determination being made by the court. If so, then this should be specified.
- 11(2)(d) – please consider. It may be that the parties tried traditional dispute resolution but did not try mediation. Such mechanisms work differently and some more effective than

others. Perhaps this can be subject to the determination of the court based on specific conditions.

- 11(2)(f) – please consider specifying *disproportionately high to the costs that would be incurred by the parties in a mediation or conciliation.*
- 11(3) – please consider using the defined term and changing the language to *the report*. The clause may be revised to say *the court shall specify the time within which the Report shall be filed by the mediator or conciliator*. However, the definition refers to the report filed at the end of the ADR process – so consider including in the definition of *report* the language *at the end of the alternative dispute resolution process or such time as required by the court under clause 11(3)* .
- 12(1) – is it necessary for there to be a written agreement which can be entered into even after the dispute has commenced.
- 12(2) – consider referring to the defined term. The clause may be re-phrased to say, *A party shall, where there is an alternative dispute resolution clause in a contract or written agreement providing for mediation or conciliation, refer the dispute to mediation or conciliation pursuant to the terms of that contract or written agreement.*
- Clause 12(2) and 12(3) – may be amalgamated for ease of readability and to allow use of defined terms to be used. Clause 12(3) may say *where there is no alternative dispute resolution clause in a contract or written agreement, the parties to the contract or written agreement may refer the matter for determination through conciliation or mediation.*
- Clause 13 – does clause 13(2) still apply even where the parties have chosen to apply the NCIA Mediation Rules for example or provided for the mediation procedure in their contract – eg the contract may say a party has 20 days to respond. The NCIA Rules say 10 days to respond. Consider adding *"..or the period specified in the invitation in accordance with any procedural rules agreed to by the parties or the terms of their contract or their written agreement."*
- Generally, clause 14 should be clear as to whether it is dealing with the parties obligations in mediation/conciliation and arbitration. It is assumed that it is only the former as arbitral disputes are excluded here. In this respect, consider using the terms mediation/conciliation for better clarity.
- Clause 14 – this is written in mandatory terms and appears to apply to all disputes as clause 14(1) is not limited to disputes limited to mediation or conciliation. Further, the term *and* is used which appears to imply through 14(1)(b) that all disputes, even disputes which are subject to arbitration should go through conciliation or mediation. Is 14(1) intended to say, *where the dispute is to be resolved though conciliation or mediation*.....The confusion is also raised through the inter-changeable usage of the terms alternative dispute resolution and mediation/conciliation – it is therefore not clear whether this clause is only referring to mediation/conciliation. In this regard, consider using the terms mediation/conciliation consistently in this clause eg. clause 14(1)(a) to say *take reasonable measures to resolve the dispute through mediation or conciliation before resorting to a judicial process* , clause 14(1)(c) to say *participate in good faith in the mediation or conciliation.*
- The language in clause 14(2)(a) to be consistent with clause 13(b) i.e. *notified the other party of the issues that are in dispute and submitted a request to that party to refer the dispute for determination through conciliation or mediation.*

- Clause 14(2)(b) – conflicts with clause 13(3) – which gives parties the option to reject a request to mediate. Does this mean that if a party rejects the request then they are in breach of clause 14(1)(a)? Note that the conjunctive word *and* is used.
- Clause 14(2)(d) may be redundant in light of the positive steps which are required from a party in (a) and (b), unless this sub-clause moves up so that it appears as the first factor in this clause.
- Clause 14(2)(e) consider using the terms mediation/conciliation throughout as suggested above. This is because *alternative dispute resolution mechanism* encompasses various processes as currently defined whereas this section appears to target mediation and conciliation only and the act excludes arbitration.
- Is clause 14(2)(e) supposed to say *participated in the appointment of the conciliator or mediator* ... it is not clear please revise the language.
- Does clause 15 apply where the court refers the matter to conciliation or mediation?
- Clause 16(2)(h), the words *if an agreement is reached by the parties* should be added to the end of this clause.
- Clause 16(3) – how does this clause relate to cases where the parties have chosen agreed procedural rules or provided for procedural rules in their contract? Clause 18(1)(b) appears to refer to prescribed rules but which rules are these because clause 16(3) gives the conciliator / mediator the freedom to choose his / her *modus operandi.*
- Clause 18(3) – consider having the report prepared before the resignation or revocation.
- Clause 19(1) consider using the terms *conciliation or mediation* throughout in this clause for consistency. In this respect the clause should be amended to read *"...shall not attend the conciliation or mediation...."*.
- Clause 22(4) – the parties should be allowed to waive the confidentiality requirement or agree in writing the circumstances where disclosure will be permissible. So clause 22(5) should also include a reference to *such other circumstance agreed by the parties in writing* – this allows disclosure to the parties advisors or parent companies etc.

Traditional Dispute Resolution

- Clause 27 – instead of the language *acquainted* consider using *is knowledgeable on the customary law*....Further considering the definition of traditional dispute resolver is this clause required considering that a person who is socially accepted as having the relevant skills is knowledgeable on community law. Consider revising as how will the level of competence be measured?
- Clause 27(2) – taking into account the fact that traditional dispute resolvers will have an increased role and may obtain references through the court, then they should also be subject to the same disclosure requirements where there is a conflict of interest
- Clause 30(1) – is it only written settlement agreements that are binding?

Recourse to Court and Recognition and Enforcement of Settlement Agreements

- Clause 31(1) consider revising the language – *An advocate shall, prior to initiating proceedings in any court or relevant tribunal on behalf of that party, advice that party to first consider resolving its dispute with another party or parties through alternative dispute resolution.*

- Does clause 31(1) sufficiently cover disputes which are first heard at the tribunal level before going to court? Consider revising as above.
- Clause 32(1) – for consistency, consider using the language *at the time of initiating proceedings in any court or relevant tribunal*...This clause should also state that that party shall file the certificate together with documents at the applicable registry.
- Clause 35(1) – is it necessary for the settlement to be registered by the Committee first and then registered in Court. In clause 1(a) consider the removal of the word *prepared and* and leave as *filed in Court*.
- Clause 35(3) – where there was a court referral and the settlement agreement was recorded by the court, is it still necessary to make an application to the court that referred the matter as under section 35(1) you already have a judgment.
- Clause 37 – there should not be any agreement to suspend the running of the limitation period – this should be automatic upon the commencement of the ADR processes.

Tabitha Joy Raore

4 August 2021

Gmail

Senate JLAHRC <senatejlahrc@gmail.com>

Fwd: Alternative Dispute Resolution Bill

1 message

Justice and . Legal Affairs Committee <senatejlahrc@parliament.go.ke> 26 July 2021 at 07:39
To: kenyanchuimoses <kenyanchuimoses@gmail.com>, "saidi.unshur" <saidi.unshur@gmail.com>, senatejlahrc <senatejlahrc@gmail.com>

From: J. P <mwendwaj98@gmail.com>
To: senatejlahrc <senatejlahrc@parliament.go.ke>
Date: Saturday, 24 July 2021 6:14 PM EAT
Subject: Fwd: Alternative Dispute Resolution Bill

---------- Forwarded message ---------
From: **J. P mwendwa** <mwendwaj98@gmail.com>
Date: Thu, 22 Jul 2021 at 18:36
Subject: Alternative Dispute Resolution Bill
To: senatejlahrc@parliament.co <senatejlahrc@parliament.co>

My name is John Mwendwa, an advocate. My concern is section 31(a) where an advocate will be punished for not advising the client to first pursue ADR option. On what jurisprudence or school of thought is that based on!? It's not achievable coz you can not prove it.
It's also unconstitutional and against the rights of an advocate.

MEMORANDUM ON THE ALTERNATIVE DISPUTE RESOLUTION BILL, 2021

1. Clauses 28,29,29 and 30 of the Alternate Dispute Resolution Bill should be **deleted in entirety** as it purports to regulate Traditional Justice Systems without taking into consideration the diverse cultures containing their **unique** traditional dispute resolution mechanisms. Different communities have different methods of adoption of alternative Dispute Resolution and ways of resolving issues as such purporting to formalize the traditional dispute resolution mechanisms and register the Dispute Resolvers in basically an affront and violation of the fundamental rights to culture as opined under Article 44 of the Constitution.

2. Part V and particularly clause 31 ,32 ,33 ,34,35 and 36 of the Bill **should be deleted in entirety**. Part V is unconstitutional in the following ways:

    1. Clauses 31,32 ,33 ,34,35 and 36 of the Bill abrogates fundamental rights and Bill of Rights and particularly Article 22 of the Constitution as it seeks to restrict limit access to justice.

    2. Clauses 31 ,32 ,33 ,34 ,35 and 36 of the Bill inhibits legal representation is contravention of Article 49 of the Constitution.

    3. Clauses 31,32,33,34,35 and 36 of the Bill destroys the principle of advocate client confidentiality and violates article 50 of the Constitution. See also section 33 and 34 of the Mediation Bill still pending in Parliament which purports to introduce mandatory mediation and restrict access to justice and offend fundamental constitutional rights.

    4. Clause 31(2) of the Bill should be deleted as it purports to criminalize access to justice by providing for conviction and fine. It violates the advocate client confidentiality and the entire provisions of the Advocates Act.

    5. Part V of the Constitution abrogates and violates the independence of judiciary and purport to place alternative dispute resolution above

judicial system and processes. It inhibits the jurisdiction of courts over disputes. The Bill basically elongates and complicates the resolution of disputes.

3. The **entire** Alternative Dispute Resolution Bill violates and contradicts various statutes including the provisions of Civil Procedure Act, Civil Procedure Rules, Advocates Act, Land Act 2012, Land Registration Act 2012, Arbitration Act 1995, Public Procurement laws, Labour Relations Act, the Small Claims Act, Fair Administration Act etc All these must be amended to give effect to the impugned Bill.

4. Majority of definitions of section 2 of the Bill should be amended to included conciliators and mediators accredited by the Ministry of Labour under the Labour Relations Act and the Judiciary as provided for by section 59 of the Civil Procedure Act.

5. Clauses 40-48 of the Bill should be deleted. It purports to erode the role of the Court Annexed Mediation and the Mediation Committee and further destroy the role of Judiciary in promoting the alternative dispute resolution mechanism.

6. The entire provisions of the Alternative Dispute Resolution Bill is a claw back to the constitutional rights. The Bill seeks to make mediation mandatory as opposed to voluntary nature of alternative dispute resolution mechanism. It seeks to ousts Kenya from the adversarial legal system. It seeks to prevent claimants from filing claims against Government.

7. The Alternative Dispute Resolution Bill offends the structural architecture of the courts. It seeks to slow and reduce the efficacy and efficiency in resolution of commercial disputes by adding another layer or restriction before approaching court. It seeks to elongates the dispute resolution processes and prevent parties from filing civil or contractual claims against the government. The Bill goes against a number of courts decisions including Supreme Court decisions which have interpretated the role of courts in dispute resolution.

8. Kenya is adversarial justice system as such, to make alternative dispute resolution system compulsory will demand that all laws be repealed. The impugned Bill introduces unnecessary restrictions, extraneous registration requirements of mediators, conciliators, resolvers, negotiators, and formalization of processes of all on forms of ADR including interfering with simple traditional justices' systems and negotiations. The Bill interferes with the freedom of contract wherein parties have the freedom to decide the forum where the matter will be referred to in case of a dispute. It forces and restricts parties to ADR.

9. There exists another Bill to wit Mediation Bill which is still pending in Parliament and it is in the interest of justice that the Mediation Bill and the Alternative Dispute Resolution Bill be refined. The Mediation Bill 2020 also contains word by word the illegal provisions in the ADR Bill highlighted above.

10. In conclusion, the Alternative Dispute Resolution Bill ought to be relooked at in light of severe violation of the constitution, the independence of court system, the role of courts and judicial system and the contractual freedom of parties. The Bill flagrantly contradicts numerous statutory laws as enumerated above. It fails to encompass other forms of traditional systems of ADR. It seeks to introduce unnecessary conditions in our unique traditional or cultural system of resolution of disputes.

11. The word '**ALTERNATIVE** Dispute Resolution Mechanism does not make it **COMPULSORY.** The Bill itself inhibit access to justice and violate Article 159(2) of the Constitution. Promotion of ADR cannot justify violation of rights. Independent legal practice promotes fundamental rights including commercial rights, rule of law and democracy. The Bill purports to restrict those rights.

Submitted by **WILBERFORCE ODHIAMBO AKELLO**
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Senate JLAHRC <senatejlahrc@gmail.com>

Fwd: Alternative Dispute Resolution Bill

1 message

Justice and . Legal Affairs Committee <senatejlahrc@parliament.go.ke> 26 July 2021 at 07:33
To: kenyanchuimoses <kenyanchuimoses@gmail.com>, "saidi.unshur" <saidi.unshur@gmail.com>, senatejlahrc <senatejlahrc@gmail.com>

From: Anna <akonuche@yahoo.com>
To: csenate <csenate@parliament.go.ke>; senatejlahrc <senatejlahrc@parliament.go.ke>
Date: Thursday, 22 July 2021 3:00 PM EAT
Subject: Alternative Dispute Resolution Bill

This Bill should not see the light of day for the following reasons;

1. It is unconstitutional to force all disputants to adopt a specific way of dispute settlement
2. It is unconstitutional to force advocates to advice their clients in a certain manner
3. Not all disputes can be solved through ADR
4. The creation of the so called conciliators is a concept that has not been well thought out
5. The requirement of resorting to customary law does not make sense where we do not have a codified law known as customary law. Whose law is this?
6. This law by design will render lawyers jobless and irrelevant

Anna Konuche

Be faithful in small things for it is in them that your strength lies - Mother Theresa ☺

THE SENATE

MATRIX

THE ALTERNATIVE DISPUTE RESOLUTION BILL, 2021

CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
Long Title	Chartered Institute of Arbitrator – Kenya Branch (CIArd)	❖ Amend the long title to read— AN ACT of Parliament to provide for the settlement and/or resolution of disputes by conciliation, mediation and traditional dispute resolution mechanisms; to set out the guiding principles applicable; and for connected purposes	✓ Considering that other forms of disputes other than civil disputes e.g. family, succession and constitutional matters are amenable to and can be resolved using mediation. ✓ Mediation is not just to achieve settlement (which sometime may involve/imply compromise/dealing with the dispute at hand) but also may relate to resolution of conflict by addressing underlying issue to avoid recurrence in future.	
	Association of Professional Societies in east	❖ Amend to remove reference to – i. 'civil'; and	✓ So as to enhance usage of conciliation and mediation in resolving other disputes.	

	Africa (APSEA)	ii. traditional dispute resolution.	✓ They are so diverse to be regulated and are currently working well in their informal status.	
	Mombasa Law Society (MLS)	❖ Should include that the Act is for the provisions as set out where the parties to the dispute agree to the mechanisms set out in the Bill. As it were, the same makes the entire process of alternative dispute resolution compulsory as opposed to voluntary;	✓	
	Federation of Women Lawyers (FIDA – Kenya)	❖ Amended to incorporate other ADR mechanisms. AN ACT of Parliament to provide for the settlement of civil and criminal disputes by diversion, conciliation, mediation, negotiation and arbitration.	✓ The Bill does not recognize conclusively other mechanisms of ADR such as negotiation, diversion and arbitration ✓ The title of the Bill which spells out its purpose and scope does not incorporate ADR in prosecution of criminal cases. ✓ It is noteworthy that the Directorate of Public Prosecution has incorporated alternatives to criminal prosecution through the National Prosecution Policy and the Diversion Policy.	
	The Legal Resources Foundation Trust (LRF)	❖ Amend to include that the Bill seeks to give effect to Article 159 (2) (c) of the Constitution, and include arbitration as a mechanism of alternative dispute resolution.	✓ It narrows the scope of alternative dispute resolution mechanisms contemplated under Article 159 (2)(c) of the Constitution by excluding arbitration. ✓ The Arbitration Act is yet to be appraised against the Constitution 2010.	

	The Women in ADR (WADR)	❖ Specification of disputes referred to as Civil disputes.	✓ Generality in application of Bill to Civil Disputes.	
	Institute of Chartered Mediators and Conciliators (ICMC)	❖ The Bill has neglected other forms of alternative dispute resolution like negotiation and arbitration.	✓ If the Bill seeks to address ADR it must take up arbitration under its umbrella to avoid doubt and multiplicity of legislation likely to cause chaos and confusion in practice.	
2	Kenya National Commission on Human Rights (KNCHR)	❖ Amend the definition of 'mediator', by deleting 'including employees and persons employed by that person. ❖ Amend definition of 'alternative dispute resolution' to 'alternative dispute resolution includes reconciliation, mediation, arbitration and traditional dispute resolution mechanism. ❖ Amend the definition of 'community' to include language, ethnicity, work, education among others. ❖ Amend definition of 'customary law' to be broad due to its evolving nature to include rules of custom(s) that a community in a given locality acknowledge and view as enforceable. ❖ Amend definition of 'conciliator'	✓ This provision contradicts the content of the Bill to the extent that mediators are required to be registered. ✓ To align it with Article 159 (2) of the Constitution. ✓ To align with Articles 249 (1) (a)	

		to include chapter 15 Constitutional Commissions and Independent Offices which are mandated to conduct ADR. ❖ Amend definition of 'party' to include groups, community and non-state organs.	(c) and Article 252 (1) (b) of the Constitution. ✓ These entities are critical stakeholders and parties to a dispute.	

	Nairobi Centre for International Arbitration (NCIA)	❖ Remove the requirement of registration and accreditation in the definition of the word 'mediator'.	✓ As a non-judicial process mediation is intended to be voluntary giving parties' choice of a mediator. ✓ The definition of mediator by the Bill might be an impediment for non-judicial mediation. ✓ The creation of a new definition for an existing term will create confusion in application of the Act.	
		❖ The definition of the word 'report' is superfluous if it is intended to be separate from the Court Annexed Mediation. However, if the intention is to complement the Court Annexed Mediation, then proposals can be made to bolster that process under the Civil Procedure Act and Rules.	✓ It is unclear whether the Bill is intended to complement Court Annexed Mediation or operate outside of the court. ✓ The purpose the report will serve and to whom it will be submitted is unclear. ✓ The need for a report presupposes literacy and sophistication of parties and therefore does not cater for all disputes that can be addressed through mediation. ✓ The expectation should be an agreement that reflects the parties' intentions for enforceability, if need be.	
	FIDA-Kenya	❖ Amend the definition of the word "alternative dispute resolution" to include diversion and arbitration.	✓ The term Alternative Dispute Resolutions refers to and incorporates all forms of resolution of disputes outside the court system which include negotiation, mediation, conciliation, arbitration as well as inquiry.	

			✓ Article 159 of the Constitution enjoins courts and judicial authorities in the exercise of judicial authority aimed at promoting all forms of alternative dispute resolution that include mediation, reconciliation, arbitration as well as traditional dispute resolution mechanisms. ✓ The Diversion Policy was introduced in 2015 by the National Prosecution Policy. The proposed alternatives to prosecution include plea negations and agreement, diversion and alternative and traditional dispute mechanisms. ✓ It also contemplates waiver of prosecution, discontinuing proceeding conditionally or unconditional or diverting cases from the formal justice considering the rights of victims and suspects. ✓ It is encouraging especially where matters relate to children in conflict with the law on the basis of the principle of the best interest of the child and need to rehabilitate such children.	
	MLS	❖ The definition of 'alternative dispute resolution' should refer to the constitutionally compliant processes and methods and should be confined to the provisions of	✓	

		the Constitution.		
	LRF	❖ Amend the definition of "alternative dispute resolution clause" to include provisions on Arbitration in the Bill. ❖ Amend the definition of "customary law" to read – "customary law" means rules that a group of people of a given locality or interest view as enforceable ❖ Revise the definition of the terms "conciliator", "mediator" and "traditional dispute resolver" to take into account the constitutional provisions for Chapter 15 commissions and institution envisaged under Article 113, 189(4) CoK.	✓ Arbitration is often included in contracts as a first stop in resolving any dispute arising from fulfillment or nonfulfillment of obligations therein. It follows then that arbitration cannot be excluded in an ADR Bill. ✓ This definition as provided in the Bill narrows meaning of customary law in view of dynamic human relations. ✓ The constitution in Article 67(2)(f), 113, 189(4) and 252 (1)(b) make provision for constitutional commissions to use conciliation, mediation and traditional dispute resolution mechanisms. These institutions will therefore not require accreditation or registration. Equally commissioners and staff have an obligation to use the alternative dispute resolution mechanisms in their work.	
	WADR	❖ Align the definition of the word "mediation" with existing statutory provision.	✓ It is in conflict with the current definition under the Civil Procedure Act: "mediation" means an informal and	

			non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto.	
		❖ The definition of the word "conciliation" requires alignment with the Labour Relations Act. ❖ To require a report offends the confidential nature of mediation which only requires that a settlement agreement be drafted by parties.	✓ Inclusion of the need of the report presupposes formality, literacy and sophistication of parties and therefore does not cater to the all disputes that can be addressed through mediation.	
	National Steering Committee for the Implementation of the Alternative Justice Systems Policy (NaSCI-AJS)	❖ The definitions of a conciliator and a mediator should factor in the constitutional powers of commissions and independent office holders. ❖ Redraft the definition of 'customary law' as follows- "customary law" means rules of custom that a community of a given locality view as enforceable	✓ To align with Article 252 of the Constitution. ✓ The definitions in the Bill overlooks negotiation as well as the substantive definition of conciliation, mediation and negotiation which are not limited to accreditation by the committee under the CPA. ✓ The Constitution defines an indigenous community as one that is marginalized and has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy.	

			✓ It should be noted that many of the communities that use Alternative Justice Systems (ADR) do not fall squarely within the bracket of indigeneity set by the Constitution. For example, we have the Luo Council of Elders, Njuri Ncheke Council of Elders who have a strong following of people who are neither marginalized nor hunters and gatherers.	
	Law Society of Kenya – Nairobi Branch (LSK - Nairobi Branch)	❖ Delete 'employees and persons employed by that person' in the definition of conciliator and mediator. ❖ Provide definitions for both a mediator and accredited mediator to make the mediation processes inclusive of even community-based mediators such as chiefs, Nyumba Kumi and elders. ❖ Delete definition of "Traditional Dispute Resolver "as the existing definition excludes community-based resolvers who may not use traditional customs. ❖ Definition of all forms of ADR be given as the Act covers all of them.	✓ To ensure liability remains with the person assigned the role (actual mediator or conciliator).	

		❖ The definition of Alternative Dispute Resolution clause creates confusion given that the proposed legislation covers a wide range of ADR mechanisms.		
3	KNCHR	❖ Amend to include the objective of sustainable development to enhance social justice transformation in the community and the society.	✓	
	LRF	❖ The Bill should state that it seeks to give effect to Article 159(2)(c) of the Constitution, and include arbitration as a mechanism of alternative dispute resolution. ❖ Draft provisions in the objects on the test to be applied with a particular focus on voluntariness of parties and public interest.	✓ It narrows the scope of alternative dispute resolution mechanisms contemplated under Article 159 (2)(c) of the Constitution by excluding arbitration. ✓ The Arbitration Act is yet to be appraised against the Constitution 2010.	
	NaSCI-AJS	❖ Include the following new objective – "give effect to article 10(2) of the Constitution"	✓ This will ensure the mainstreaming of the important national values and principles of governance, including human dignity, equity, social justice, inclusiveness, equality, human rights, nondiscrimination and protection of the marginalized, in all alternative dispute resolution frameworks in place.	
4	KNCHR	❖ Amend to include human rights disputes and environmental or labour, safety and health issues.	✓ All disputes have an element of human rights and the Bill should therefore cover human rights disputes. Environmental and labour	

			disputes are best resolved by alternative justice system mechanisms which have restorative and sustainable principles. In Northern Kenya, we have the Modogashe Declaration which was historically used as an AJS agreement to resolve land, water, boundary and pasture disputes where the common law courts had failed to bring peace, cohesion and development in the region.	
	NCIA	❖ As we develop Kenya as viable destination for dispute resolution a distinction should be made in the application of the Bill between domestic disputes and international disputes. The intention being to curve out international disputes from the application of the Bill. international disputes will be more adequately covered after due consideration of convention and practices to which Kenya is signatory or reflective of prevailing international best practices.	✓ If the Bill encompasses mediation in its broad sense it will be useful to incorporate elements in the emerging international trends/best practices that promote Kenya as a viable destination for dispute settlement.	
	Law Society of Kenya (LSK)	❖ Clause 4(2) should exclude the supervisory jurisdiction of the High Court.		
	FIDA-Kenya	❖ Amended to extend the scope of application of the Act to criminal	✓ The Diversion Policy was introduced in 2015 by the National	

		disputes where the ODPP or any other person exercising the delegated powers makes a decision on diversion of a matter.	Prosecution Policy. The proposed alternatives to prosecution include plea negations and agreement, diversion and alternative and traditional dispute mechanisms. ✓ It also contemplates waiver of prosecution, discontinuing proceeding conditionally or unconditional or diverting cases from the formal justice considering the rights of victims and suspects. ✓ It is encouraging especially where matters relate to children in conflict with the law on the basis of the principle of the best interest of the child and need to rehabilitate such children.	
	Registrar - Mediation Accreditation Committee, Judiciary.	❖ The scope and application of the Act should be expanded beyond Civil Disputes.	✓ The Court Annexed Mediation Program currently applies to Environment and Land, Employment and Labour, Children, and Divorce Disputes.	
	LRF	❖ Amend 4(2)(e) and (f) to provide instances where ADR may be used in the interest of justice. The judiciary has obligation to promote ADR in all disputes.	✓ Disputes of this nature do not necessarily invite long drawn litigation as parties may in due course determine that ADR is the best route to a resolution. ✓ The reason of the Bill itself is to ensure that there is no violation of the access to justice right institutionalized under Article 48 of the Constitution.	

	WADR	❖ The definition of Civil Disputes to be expounded and clarified	✓ This provision offends provisions of the following legislations which define disputes; i. Inter-Governmental Relations Act; ii. the Governments Proceedings Act; and iii. The Civil Procedure Act and Rules ✓ Further, generality of the Act creates an assumption that trade related disputes under the AfCFTA can be resolved under the ACT through mediation/conciliation instead of Good Offices mechanism.	
	Council of Governors.	❖ Insert the following paragraph in 4(2) – (g) disputes under the Intergovernmental Relations Act	✓ Article 189(3) of the Constitution and section 30 of the Intergovernmental Relations Act provides for a framework for the alternative dispute resolution between governments. Further, regulations to the Intergovernmental Relations Act are ready and are awaiting approval which further make provisions on the dispute resolution process between governments.	
	ICMC	❖ Expand the scope of the Bill to criminal and quasi-criminal cases such as in the cases of assault, trespass or destruction of private property.	✓ This clause limits the scope of application to civil matters yet there are instances where ADR is suitable in criminal and quasi-criminal cases.	

	NaSCI-AJS	❖ Reframed clause 4(2)(e) and (f) as – "a claim processing causing a violation of public interest involving..." i.e. a violation of the bill of rights. Otherwise, a dispute is caused by a violation of rights.	✓ Clause 4(2)(e) and (f) limits possibilities to fast-track resource and land conflicts that will have an aspect of violated rights or of safety, environmental and health public interests. The reason of the bill itself is to ensure that there is no violation of the access to justice right institutionalized under Article 48 of the Constitution. Hence to remove such claims under the Bill's mandate is to remove the very purpose of its enactment.	
	LSK - Nairobi Branch	❖ In clause 4(1) delete the word 'civil'. ❖ Delete clause 4(2)(b). ❖ Include definition of a 'dispute'.	✓ ADR should not be exclusive to Civil disputes since some criminal matters can be settled through ADR ✓ These tribunals have similar jurisdiction to the Magistrates Court and thus ADR should be applicable to those disputes. Cases should be screened on other bases in line with the provisions in the Bill. ✓	
	Victoria N. Nasimiyu, Advocate	❖ Clauses 4 and 11 should include cases initiated by advocates on pro bono basis and matters where the prospective clients are not capable of paying sums upfront as clause 38 contemplates that parties have the capability to pay for the process.	✓	

		❖ The Act should be limited to commercial matters concerning banking contracts, building contracts, architects and engineers as ADR process for the common man on the street is not a viable option economically.		
5	KNCHR	❖ Add the principles: That justice shall be done to all irrespective of status. That the traditional dispute resolution mechanism shall not be used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality. ❖ 5(f) of the Bill should provide for the criteria/threshold for the competency of a traditional dispute resolver. Alternatively, traditional dispute resolution practitioners should be exempt from the provisions of the Bills generally. More specifically on the requirements for Registrations in appreciation of the lived realities in communities that resort to them as the only means to access justice.	✓ To align the clause with Article 159 (2) (a) of the Constitution. ✓ To align the clause with Article 159 (2) (a) of the Constitution. ✓ To cure any conflicting interpretations of the qualifications of a traditional dispute resolver.	

	FIDA-Kenya	❖ Amended to include compliance with the Constitution and the bill of rights in decisions made, the principle of equality of the parties during the process, and the principle of accessibility and flexibility.	✓ Art. 2(4) of the Constitution provides that any law including customary law that is inconsistent with the Constitution is void to the extent of the its inconsistency and any act or omission in contravention of the Constitution is invalid. ✓ In all the ADR mechanisms, the independent third party is required to treat all parties to the dispute as equal during the process of resolution of the dispute. ✓ The state is obligated to ensure access to justice. This means that the ADR mechanism adopted or used in civil and criminal cases should be easily accessible to the parties at minimal costs.	
	MLS	❖ Clause 5(a) is at variance with the clause 31. The submission to the process of alternative dispute resolution is in the first instance made voluntary and later on made compulsory. The same ought to be a voluntary process by the parties to a dispute entirely.		
	ICMC	❖ Amend to include a proviso that parties are at liberty to deploy multiple ADR mechanisms provided that not more than one method may be used at any given time. The principle of graduating	✓ The clause has not provided proper qualification which implies a possibility of the same dispute being instituted in multiple ADR for a concurrently thereby having the same effect as the principle of	

		from a minor method escalating into a court matter is desirable.	res sub judice.	
	LSK - Nairobi Branch	❖ In 5(a) delete that 'a party may withdraw from ADR,'.	✓ Since the entire process is voluntary, the parties are free to withdraw therefrom at any time. Expressly allowing the parties to withdraw will make the process prone to abuse and misuse.	
		❖ In 5(c) delete 'except in the case of traditional dispute resolution'.	✓ There should not be exception on confidentiality for whichever form of ADR.	
		❖ In 5(d) delete 'in the shortest time practicable' 'and replace with 'within 60 days.'	✓ to give more specific timelines for certainty.	
		❖ In 5(f) Delete 'competent' and replace with 'accredited'.	✓ Since the competence cannot be ascertained especially for traditional dispute resolvers	
		❖ In 5(g) Delete entire clause	✓ It will be prone to abuse.	
6	CIArb	❖ Amend clause 6 (1) to differentiate between the centres approved for training, accreditation and registration.	✓ There is need to recognize other centres that are currently providing accreditation such as the Chartered Institute of Arbitrators	
	KNCHR	❖ Review the Bill to exclude Constitutional Commissions and Independent Offices from the accreditation requirement including the application for accreditation (as ADR practitioners) and revocation of	✓ Provides for accreditation of ADR Practitioners to be conducted by the Alternative Dispute Resolution Committee. This does not factor the powers of Constitutional Commissions and Independent Office (CCIOs) holders under	

		accreditation under Paras 8 and 10 of the Bill.	Article 252 (2) (b) of the Constitution. The said Article empowers the CCIOs to conduct conciliation, mediation and negotiations all of which are ADR mechanism.	
	NCIA	❖ Mandatory registration should not be imposed.	✓ The utility value of mandatory registration ought to be assessed before adaption. ✓ Mediation happens everywhere in everyday life and only a small percentage is formalised. Comparable jurisdictions such as Ireland, Canada and Australia have a hybrid model of national norms and principles and decentralised practice formations to enhance quality and promote free enterprise. These decentralised centres train, employ codes of conduct and maintain panels of mediators with flexibility to accommodate the features of mediation in a field of practice. Incentives and disincentives are applied through self-regulation along the broad national principles. ✓ It is counter-intuitive to impose mandatory accreditation or registration for mediators operating within the format of guilds, familial affinity, or the ad hoc commercial setting and similar formations. Self-	

			recognition norms exist in these formations without the formal registration regime. ✓ Section further creates duplicity of roles in reference to Section 13 (1) of the Mediation Bill, 2020 before the National Assembly.	
	LSK	❖ The change of role of the Nairobi Centre for International Arbitration to the Nairobi Centre for Alternative Dispute Resolution is fundamental and needs to be rationalized. ❖ It is vital that the qualifications are set out in the Act. This should not be delegated to a Centre to arbitrarily set. ❖ The complex and technical disputes ought to be referred to conciliators with the requisite technical expertise.		
	Registrar - Mediation Accreditation Committee, Judiciary.	❖ Considering the provisions for the Nairobi Centre for International Arbitration Act that establishes the Centre, the proposal by the Bill to have the Centre be the Central Body that accredits ADR practitioners is inappropriate and likely to cause confusion amongst the different ADR practitioners i.e mediators, arbitrators, conciliators,	✓	

		and traditional dispute resolution practitioners. It is proposed that a new centre be created for that purpose.		
	WADR	❖ The role of Accreditation of professional mediators can be ascribed to NCIA, however registration of mediators should not be mandatory. ❖ Further, the registration fee to be charged should be recommended if adopted to ensure affordability.	✓ The Bill does not take into account Registration processes of trained mediators by institutions other than the Nairobi Centre for International Arbitration. (NCIA) ✓ The Bill should have reviewed Sec. 5 of the NCIA Act to align the provisions for registration and accreditation. ✓ The Bill fails to take into consideration the operational capacity of NCIA in registration and accreditation of Mediators in Kenya. ✓ The Bill reduces fair competition and diversity in training of mediators by creating NCIA as a sole registration and accreditation institution. ✓ The provisions of accreditation and registration by the Centre conflict with the statutory mandate of MAC under the Civil Procedure Act which the bill has also failed to align. ✓ This provision does not take into account the committee of conciliators appointed by the Ministry of Labour.	

			✓ TDRMs are not within the objective or mandate of the NCIA and should not be subjected to formalisation through registration by an institution.	
	LSK - Nairobi Branch	❖ In 6(1) add 'accredited and registered as a conciliator or mediator by the centre and the Mediation Accreditation Committee,'.	✓ To avoid conflict with the already existing accreditation structures.	
	Tabitha Joy Raore	❖ Clarify whether the clause applies retrospectively with respect to persons who have already received accreditation and are practicing mediators.	✓	
7	CIArb	❖ Prescribe form and fees in the rules.	✓ The forms and fees must be provided in the rules that the Attorney General in consultation with the Centre will formulate. In order for this section to become effective and operational, the wording of section 39 will have to change to make it mandatory for the Attorney General to formulate the Rules within a specified period. If this is not done, there will be no rules guiding accreditation and registration thus bringing about challenges when it comes to how and who should be accredited and registered as a mediator or a conciliator	

	LRF	❖ Redraft the section to exclude advocates and persons working in institutions constitutional commissions already mandated to apply ADR by the constitution and statute.	✓ This provision create an additional layer for professional certification for Advocates whose nature of practice is that they have to apply alternative dispute resolution through "demand letters before instituting proceedings". ✓ The centre may very likely become a gate keeping entity as opposed to facilitating ADR	
8	CIArb	❖ Amend clause 8(c) to read— 8(c) is found to be in breach of the code of conduct.	✓ The body given mandate to deal with issues of breach is not a court of law or quasi- judicial tribunal and the word guilty should be deleted from the Bill.	
	KNCHR	❖ Insert, if the mediator or conciliator contravenes chapter six of the Constitution The revocation must be in writing	✓ This provides a framework to enhance accountability and transparency in the process.	
	Tabitha Joy Raore	❖ Clause 8(c) to specify whether the code of conduct applicable is the one referenced in clause 10. If so then there should be a cross reference.	✓	
9	CIArb	❖ Amend clause 9(1) and (2) to increase the number of days from seven to thirty. ❖ Amend to include provision on	✓ Seven (7) days is too short. Some conciliators and mediators will be lay people needing representation, without a High Court near them and this may be a fetter of the right of access to justice	

		finality regarding court intervention. 9 (3): An appeal to the High Court under Section 9 (2) shall be final.		
	KNCHR	❖ Insert a new subsection after clause 9(2) to provide that once the appeal has been finalized and the aggrieved party has been cleared, he or she can apply to the Centre to be registered/ reinstated		
	Registrar - Mediation Accreditation Committee, Judiciary.	❖ Appeal under 9(2) the appeal be made before a Magistrate's Court.		
	WADR	❖ The provisions on appeal should be reviewed and aligned with the civil procedure Act and Rules and international best practice as recommended under the Singapore Convention.		
10	CIArb	❖ Amend clause 10(1) to provide the timelines within which the Centre shall publish a code of conduct— 10. (1): The Centre shall publish a code of conduct for conciliators and mediators **within Ninety (90) days of the commencement of this Act.**	✓ The Bill has not provided for timelines.	

	LSK	❖ Dispute resolution is a sector inherently vulnerable to corruption, conflict of interest, bias, etc. A code of conduct is not sufficient to mandate disciplinary action. This must be set out in the law with clear powers vested in an independent disciplining body.		
		❖	✓	
11	CIArb	❖ Amend clause 11(3) to provide the timelines within which a report shall be filed with the court. 11. (3) A report on the conciliation or mediation proceedings should be filed with the court within Fourteen Days of conclusion of the proceedings.	✓ The Act should prescribe the time period within which a report on the referral shall be filed with the court.	
	KNCHR	❖ Delete the exclusion on environmental matters as scope for ADR Define what amounts to delay that can exclude that matter from being handled by the mediators.	✓ There are existing issues involving the government on environmental justice and climate change, hence the limitation on the scope is not justified. ✓ Additionally, all disputes have a human rights perspective. The exclusion of cases pertaining to human rights is not justified.	
	FIDA-Kenya	❖ Amended the marginal note to read –	✓ The proposed Bill recognizes 3 forms/methodologies of referral to	

		Referral of cases to court annexed conciliation or mediation processes.	conciliation and or mediation. ✓ Under Section 11 reference is made to conciliation and/or mediation through the court process while Section 12(1) refers to parties' voluntary initiative to approach conciliation/mediation mechanisms as a form of resolving their dispute while Section 12(2) and (3) refers to referral of parties to a conciliation/ mediation mechanism arising from an agreement entered into by both parties.	
	LSK - Nairobi Branch	❖ In 11(1), (2) and (2)(a) add a 'court / tribunal'. ❖ In 11(2)(b) change of wording to 'the dispute is incapable of resolution through conciliation or mediation,' ❖ Delete 11(2)(d), (e), (f), (g), (h) and (i).	✓ ✓ To create avenues for more cases to be referred to ADR and reduce backlogs in courts and tribunals. ✓ They are too broad. Instead, redraft 11(1)(a), (b) and (c) to give the judicial officer discretion to make the decision.	
	Victoria N. Nasimiyu,	❖ The court has a process where the courts refer the matter to mediation through the Court Annexed Mediation. This might	✓	

	Advocate	lead to duplication of process which may result in delays in finalisation of a matter.		
	Tabitha Joy Raore	❖ Consider revising 11(3) to read – The court shall specify the time within which the Report shall be filed by the mediator or conciliator.	✓ The definition refers to the report filed at the end of the ADR process	
12	CIArb	❖ Clause 12(3) is not clear as to whom the dispute is being submitted to and in what form or format.		
	FIDA-Kenya	❖ Amended clause 12(3) to require that the consent to submit to conciliation or mediation should be reduced in writing.	✓ This consent should be reduced into writing since it is essential to ascertain the autonomy and equality of parties during the conciliation and mediation process. It may also be easily enforceable as the party autonomy and voluntariness is essential in ADR.	
13	LSK - Nairobi Branch	❖ In 13(2) delete 'period specified in the invitation' and retain 7 days for certainty of duration.	✓	
	Tabitha Joy Raore	❖ Consider adding – "... or the period specified in the invitation in accordance with any procedural rules agreed to by the parties or the terms of their contract or their written	✓	

		agreement."		
14	KNCHR	❖ Amend clause 14(1) by replacing the word 'shall' appearing after 'dispute' with the word 'may'.	✓ Mediation is a voluntary process that the parties, if they so wish, may choose to engage in. The Bill should clearly state that mediation is not a mandatory exercise and a party may opt to engage the courts directly.	
	LSK	❖ The clause is mandatory and defeats the purpose of ADR and further goes against the dictates of Article 159. Any party should be able to approach the Court without restrictions.		
	LSK - Nairobi Branch	❖ In 14(2)(c) delete 'documents,'.	✓ This is covered by 'relevant information;' and to avoid overformalizing the processes. There needs to be a distinction between the court process and the ADR process.	
	Victoria N. Nasimiyu, Advocate	❖ The clause is mandatory and defeats the purpose of ADR and further goes against the dictates of Article 159 of the Constitution. Any party should be able to approach the Court without	✓	

		restrictions.		
	Tabitha Joy Raore	❖ Consider using the terms mediation/conciliation consistently in this clause. ❖ Consider revising clause 14(2)(e)(i) to read – (i) participated in the appointment of the conciliator or mediator.	✓ The clause is written in mandatory terms and appears to apply to all disputes as clause 14(1) is not limited to disputes limited to mediation or conciliation. It is therefore not clear whether this clause is only referring to mediation/conciliation. ✓ For clarity.	
15	CIArb	❖ In clause 15(3) and (4), there should be one mediator or conciliator only. ❖ Prescribe the mode of appointment and appointing authority of conciliators and mediators.	✓ Having two mediators and conciliators may poses a risk for bias in handling the process.	
	LSK - Nairobi Branch	❖ In 15(1) add subsection that for Court Annexed Mediation, the Mediation Registrar to appoint the dispute resolver.	✓	

	FIDA-Kenya	❖ Amended to include the requirement for the mediator or conciliator to be guided by the principles as stipulated in clause 5, as well as the requirement of the mediator or conciliator to treat both the parties equally during the proceedings.	✓ This inclusion is necessary to ensure that the mediator or conciliator facilitates the mechanism in the proper manner and that the mediator or conciliator is bound by the principles of the respective mechanism. It also holds the mediator or conciliator to a specified standard. ✓ The requirement to treat both parties equally should be included as party equality is a foundational requirement of ADR mechanisms. This addition would also ensure that the mediator or conciliator carries out his actions to a required standard.	
16	LSK - Nairobi Branch	❖ In 16(2)(b) delete 'provide a written statement' and replace with 'provide information', and delete 'at least one day before', and replace with 'shall at the commencement of the ADR process,'. ❖ In 16(2)(h) delete the word 'authenticate' and replace with 'ensure parties execute'.	✓ To avoid overformalizing the process. ✓ To avoid ambiguity.	

		Additionally, the term 'may' rather than 'shall' is preferred since in certain instances parties or representative of parties prepare the agreement and present it for authentication and execution. ❖ In 16(3)(b) delete entire clause.	✓ Since mediation does not always lead to a settlement	
	Tabitha Joy Raore	❖ In clause 16(2)(h), the words "if an agreement is reached by the parties" should be added at the end of this clause.	✓	
17	KNCHR	❖ Amend by merging 17(1) and (2) so as to read: 17. (1) A mediator appointed to facilitate mediation process shall before accepting the appointment and during the mediation process, disclose to the parties any circumstance which may affect — (a) impartiality of the conciliator or mediator; or (b) the conduct of the conciliation or mediation process. (2) The parties to conciliation or	✓ Merging is necessary for coherence and to avoid repetition.	

		mediation process may substitute a conciliator or mediator who makes a disclosure under subsection (1).		
18	KNCHR	❖ Amend to clause 18(2) to read: 18(2) A mediator appointed to facilitate mediation may resign upon giving prior notice to the parties.	✓ It is prudent for the mediator to give notice if he wishes to resign in order for the parties to make appropriate alternative arrangements.	
	Tabitha Joy Raore	❖ In clause 18(3) consider having the report prepared before the resignation or revocation.	✓	
19	KNCHR	❖ Amend to remove the requirement for consent by the other party	✓ Fair trial and natural justice requirements prefer discretion on a party to choose in what manner that party adduces evidence.	
	MLS	❖ Experts or other person representing a party in alternative dispute resolution should be led by an advocate whose conduct is prescribed by law for the safeguard of the client.	✓ While the duties and responsibilities of an advocate are well set out in the Advocate's Act, there needs to be clear provisions on the duties of the expert or such other person as the party may consider appropriate to represent him or her primarily because a party may be reliant on their advice in the dispute.	

	NaSCI-AJS	❖ Clause 19(4) limits a party's request for expert witnesses to the other party's consent.	✓ It is part of fair administrative rules as to how a party chooses to present their evidence.	
20	KNCHR	❖ Insert virtual/online sessions	✓ Recognizing the lessons learnt amidst Covid-19, it is important to have a provision on virtual or online meetings where appropriate	
	LSK - Nairobi Branch	❖ Make express provision allowing for virtual proceedings.	✓	
21	LSK - Nairobi Branch	❖ In 21(1) replace 'statement of issues,' with 'case summary', delete 'period when such parties may agree,' and retain 7 days, and replace 'party shall' with 'party may'. ❖ 21(2) be deleted.	✓ To avoid over-formalizing the process and making it appear complex for parties; ✓ To ensure certainty regarding timelines, and ✓ To give discretion to mediator/conciliator to decide if it is important. ✓ It makes mediator seem to have a position in the case rather than being impartial. It presupposes that the mediator may be the one making the decision. It leans towards arbitration rather than	

			mediation and conciliation.	
22	KNCHR	❖ The entire clause introduces an adversarial nature of dispute resolution.	✓ The intention of ADR is simplification of the process without linages to the court adversarial process. This provision will deter members of the public from seeking justice.	
23	CIArb	❖ Amend clause 23 to provide for consequences of failure to register a settlement agreement. 23(7) Failure to register the settlement agreement under (6) will render the settlement agreement unenforceable in court in accordance with Section 35 (3).		
	ICMC	❖ Delete the word "Committee" appearing in 23(6) and replace it with "Court".	✓ The only institution in Kenya with the powers to enforce a settlement agreement is the Court.	
	LSK - Nairobi Branch	❖ 23(1) is in conflict with roles of mediator. A conciliator may in some cases formulate terms of a possible settlement but a mediator does not formulate terms. ❖ In 23(2), replace 'shall' with 'may'. ❖ In 23(5) delete 'authenticate' and	✓ ✓ To give room to situations where one of the parties representatives prepares the settlement.	

		replace with 'ensure parties execute'. ❖ In 23(6) delete 'committee' and replace with 'court'. ❖ Be cognizant of virtual proceeding where parties do not physically meet mediator/conciliator to Execute	✓ To avoid ambiguity. ✓	
24	LSK - Nairobi Branch	❖ It should be noted that sometimes there is a partial settlement or no settlement at all.	✓	
25	LSK	❖ Clause 25(a) poses an outright conflict of interest and an abuse of the position since the ADR practitioner will be privy to confidential and potentially prejudicial information pertaining to the non- client.		
	MLS	❖ Clause 25(a) ought to be expressly provided that a conflict of interest would arise where a conciliator or mediator acts as an arbitrator, representative or advocate of a party in judicial proceedings in respect of a dispute he/she facilitated.		
26	CIArb	❖ Amend clause 26(1) to read— 26 (1) A conciliator or mediator shall not be liable for any act or omission in the performance of his or her role under this Act unless		

		the conciliator or mediator is proven to have acted fraudulently, negligently or in bad faith. ❖ Insert the following new subclause – 26 (2): Subsection (1) shall apply to a servant or agent of a conciliator or mediator in respect of the discharge or purported discharge by such a servant or agent, with due authority and in good faith, of the functions of the conciliator or mediator.		
27	LRF	❖ Delete reference to registration of traditional dispute resolvers in clause 27(3).	✓ The provision attempts to centralize traditional dispute resolution practitioners is contrary to Article 1 of the Constitution which protects exercise of undelegated power to resolve disputes in enjoyment of rights protected under Article 44.	
	WADT	❖ This provision does not take into account what constitutes customary knowledge; or what will be used to measure competence in customary laws and	✓	

		practices.		
	Commission on Administrative Justice (CAJ)	❖ The requirement that the NCIA should prepare and maintain a list of traditional dispute resolvers as far as practicable is not practicable.	✓ Identification of traditional dispute resolvers may be difficult since the most respected groups of elders within communities are increasingly becoming difficult to identify and ascertain who authoritatively speaks for a particular community.	
	LSK - Nairobi Branch	❖ Delete 27(1).	✓ Customary law is not coded such that the centre may not be able to ascertain the section. The competence of the traditional dispute resolver cannot be attested to.	
	Tabitha Joy Raore	❖ Instead of the word "acquainted" consider using the word "knowledgeable on the customary law". ❖ Clause 27(2) – taking into account the fact that traditional dispute resolvers will have an increased role and may obtain references through the court, then they should also be subject to the same disclosure requirements where there is a conflict of interest.		

	APSEA	❖ Delete Part IV (clauses 27 – 30)	✓ Traditional dispute resolution mechanisms are diverse to be regulated and are currently working well in their informal status.	
28				
		❖	✓	
	KNCHR	❖ Amend clause 28(4) to expressly include "human rights".	✓ To align it with Article 159 (3) (a) of the Constitution.	
29	FIDA-Kenya	❖ Amended to add two additional means of ending traditional dispute resolution i.e. – a) Parties jointly decide to end the traditional dispute resolution; or b) Where one party wishes to end the traditional dispute resolution.	✓ These additions are necessary as one of the most fundamental principles of ADR mechanisms is that they are party driven and voluntary. Therefore, where either party or both parties collectively do not wish to continue the process, they should have an opportunity to terminate them. ✓ This option has also been recognized above in Clause 24(1) and there is no evident fundamental difference as to why it would not be included for traditional dispute mechanisms. ✓ Further, it also recognizes the ability of the party to terminate the	

			process ahead in Clause 29(2)(b) with no prior provision.	
	NaSCI-AJS	❖ Clause 29(1), (2)(a)(ii), (2)(b)(ii) and (3) of the Bill should contemplate third party annexation (processes that involve third-parties who are not necessarily members of the community) as documented under the ADR policy whose implementation by NASCI – AJS is ongoing.	✓ The AJS is already implementing a third-party annexation which has not been captured in the Bill.	
	KNCHR	❖ 29 (2) (a) (i) and 29 (2) (b) (i) be amended to include an obligation on traditional dispute resolution mechanism practitioners to "cause the Agreements to be prepared"	✓ This is in appreciation of the fact that not all such actors are schooled in the formal education system. The general recommendation however remains that TDRM Practitioners should be exempted from the provisions of the Bill.	
30	NaSCI-AJS	❖ The recording envisaged under clause 30(2) can only be restricted to mediation but not to other forms of ADR e.g. The National Land Commission and other independent offices and commissions have under Article 252 of the Constitution devised their claim processing and		

		recording mechanisms. Some have not been appealed against. Some of these decisions by quasijudicial State organs have been adopted as judgments by courts.		
		❖	✓	
31	CIArb	❖ Delete	✓ It is wrong to impose an obligation upon an advocate to advise a party to consider mediation prior to initiating judicial proceeding. This is interfering with a party's right to determine the mode of dispute resolution to adopt. In any event, who will police this and how?	
	LSK	❖ Clauses 31 and 32 are discriminatory against Advocates and it impinges on the right to access to justice. It introduces punitive measures that are out of touch with reality. ❖ Clause 32 makes it mandatory when one wishes to initiate a judicial process. The Bill makes the ADR process mainstream and the judicial Court process alternative. This goes against the	✓	

		spirit and letter of Articles 159. ❖ The two clauses are unconstitutional as they go against the spirit and letter of Articles 159.		
	Registrar - Mediation Accreditation Committee, Judiciary.	❖ Delete 31(2)	✓ It is not easy to enforce and its likely to cause advocate apathy against ADR. Section 32(2), (3), and (4) adequately cover the concerns raised under Section 31.	
	KNCHR	❖ Delete the penalty clause under clause 31(2).	✓ The Penalty creates an onerous task on the Advocates especially those in private practice who charge for services rendered. ADR is meant to facilitate easily accessible and more affordable justice. This is likely to increase the cost of legal services, a burden that would inevitably be passed on to those seeking justice. ✓ This is potentially unconstitutional as the Bill diverts the obligation to promote the use of ADR to private practitioners. The obligation is on the judiciary in line with Article 159 of the Constitution. It further seeks to penalize Advocates for practicing their profession in	

			contravention of international best practices on the practice of the law. ✓ The intention of the Constitution is not that parties resolve their disputes through ADR and only resort to the courts when they are unable to resolve their disputes. Section 31 offends the spirit of the Constitution	
	MLS	❖ Clauses 31 and 32(3) offends advocate-client privilege which may only be waived by the client and no legislation should require an advocate to provide privileged information. Further, the imposition of criminal sanction against the Advocate seeks to criminalize provision of advice and unfairly target advocates.	✓	
	LRF	❖ Replace the word "shall" with "may" in clause 31(1). ❖ Delete clause 31(2).	✓ The provision criminalizes aspect for legal practice yet advocates act on instructions of clients. ✓ Advocate client confidentiality will be breached. Advocates will be sent to jail for filings claims or suits against Government.	

	WADR	❖ Imposition of a fine for failure to advise on ADR does not take into account provisions of CPA on institution of suits and the Advocates Act on conduct of Advocates.	✓	
	ICMC	❖ Delete 31 and 32.	✓ The two provisions are inconsistent with the Advocates Act. the duties of an advocate are matters of professional ethics already provide for by the Advocates Act, which also makes offences of omission or commission such as contemplated in the Bill.	
	John Mwendwa, an advocate.	❖ By proposing to punish advocates is not achievable coz you cannot prove it. It's also unconstitutional and against the rights of an advocate.	✓	
	CAJ	❖ The clause places an untenable burden on advocates to advise their clients to consider using ADR and further criminalise failure to provide such advice	✓ This is unfair since by the time clients are going to advocates most of the time they have already decided that they want to utilize the formal judicial court process and/or ADR mechanisms have failed.	
	NaSCI-AJS	❖ Delete	✓ The clause changes the conceptual	

			basis of arbitration/mediation /conciliation. The architecture of ADR is to make it consensual and not mandatory. The criminal element may not achieve the desired objectives. This also presumes that all matters can be successfully subjected to ADR, including criminal cases and all civil cases.	
	LSK - Nairobi Branch	❖ Delete	✓ The clause criminalizes access to justice and elevates the place of Alternative Dispute Resolution Mechanism over Courts which is patently unconstitutional. ✓ The clause negates the powers of courts and tribunals to refer disputes to ADR upon determination that such disputes are best determined in such fora. ✓ 31(2) is in contravention of the Advocates Constitutional duty to advice the client on legal issues including but not limited to the best forum for resolution of a dispute if any. The danger of such a proposition is that it opens up	

			Advocate-Client confidentiality as it seeks to examine the advice given to establish the commission of an offence. ✓ The failure to advise cannot constitute an offence as the offending action would be failure to give advice and will further amount to punishment of an advocate in the discharge of his professional duties outside the scope contemplated by the Advocates Act.	
	Victoria N. Nasimiyu, Advocate	❖ Is unconstitutional.	✓ An advocate is not a party in the dispute and holding one criminally liable is an excess of the powers and against mandate of an advocate under the Advocates Act.	
	Tabitha Joy Raore	❖ Consider revising clause 31(1) to read – An advocate shall, prior to initiating proceedings in any court or relevant tribunal on behalf of that party, advice that party to first consider resolving its dispute with another party or parties through alternative dispute resolution.	✓	

32	CIArb	❖ Delete	✓ This is an unnecessary addition to the bureaucracy of litigation. Whether or not conciliation or mediation has been considered, is of no consequence. It would only be of importance if mediation had been attempted and outcome disclosed, a party should not be entitled to a benefit on the issue of costs simply because of a mediation certificate. The party may lie about having considered mediation just to derive this benefit.	
	LRF	❖ Delete the clause.	✓ The section elevates ADR above the courts which runs afoul to Article 159(2) obligating the judiciary to promote alternative dispute resolution. Its operationally impossible to promote an aspect that is already functionally above.	
	CAJ	❖ The requirement that parties and advocates file ADR certificates at the point of instituting and commencing judicial proceedings and entering appearance goes against the very essence of ADR which is supposed to be an informal, voluntary process.	✓	

	LSK - Nairobi Branch	❖ Delete 32(1)	✓ Such a confirmation it is provided for in the pre-trial conference forms as a checklist to determine the suitability or otherwise of referring the matter to ADR before the Court/Tribunal can consider it. Further it seeks to make participation in ADR mandatory which infringes on the rights of parties to seek justice as set out in Article 48 of the Constitution.	
	Victoria N. Nasimiyu, Advocate	❖ The clause makes it mandatory when one wishes to initiate a judicial process thereby making ADR process mainstream and the judicial process alternative. This goes against the spirit and letter of Article 159 of the Constitution.	✓	
	Tabitha Joy Raore	❖ Consider revising clause 32(1) using the language '... at the time of initiating proceedings in any court or relevant tribunal ...'. ❖ This clause should also state that that party shall file the certificate together with documents at the applicable registry.	✓ For consistency	

33	CIArb	❖ Delete	✓ The section is a copy and paste of the Arbitration Act. Applications to the courts curtails the spirit of alternative dispute resolution. There should be solutions from the ADR mechanisms.	
		❖	✓	
			✓	
	LSK	❖ The clause makes the entire judicial process most cumbersome and costly.		
	LSK - Nairobi Branch	❖ Replace entire section with 'A party whose matter was referred to ADR may apply to the High Court or referring Court,' to avoid verbosity. ❖ Delete sections 33 (b, c, d, e) given the previous sections underscores the voluntary nature of ADR.		
	Victoria N. Nasimiyu, Advocate	❖ The clause makes the entire judicial process more cumbersome and costly.		
34	LSK - Nairobi	❖ Delete 34(2), (3) and (4) as they are unnecessary given that parties		

	Branch	can request for ADR at any point in the proceedings. The provision is also available in the Civil Procedure Act.		
35	WADR	❖ Clarify the provision to allow for consideration of outcomes from ADR processes instead of disregarding them where there is no agreement.	✓ The provision does not take into account the form of conciliation outcomes; the conciliator's opinion may be useful in enabling the court to make a decision even when not adopted by the parties.	
	LSK - Nairobi Branch	❖ In 35(1) insert 'where a court referral,' since the section seems to be limited to Court referral. ❖ In 35(4) delete 'High Court,' and replace with 'the court' and define court as court that has referred a case to ADR.	✓	
36	Registrar - Mediation Accreditation Committee, Judiciary.	❖ Delete 36(a)(iii) and (iv).	✓ They are likely to encourage parties to renege on a settlement agreement that they will have participated in only on account of improper notice.	
	LSK - Nairobi Branch	❖ Delete.	✓ On account of the voluntary nature of the process. All these should be raised before the ADR processes commences.	

37	LSK	❖ This clause overrides the provision of the Limitation Act and other statutes that have a limitation period. This is not possible.		
	MLS	❖ Suspension of the Limitation of Actions Act should be a judicial determination on a case by case basis and should not be legislated.		
	Victoria N. Nasimiyu, Advocate	❖ It is not possible to override the provisions of Limitations of Action Act and other statutes that have a limitation period.		
	Tabitha Joy Raore	❖ There should not be any agreement to suspend the running of the limitation period – this should be automatic upon the commencement of the ADR processes.		
38	LSK	❖ This clause will not work in this economy unless the parties are of an equal economic standing. ❖ It has no breakdown on costs and is ambiguous and arbitrary. ❖ It does not allow for parties to agree with the conciliator on costs		

		prior to commencement of the conciliation process. ❖ If the conciliation process fails, parties will be subjected to a double taxation. Hence parties will be required to know what kind of arrangements they will enter into economically.		
	Registrar - Mediation Accreditation Committee, Judiciary.	❖ It should be clarified whether this Section applies to Court Annexed Mediation Program.		
	KNCHR	❖ Clause 38 (3) should be amended to delete the words "proportionate to the importance of issue or issues at stake"	✓ ADR is meant to be a cheaper/more affordable and thus accessible justice mechanism and it should suffice that expenses be based on the amount of work done by the ADR Practitioners and customary practices in TDRM.	
	LRF	❖ Redraft clause 38(3) to take cognizance that expenses in TDRMs shall be agreed by the parties in accordance with the applicable customary law.	✓ Expenses for TDRM cases are often determined based on the customary laws of the parties involved in the dispute.	

	CAJ	❖ Cheeks needs to be introduced by setting out clear guidelines on the amount of fees to be charged.	✓ The clause as drafted may be abused since the determination and calculation of the amount payable will most likely be left to the discretion of the mediator or conciliator or traditional dispute resolver.	
	NaSCI-AJS	❖ Expenses for TDR cases should be agreed according to the customary of the parties involved in the dispute.	✓ This section must take cognizance that expenses shall be agreed by the parties in accordance to the customary law in respect to TDR.	
	LSK - Nairobi Branch	❖ Make provision for formulation and development of scale of payment of mediators through regulations or rules, payment of fees in Court Annexed Mediation and payment of advocate fees for cases referred to ADR.	✓	
	Victoria N. Nasimiyu, Advocate	❖ The clause will not work in this economy unless the parties are of an equal economic standing. ❖ The clause has no breakdown on costs and is ambiguous and arbitrary. ❖ The clause does not allow parties to agree with the conciliator on	✓	

		costs prior to commencement of the conciliation process. ❖ If conciliation fails, parties will be subjected to double taxation.		
39	CAJ	❖ Amend to provide that the duty to make rules lie with the Cabinet Secretary in charge of justice and human rights.	✓ To cater for instances where the government of the day has both a Ministry of justice as well as an Attorney-General as has been the case with previous dispensations.	
	KNCHR	❖ Amend to expressly incorporate the requirements of public participation in the development of the Rules. ❖ Replace the words 'Attorney General' with 'Chief Justice.'	✓ To align it with Article 10(2)(a) of the Constitution on participation of the people as a key principle of governance. ✓ Currently, mediation under the Court Annexed Mediation is supervised by the Judiciary and the same should apply in the Mediation Bill. This will uphold the principle of separation of powers between the judiciary and the Executive (office of the Attorney General).	

	NCIA	❖ Any amendments to existing legislation should await the adoption of a policy on ADR, currently under consideration by the AG, to allow for integration of the Policy Proposals into the legislative process thus giving opportunity to a wholistic approach to the ADR Practice, Mediation & Conciliation included. It will also forestall potential conflict for mediation practice due to the parallel provisions in the Mediation Bill, 2020 now before the National Assembly.	✓ The requirement of the Attorney General to make rules of practice and procedure encompassing mediation and conciliation is contradictory to Section 5 (d) and Section 25 (d) of the NCIA Act. ✓ The Nairobi Centre for International Arbitration in the performance of its statutory mandate promulgated the Centre's NCIA Mediation Rules, 2015. LN No.253 of 2015. ✓ Parties to contracts that have incorporated these NCIA Mediation Rules globally have a legitimate expectation that the Rules will operate in perpetuity and that changes will not be made to supplant the choice to have their disputes mediated under the Rules.	
	WADR	❖ Exclude/delete the role of the Attorney General.	✓ The requirement of the Attorney General to make rules of practice and procedure encompassing mediation and conciliation is contradictory to Section 5 (d) and Section 25 (d) of the NCIA Act and	

			Section 59 of the CPA.	
	ICMC	❖ Amend and give the power to make rules to an independent institution (a council) with the approval of the Chief Justice.	✓ Empowering the AG to make rules is unconstitutional. Judicial authority lies with the Judiciary while the AG is the chief government advisor. Mediation being a quasi-judicial function is more suited to be administered by the Judiciary than the OAG.	
	NaSCI-AJS	❖ Clause 39(1) of the Bill on referral to the rules and procedures where the center is involved be limited to mediation, conciliation and arbitration.	✓ Rules and regulations cannot be formulated for TDR as this is based on customary law unique to the relevant community (Community as defined under Community Act). The supporting organization such as NASCI AJS or NLC in land related disputes under Article 67(2)(f) supports the distillation of best practices and ensures adherence to Article 159 of the constitution.	

	LSK - Nairobi Branch	❖ In 39(1) and (2) reference should be to the 'CJ and the Rules Committee,' and not the 'Attorney General,' as Article 169 envisioned this mandate to be under the judiciary.	✓	
40	NCIA	❖ Delete clause 40 - 44	✓ The proposal vides section 40 - 45 to amend existing long title and the name of the Centre overlooks the foundational framework of the Nairobi Centre for International Arbitration Act No 26 of 2013. The Act was promulgated with the purpose for the establishment of regional center for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes. ✓ The proposed amendment seeks to rename the Nairobi Centre for International Arbitration to Nairobi Centre for Alternative Dispute Resolution. Whereas the naming of an institution may change or evolve over time, the historical	

			origin/context should inform the decision to alter, change or retain a name and the timing of either action. ✓ The naming Nairobi Centre for International Arbitration can be traced back to a consensus amongst Asian and African countries to establish regional arbitration centres under the framework of Asia Africa Legal Consultative Framework (AALCO). Kenya is a member state of this international organization consisting of 48 Members states of African and Asian countries. ✓ The consensus was entered into in 2007 where the Government of Kenya and the AALCO concluded a Host Country Agreement. ✓ A comparison of the naming norms of regional Centres established under the framework of AALCO indicates a comity amongst the nations. There is a consistency of naming to reflect the intention of the member states for a common	

			identifier. The five existing centres are Asia International Arbitration Centre – Malaysia (AIAC), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Lagos Regional Centre for International Arbitration (LRCIA), Tehran Regional Arbitration Centre (TRAC), and Nairobi Centre for International Arbitration (NCIA). The common denominator is, "Centre for International Arbitration". The objectives of each of these Centers are broad enough to cover alternative dispute resolution. ✓ The renaming of the Nairobi Centre for International Arbitration will be a departure from a long-established heritage that transcends the AALCO framework. The global practice for international arbitration (which includes ADR) has developed practices that have acquired trade usage. Such is the case with naming of institutions for international arbitration such as London Court of International	

			Arbitration (LCIA), Kigali International Arbitration Centre (KIAC), Singapore International Arbitration Centre (SIAC), and Lagos Court of Arbitration (LCA). ✓ To place NCIA in the global map and elevate the stature of Nairobi into a regional hub for international arbitration, it behooves us to identify with the competition. The alternative is to risk being relegated to a purely national institution without a prospect of engaging the wider international market. To retain the name will achieve the objective of reaching the international market without compromising in the domestic practice of ADR. In actual practice, the Centre has advanced both international and domestic arbitration and mediation through its Arbitration and Mediation Rules, 2015 (Revised 2019). ✓ Secondly, the Centre has acquired a market identity marker that is now incorporated into agreements and contracts, domestic and	

			international. In the process the Centre has managed disputes with a value of over USD 200,000,000 under its Rules. This reflects an acceptance of NCIA brand as a significant player in both domestic and international arbitration. To introduce a major shift in the identity of the Centre at this point of its existence will possibly dent the claim of legitimacy, credibility, and longevity in a highly competitive sector. This crisis has afflicted one Centre established in a jurisdiction in Southern Africa. After the pull-out of its Europe-based partner, the promoters of the Centre have struggled to resuscitate the Country as a destination for international arbitration. ✓ Finally, the Centre continues to devote significant resources and funds on domestic arbitration, mediation, and other forms of ADR. Extensive work on a draft National Policy on ADR was completed by the National Steering Committee for Formulation of the	

			Alternative Dispute Resolution Policy. The policy framework and proposed legislation now awaiting consideration by Office of the Attorney General will address gaps in the sector to give a more comprehensive solution to the development of ADR.	
40	LSK - Nairobi Branch	❖ Proposed amendments to the National Center for International Arbitration Act should be made in a bill specifically designed to amend that Act as opposed to amending it herein.	✓	
48	CIArb	❖ Clause 48(d) which amends section 59A(2)(d) of the Civil Procedure Act ought to include members from bodies that have experience and knowledge in matter mediation and conciliation such as the Chartered Institute of Arbitrators (CIArb).		
	Registrar - Mediation Accreditation	❖ In clause 48(b)(ii)(a), delete the words 'of the High Court'.		

	Committee, Judiciary.	❖ Retain the membership of MAC as it is save for the proposal under 48(b)(ii)(a) and 48(b)(iii)(ab). ❖ Retain Section 59(A)(3) of the Civil Procedure Act that establishes the office of the Registrar for the day-t-day running of the activities of the Committee and its secretariat. Clause 48(c) proposes to delete the section. ❖ Delete 48(e).	✓ The function of maintaining a register to be carried out by the Court and not MAC.	
	LRF	❖ There is need for clarity on who has overall responsibility to register mediators.	✓ The Bill amends Section 59 of Civil Procedure Act in relation to Mediation Accreditation Committee yet it takes away its role to register mediators for the court annexed mediation to the Centre for Arbitrations	
	CAJ	❖ The removal of representatives of CIArb, ICJ, ICPAK, ICPSK and Kenya Bankers Association from being nominated as members of the Mediation Accreditation Committee in clause 48(d) leaves	✓ The Committee needs to have a wholesome and inclusive representation of all key professionals in Kenya who also usually have the requisite expertise for accreditation as mediators or	

		out representation from key non-state actors and professional associations.	conciliators.	
	LSK - Nairobi Branch	✓ There is no need to reconstitute the Mediation Accreditation Committee. The proposed amendments to the constitution of the committee would lead to formation of a non-inclusive committee. Additionally, it is not clear from the Bill whether this is a creation of a new committee or merging of committees with the existing one whose mandate is yet to expire. ✓ Further the functions proposed to be given to the committee are also not supported by the provisions in the body of the Act.		
	APSEA	✓ Include APSEA as a member of the Mediation Accreditation Committee under clause 48(d).	✓ APSEA represents diverse disciplines whose disputes would benefit immensely from conciliation and mediation guided by the diverse skills and expertise.	

GENERAL COMMENTS

1. THE NAIROBI CENTRE FOR INTERNATIONAL ARBITRATION (NCIA)

i. Informed the Committee that the Attorney-General appointed a National Steering Committee for the formulation of the National ADR Policy to, among others, oversee the process for formulation of a national policy on alternative dispute resolution, and propose appropriate reforms to the legal and institutional framework for alternative dispute resolution. The Steering Committee developed a policy framework and made legislation legislative proposals, and the same are awaiting consideration by Office of the Attorney General. NCIA observed that there is need for conclusion of the process for formulation of a proposed National Alternative Dispute Resolution Policy to precede legislation on ADR.

ii. On Part III of the Bill, NCIA submitted that there is existing legislation within the Civil Procedure Act and Rules on reference of matters to Mediation and proposed that it is preferable that changes be made to the Civil Procedure if the provision therein are inadequate.

Additionally, it was submitted that there is diversity of culture in mediation. For example, in some the parties prepare the agreement, while in others a mediator does point out possible options for the settlement. In some jurisdictions that distinction may be what separates mediation from conciliation. This unique diversity should not be collapsed into the one method as proposed in Part III. NCIA proposed that all options for concluding a mediation settlement agreement should be provided.

2. COMMISSION ON ADMINISTRATIVE JUSTICE

The Commission is of the considered view that it would be important to consider a holistic approach involving both Houses of Parliament and all stakeholders on all legislative proposals aimed at ensuring effective operationalization of Article 159(2)(c) of the Constitution for the following reasons –

i. There is a Mediation Bill, 2020 introduced in the National Assembly; and

ii. There is in existence a National ADR Policy which was developed by the NCIA. Hence best practices on law making dictates that policy should ideally precede legislation.

3. THE REGISTRAR, MEDIATION ACCREDIDATION COMMITTEE – JUDICIARY

The proposed Bill is not clear on the following aspects –

i. the exact roles to be played by MAC and the Centre;

ii. whether a mediator intending to practice as such would require to be accredited by both MAC and the Centre, and /or either of them;

iii. whether a practitioner whose application for accreditation has been declined by the Centre or whose accreditation status has been revoked by the Centre may still continue to practice under CAMP; and

iv. whether the applicable Code of Conduct to practitioners under CAMP shall be the one published by the Centre or the one published by MAC.

Further, it is proposed that the entire Part IV which provide traditional dispute resolution be deleted and that the application of the proposed Bill to Traditional Dispute Resolution Mechanisms be removed from the Bill altogether

4. THE NATIONAL STEERING COMMITTEE FOR THE IMPLEMENTATION OF THE ALTERNATIVE JUSTICE SYSTEMS POLICY (NASCI-AJS COMMITTEE)

NASCI-AJS Committee was appointed by the Hon. Chief Justice on 9th December, 2020 to implement the Alternative Justice System (AJS) Policy which seeks to mainstream into the formal justice system traditional, informal justice systems and other informal mechanisms used to ensure access to justice in Kenya. The committee singled out one main concerns about the current ADR Bill which is that it takes the form of regulation rather than facilitation of the different forms of ADR including AJS. In this regard, three aspects of the ADR Bill were highlighted –

i. Clauses 31 and 32 of the ADR Bill are potentially unconstitutional and strategically unwise for at least four reasons that the two provisions –

   a) places on advocates and disputants the obligation to promote ADR in Article 159 of the Constitution, which responsibility the Constitution places on the Judiciary;

b) require parties to utilize ADR and only resort to the court system where those attempts fail. This violates the principle of voluntariness which is inherent in Article 159(2)(c) of the Constitution;

c) create the perception that ADR (including AJS) will be unable to resolve the majority of the cases presented to the Courts by anticipating that if all disputes are presented for ADR or AJS, there will still be a big percentage of cases which will end up in Court. Additionally, they do not distinguish cases which are not amenable for ADR or AJS resolution which, by law, must be determined in Court or before certain tribunals;

d) impose criminal sanctions on lawyers for doing that which they are trained and licensed to do, represent their clients in Court. Rather than pursue this route, the ADR Bill should provide incentives for parties and their lawyers to choose ADR or AJS; and

e) do not take into account practical realities lawyers face before commencing suits on behalf of their clients – including the statute of limitations; the need for immediate Court protection or reliefs; the futility of pursuing ADR or AJS for the specific dispute, etc.

ii. The requirement that a "Traditional Dispute Resolver" shall be acquainted with "customary law" is unwise and untenable since most AJS do not solely use "customary law" in resolving dispute. They often utilize a dialectical ken of normative principles drawn from anthropological, community, "modern", constitutional and other borrowed normative orders. Additionally, to require the Center to prepare and maintain a list of traditional dispute resolvers as provided under clause 27(2) might be viewed as impermissible regulation since there are literally hundreds of thousands of AJS fora and mechanisms where disputes are resolved every day.

iii. In attempting to capture all forms of ADR in a single Bill, the ADR Bill misses the complexity of AJS which is excellently captured in the AJS Policy. In particular, like its previous version, the Bill begins with an assumption that there is a closed category of ADR mechanisms which it seeks to capture and bring within the gaze of the law. The object of the Bill should be the opposite: to acknowledge, as the Constitution does, that there are many mechanisms of accessing justice outside Court and find ways to facilitate and promote them in a way which aggrandizes the values of the Constitution without undermining human rights.

The NaSCI-AJS recommended that the ADR Bill should be withdrawn at this time and that it be subjected to more robust and wider engagement with stakeholders. In the alternative, NaSCI-AJS recommended that all references to AJS and TDRM in the Bill be removed.

5. THE COUNCIL OF GOERNORS

Whereas the Bill proposes to provide for a dispute resolution alternative to the court process, it concentrates only on conciliation, mediation and traditional dispute resolutions yet there are other methods including negotiation, arbitration, Med-Arb among others. Additionally, the Bill limits itself to disputes where the national government, county governments and State organs are parties leaving out individuals and the private sector. This infringes on an individual's right to access to justice as envisioned in Article 48 of the Constitution.

Further the Judiciary in collaboration with the Nairobi Centre for International Arbitration finalized the Alternative Dispute Resolution Policy and presented the same to the Attorney-General.

The Council of Governors recommendation that the Senate awaits the outcome of the Policy to align the Bill to the Policy.

6. THE CHARTERED INSTITUTE OF ARBITRATORS, KENYA BRANCH (CIArb)

Made the following observations –

i. There is need for some form of regulations but care must be taken not to turn the process into a technical and rigid process;

ii. There is need to consider the practicability to regulate traditional dispute resolution process and process to certify dispute resolver under customary law;

iii. The Bill has not addressed adjudication as a mechanism of dispute resolution;

iv. Under the Nairobi Centre for International Arbitration Act, NCIA trains and provide accreditation. Other institutions provide training but now NCIA will be responsible for accreditation. This may raise issues of discrimination in favour of NCIA trainees.

7. MOMBASA LAW SOCIETY

Observed that the Bill is not in conformity with the provisions of Article 159 of the Constitution. The Constitution is clear that judicial authority is vested in the Judiciary by the sovereign people of our country. While alternative dispute resolution is encouraged in Article 159(2) (c), this Bill now comes in to make the judicial process its alternative and pushes it to the periphery. As such, it undermines the right to access the judiciary which is the fundamental method of dispute resolution as per the constitution and further erodes the independence of the judiciary which must be upheld.

Further, the Mombasa Law Society noted that the Bill as drafted has not taken into consideration the provisions of Article 27, 28, 32 and 48 of the Constitution which safeguard equality and freedom from discrimination, human dignity, freedom of conscience, religion, belief and opinion, and access to justice.

On traditional dispute resolver, it was noted that the same needs further clarity especially in light of our diverse social backgrounds.

8. LEGAL RESOURCES FOUNDATION TRUST (LRF)

a) The Bill in its design is an affront to the constitution for the following reasons;

i. The Bill undermines the Judiciary in a way that endangers the principle of separation of powers by shifting the role of the judiciary as envisaged under Article 159 of the Constitution of Kenya on promoting ADR to legal practitioners, advocates.

ii. It creates an institution to oversee application of ADR in dispute resolution outside of the framework contemplated under Chapter 10 of the Constitution.

b) The Bill, by seeking to regulate through registration traditional dispute resolvers offends succinct recommendations in the AJS Policy which was launched on 27th August 2020 by the Chief Justice and for which a National Steering Committee on Implementation of Alternative Justice Systems (AJS) Policy has already been put in place.

9. INSTITUTE OF CHARTERED MEDIATORS AND CONCILIATORS (ICMC)

ICMC made general comments observing that the Bill appears to have been drafted without consultation and participation of relevant stakeholders and professionals in the field. There is therefore need for inclusive participation of relevant stakeholders to broaden the scope for proper administration of the alternative dispute resolution practice.

Additionally, it was submitted that the Nairobi Centre for International Arbitration (NCIA) primarily deals with arbitration and it is not properly constituted hence lacking crucial expertise in all alternative dispute resolution practices. As such, NCIA cannot oversee the practice and set standards in line with international best practices as provided in the Bill.

10. THE LAW SOCIETY OF KENYA – NAIROBI BRANCH

The LSK – Nairobi Branch made general comments suggesting that –

i. If the Bill was to be an all-inclusive ADR Bill, it should focus on giving general policies and governance direction so as to create consistency and allow specific and dedicated bills such as AJS Bill and Mediation and Conciliation Bill to be enacted thereafter either in the rules or in Acts specific to each type of dispute resolution. This is because, the different ADR methods require a lot of specificity and one framework may be unable to cover them all. In the alternative, the current Bill be transformed to a Mediation and Conciliation Bill as opposed to its current reference which is a term with an extremely wide scope.

ii. Being the first ADR Bill, the Bill should acknowledge the forms of ADR and give definitions and general guidelines, but not go into the nitty-gritties such as accreditation and registration. This will be best covered in Rules.

iii. Part IV on Traditional Dispute Resolution be discarded, given the competence of traditional dispute resolvers cannot be ascertained as customary rules are not coded. It is close to impossible to legislate on TDR. Further, there is no provision for registration of the traditional dispute resolvers and their regulation.

iv. The Bill refers to conciliation whereas Article 159 talks of reconciliation. Within the ambit of ADR conciliation and reconciliation are two different processes. The Bill ought to specify which process is being referred to.

v. Provisions in the ADR Bill and the Mediation Bill should be harmonised to avoid duplication and conflict.

vi. That the Bill does not take note of the difference between court annexed mediation and self-referred mediation all through different provisions. This is a recipe for confusion.

11. KENYA CHRISTIAN PROFESSIONALS' FORUM

The Kenya Christian Professionals Forum opposes the Bill for the reason that the definition of the word 'centre' is limiting since it excludes the possibility of formation, registration and recognition of any other centre other than the Alternative Dispute Resolution Centre provided for in the Bill.

12. MR. WILBERFORCE ODHIAMBO AKELLO

The Bill ought to be relooked as it violates the constitution, the independence of court system, the role of courts and judicial system and the contractual freedom of parties in the following ways –

i. it violates and contradicts various statutes including the provisions of Civil Procedure Act, Civil Procedure Rules, Advocates Act, Land Act 2012, Land Registration Act 2012, Arbitration Act 1995, Public Procurement laws, Labour Relations Act, the Small Claims Act, Fair Administration Act etc All these must be amended to give effect to the impugned Bill.

ii. the Bill is a claw back to the constitutional rights as it seeks to make mediation mandatory as opposed to voluntary nature of alternative dispute resolution mechanism, ousts Kenya from the adversarial legal system, and seeks to prevent claimants from filing claims against Government.

iii. the Bill offends the structural architecture of the courts, and it seeks to slow and reduce the efficacy and efficiency in resolution of commercial disputes by adding another layer or restriction before approaching court which will elongate the dispute resolution processes.

iv. Part IV which provides for Traditional Dispute Resolution purports to regulate Traditional Justice Systems without taking into consideration the diverse cultures containing their unique traditional dispute resolution mechanisms. To formalize the traditional dispute resolution mechanisms and register the Dispute Resolvers in basically an affront and violation of the fundamental rights to culture as opined under Article 44 of the Constitution.

v. Part V is unconstitutional as clauses 31,32 ,33 ,34,35 and 36 of the Bill abrogates fundamental rights and Bill of Rights and particularly Article 22 of the Constitution as they seek to restrict access to justice, they inhibit legal representation is contravention of Article 49 of the Constitution, they destroy the principle of advocate client confidentiality and violates article 50 of the Constitution, violates the advocate client confidentiality, and also the Part abrogates and violates the independence of judiciary and purport to place alternative dispute resolution above judicial system and processes.

13. MS ANNA KONUCHE, ADVOCATE

Opposes the Bill on the following grounds –

i. It is unconstitutional to force all disputants to adopt a specific way of dispute settlement;
ii. It is unconstitutional to force advocates to advise their clients in a certain manner;
iii. Not all disputes can be solved through ADR;
iv. The creation of the so-called conciliators is a concept that has not been well thought out;
v. The requirement of resorting to customary law does not make sense where we do not have a codified law known as customary law; and
vi. This law by design will render lawyers jobless and irrelevant

14. THE YOUNG BAR ASSOCIATION

The Young Bar Association (TYBA) observed that the ADR Bill seeks to supplant, instead of supplementing the law and the work of lawyers by providing that a party to a dispute shall take reasonable measures to resolve the dispute through alternative dispute resolution before resorting to a judicial process. They were of the view that submission to Alternative Dispute Resolution should be voluntary and that it should be the court's discretion to determine whether to refer a case to mediation, conciliation, or arbitration, and it should do so on a case-to-case basis, without legislators fettering that discretion with hard and fast rules like the ones the ADR Bill proposes. As a result, the following recommendations were made so as to bring the Bill in line with the law and the best interests of all stakeholders –

i. Make submission to ADR mechanisms voluntary instead of making it mandatory;

ii. Allow lawyers the discretion to devise the best strategies for the resolution of client's problems without strong-arming them to direct clients to ADR;

iii. Provide for legal training to be the primary qualification for conciliators and mediators in addition to any other competencies that the Nairobi International Centre for Dispute Resolution may deem fit; and

iv. Redirect the resources committed to mounting a court-independent ADR system to developing a court-connected ADR system.

15. THE KENYA NATIONAL COUNCIL OF ELDERS

The Kenya National Council of Elders held a meeting held on 20th July, 2021 at Sarova Stanley Hotel, and the following general comments were made for consideration by the Committee –

i. Qualification is too high for elders. They have experience and the Bill to state exactly the needed qualification instead of leaving it to the center to determine;

ii. The name traditional dispute resolver is not desirable for elders. The council of elders should be treated as mediators too, be registered as whole and not individuals, and be provided security provision just like judges who resolve issues.

iii. The bill states that matters handled by resolvers will not be confidential. Seems there is little trust for elders. Clause for confidentiality should be equal across board;

iv. Elders need to be represented in the mediation accreditation committee by at least one member;

v. The cases should be solved with at least two mediators to avoid corruption;

vi. Definition of mediators is limiting;

vii. The modalities are too procedural for them;

viii. It is not practical to resolve a case in 3 days; and

ix. There is need for the council of elders to participate and validate the Bill since they have never been involved.