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Alternative Dispute Resolution in Tanzania

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Chapter Two

The Concept of Alternative Dispute Resolution (ADR)

2.0 INTRODUCTION

To date, "alternative dispute resolution" – or as also called in certain circles: "appropriate dispute resolution"[65] (ADR) – is increasingly becoming common practice in many judicial processes around the world. This is because of its many benefits as compared to other judicial mechanisms of dispute resolution. Some of the benefits of ADR include its capability to reduce litigation costs as well as less time involved in the determination of disputes. In this Chapter we discuss the concept of ADR by looking at the origins and philosophy of ADR. The Chapter also traces the reform of the US justice system in favour of ADR in the 1970s and the spread of the concept and practice of ADR to other countries thereafter. Lastly, the Chapter looks at the benefits of ADR in general terms.

2.1 MEANING OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR simply refers to all modes of dispute settlement/resolution other than the traditional dispute settlement through courts of law. As Yona Shamir opines,

> *It covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party imposes a solution. Somewhere along the axis of ADR approaches between these two extremes lies "mediation," a process by which a third party aids the disputants to reach a mutually agreed solution.*[66]

Developed in the West to resolve disputes or conflicts outside the formal litigation framework in courts, ADR comprises a variety of 'mechanisms or techniques, which share the essential characteristics of being different from dispute mechanism of litigation in State

65 Shamir, Y., *Alternative Dispute Resolution Approaches and the Application*. Unesco, 2003, p. 2.

66 Ibid.

courts.'[67/68] Mainly, these mechanisms or forms are: negotiation, mediation, [re]conciliation, and arbitration. In most jurisdictions, like Tanzania, ADR has two modes: methods of resolving disputes outside of the judicial mechanisms; and informal methods attached to or pendant to official judicial mechanisms.[69]

Of late, ADR is manifested in two categories: offline and online ADR. Whereas the former category is the most common in Tanzania, the latter has just started to take shape in the country, as elsewhere in the world, with the advent of e-commerce that is increasingly dominating the contemporary world stage. Offline ADR is traditionally conducted under paper-based environment; and online ADR uses the internet Internet as a medium of facilitating dispute resolution.[70]

2.2 ORIGINS AND IDEOLOGY OF ADR

2.2.1 General Overview

As we have seen in Chapter One above, conflicts or disputes have been an integral part of human interaction from time immemorial; and, as such, societies around the world have learnt 'to manage them, to deal with them in a way that will prevent escalation and destruction, and come up with innovative and creative ideas to resolve them.'[71] As such,

> *Dealing with conflicts – "conflict management," or "conflict resolution" as it has come to be called in professional circles – is as old as humanity itself. Stories of handling conflicts and the art of managing them are told at length throughout the history of every nation and ethnic group who share the same history.*[72]

Scrutiny of many ancient or traditional societies around the world reveals that there exist accounts of various types of negotiations: for

67 Kimei, M.C., "Alternative Schemes for Resolving Banking and Financial Disputes." *The Tanzania Lawyer*. Vol. 1 No. 2, 2012, pp. 46–71, p. 54. *See* also Street, L., "The Language of Alternative Dispute Resolution." *Alternative Law Journal*, Vol. 66, 1992.

68 Kamau, W., "Law, Culture and Dispute Resolution: Prospects for Alternative Dispute Resolution (ADR) in Africa." *East African Journal of Peace and Human Rights*. Vol. 15 No. 2, 2009. pp. 336–360, pp. 336–7.

69 These methods of ADR in Tanzania are discussed in Chapters Eight and Nine of this work.

70 Mambi, A.J., *ICT Law Book: A Source Book for Information and Communication Technologies and Cyber Law*. Dar es Salaam: Mkuki na Nyota Publishers, 2010, p. 155.

71 Shamir. Op. cit, p. 2.

72 Ibid.

instance, between two persons, between an individual and a group, and between two groups. In other countries, arbitration, as a form of ADR, 'had its origin in private commercial arbitration outside the formal court structure and it was used by merchants when disputing with each other.'[73] In addition, the labour movement, immigrant and religious communities in the US and societies in other parts of the world – Asia and Africa, in particular – 'have for a long time relied on consensual methods of dispute settlement.'[74]

2.2.2 Rationale for the Emergence of Modern ADR

Historically, the "modern" ADR movement began in the US in 1970s[75] as a result of two main concerns in the US judicial system. First, there was call for better-quality processes and outcomes in the judicial system; and, second, there was a need for efficiency of justice.[76] These concerns are briefly discussed below.

(a) Need for Better-Quality Processes and Outcomes in the Judicial System

The call for better quality of dispute resolution processes was attributed to lack of responsiveness and sensitivity of the judicial system. There was also lack of participation of members of the community in the formal justice system. The ranges of outcomes provided by the formal justice system were pre-determined and limited [i.e. polarized, "win/lose" judgments]. At the same time, the justice system did not provide a continuing social relationship amongst disputants in certain matters [e.g. family, tenancy, or employment].

This concern necessitated advocates for reform in the justice system in the US in the 1960s and 1970 to campaign for better quality processes and outcomes.[77] There was a need, thus, for consensual (as opposed to adversarial) approach to problem-solving, and for processes that were more accessible and participatory, less formal, less expensive and less time-consuming, which would lead to more "win-win" results.[78]

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73 Kamau. Op. cit, p. 349 (note 68).
74 Ibid.
75 Menkel-Meadow, C., "Alternative Dispute Resolution." In Kritzer, H.M. (ed.), *Legal Systems of the World: A Political, Social and Cultural Encyclopedia*, 2002, p. 40.
76 Kamau. Op. cit, p. 349.
77 Ibid.
78 Menkel-Meadow. Op. cit, p. 41.

(b) Need for Efficiency of Justice

Parallel to the concern for better quality in the judicial processes in the US, there was a call for "efficiency" of justice. This was attributed by the fact that the judicial process was too expensive, overwhelmed by cumbersome rules of procedure. The judicial process was also seen as unnecessarily prolonged, resulting in being too expensive and time-consuming. Furthermore, it was argued that the judicial process was congested with, or over-loaded, by caseload. Hence, there was a need for a dispute settlement system that would divert cases from the court and reduce case backlogs and provide other and efficient ways of providing access to justice.[79]

2.3 REFORM OF THE US JUSTICE SYSTEM IN FAVOUR OF ADR

In response to the foregoing concerns, in 1976 the then US Chief Justice (CJ), Warren Burger, convened the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (popularly known as the Pound Conference) to develop proposals for judicial reform. In his Keynote address, CJ Burger proposed an alternative dispute resolution method that would reduce the problems facing the judiciary: delays of cases, high costs and undue technicality.[80]

As Kamau reminisces, in the aftermath of the Pound Conference, a number of remedial processes emerged aiming at revamping the judicial system in the US. "Multi-door courthouses"; community justice centres; small claim cases; court-mandated arbitration; and family mediation were initiated to propagate ADR at its formative stages. At the same time, parties 'were also encouraged to include arbitration clauses for disputes arising from services provided by industries such as banking, health care, securities and communications.'[81]

Historically speaking, the first ADR method 'to gain acceptance was arbitration, which shared many of its practices and procedures with the judicial system, including the judge (or arbitrator) deciding the outcome of the dispute.'[82] To date, 'ADR has matured and developed, and mediation is being received as a preferred alternative and has become widely accepted as a process providing more flexibility and

79 Kamau. Op. cit.

80 Ibid, p. 350. *See* also Burger, W., "Isn't there a Better Way?" *American Bar Association Journal*. Vol. 274 No. 68, 1982.

81 Kamau. Ibid.

82 Shamir. Op. cit, p. 5.

less procedural complexity.'[83] In addition, the US Federal Civil Rights Act (1964) led to the formation of the CRS (Community Relations Service in the US Department of Justice), which was mandated to help 'communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, colour, or national origin.'[84] "Mediators" were asked to assist in resolving disputes of any sort, and not only to deal with issues of discrimination.[85] Yona Shamir argues that,

> *Throughout the United States and other countries, the courts became involved in mediation, following Professor Frank Sander's (Harvard University) vision of a courthouse that would become a dispute resolution centre – a "multi-door courthouse" – where each case would be referred to a process most appropriate to it. The NJC's*[86] *became part of a city-based, court-based, or district attorney-based alternative dispute resolution service.*[87]

The American Bar Association (ABA) 'took a proactive role in the process and created CPR – The Centre for Public Resources – which provides ADR services.'[88] More recently, following an act of Congress (1990), federal agencies are 'obligated to use mediation in certain civil cases before going to court. Many states passed a law requiring mandatory mediation. In the private sector, many large US and multinational companies signed a mediation pledge, according to which they use mediation before going to court.'[89]

2.4 THE SPREAD OF ADR BEYOND THE US

2.4.1 The Spread of ADR to Other Developed Countries

From the US, the ADR movement gradually spread to other Western countries: UK, Canada and Australia; and to other parts of the world. These countries are experiencing similar growth as it was in the US 'while continuing to develop new and creative ADR processes

83 Ibid.
84 Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflicts*. Op. cit.
85 Goldberg, S. B. et al. *Dispute Resolution: Negotiation, Mediation, and other Processes*. Boston: Mass., Little Brown, 1992.
86 The US federal government funded Neighbourhood Justice Centres (NJC), provide free or low-cost mediation services.
87 Shamir. Op. cit.
88 Ibid.
89 Ibid.

and applications. Canada, New Zealand, Australia, and the United Kingdom have become pioneers in the field.'[90] In the United Kingdom, for example, the Advisory, Conciliation and Arbitration Service (ACAS) was set up in 1974 'to deal with industrial disputes, and at the end of the 1980s commercial mediation services became available, corresponding to the Lord Chancellor's statement in a television interview, "Mediation and other methods of resolving disputes earlier, without going to court, produce satisfactory results to both sides are, I think, very much to be encouraged".[91]

2.4.2 The Spread of ADR to Africa

In Africa, modern ADR was transplanted by the developed Western countries as part of the globalization process in the 1980s through to 1990s. This period witnessed the superimposition (by the World Bank and developed Western countries) of socio-economic and political reforms that were packaged in the structural adjustment programs (SAP's), which were accompanied by 'demands for good governance, establishment of human rights framework, and legal sector reforms.'[92] In effect, the requirement for reform in legal sectors in Africa meant the export of legal ideas and approaches from the Western world in what Kamau terms as 'in the form of legal transfers, including the global dissemination of ADR.'[93]

Constituting "soft technology" transferred from the Western world, ADR was disseminated across Africa as one of the many social reform programmes spearheaded by the West. Thus, 'African countries have recently witnessed concerted efforts by representatives of Western legal institutions and NGOs to introduce ADR techniques and mechanisms into their legal polities as part of legal sector reforms.'[94] In Tanzania, for instance, the Civil Procedure Code (1966) was amended in 1994 through Government Notice No. 422, which amended the First Schedule to the Civil Procedure Code Act (1966). As we shall see in Chapters Three and Eight, the amendment to the CPC introduced new stages between the completion of pleadings and trial in civil cases.

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90 Ibid.

91 Ibid. *See* also Acland, A. F., *Managing Conflict through Mediation*. London: Hutchinson Business, 1990.

92 Kamau. Op. cit, p. 337.

93 Ibid.

94 Ibid, pp. 337–8.

It should be noted at this juncture that the promotion of ADR techniques and mechanisms is 'a return to the model of dispute settlement used in the past by non-Western societies, utilizing a model of harmony and with the primary goal of preserving social bonds.'[95] However, as Kamau argues, this promotion of the ADR movement should be critically looked upon, because the "new" ADR movement, although "borrowed" from non-Western countries, has been "refined" in the Western and brought back to African societies that have different socio-economic, political and cultural structures from those in the West.[96] This criticism provides a thesis that African countries need to introduce ADR techniques that are concomitant with their socio-economic, political and cultural contexts.

All in all, the wide dispersion of "modern" ADR from the US to almost every part of the world signifies its effectiveness in informally dealing with disputes. As Shamir points out,

> *The ADR "movement" started in the United States in the 1970s in response to the need to find more efficient and effective alternatives to litigation. Today, ADR is flourishing throughout the world because it has proven itself, in multiple ways, to be a better way to resolve disputes.*[97]

Although the search for efficient and better ways to resolve disputes, and the art of managing conflicts, are as old as humanity itself, 'yet it has only been within the last thirty years or so that ADR as a movement has begun to be embraced enthusiastically by the legal system. More recently, ADR has become institutionalized as part of many court systems and system for justice as a whole throughout the world.'[98] Indeed,

> *The ADR movement has been gaining popularity, and a movement that started as an answer to needs of the judicial system, has generated interest in a variety of fields (such as education, society, environment, international, and gender concerns). In the 1980s, the US National Association of Mediation in Education (NAME) was founded, and a large variety of ADR programs, including negotiation, problem solving, and mediation was introduced in schools.*[99]

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95 Ibid, p. 338.
96 Ibid.
97 Shamir. Op. cit, pp. 4–5.
98 Ibid, p. 5.
99 Ibid.

So, although it was transplanted from the Western world to Africa, "modern" ADR is very important to reducing some of the chronic problems that have been facing Africa's justice systems from the time of independence – including heavy caseloads, unnecessarily long delays of finalization of cases, corruption and high costs involved in case management and litigation. These aspects are elucidated at some length in Chapter Four of this work.

2.5 THE BENEFITS OF ADR

ADR is generally regarded as having many benefits over the formal litigation mechanisms – ranging from being less expensive, speedier[100], less formal and more flexible. As Kamau points out: 'The flexibility of ADR is said to lend itself to the crafting of "win-win" solutions rather than the "zero sum"[101] game of litigation.'[102]

In this regard, ADR suits and functions well in situations where the disputants are to maintain ongoing relationships even after the dispute is resolved. These situations include employer and employee, landlord and tenant, and family relationships. This is the main reason why all dispute settlement mechanisms introduced in Tanzania recently in these areas of the law make it mandatory to initially try to resolve by some form akin to ADR. For instance, under section 86 of the Employment and Labour Relations Act (ELRA) (2004),[103] all labour disputes should ordinarily be referred to the Commission for Mediation and Arbitration[104] (CMA) whose procedure requires a dispute first to be mediated and if mediation fails it should be arbitrated.

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100 In a number of cases, the courts in Tanzania have held that resort to ADR reduces delays in determination of legal disputes. *See* particularly *CRDB Bank Ltd. v. Seif Ahmed Sharji*, High Court of Tanzania at Mbeya, Civil Case No. 11 of 2002 (Unreported); *David N. Mushi v. Joseph Massawe*, High Court of Tanzania at Dar es Salaam, Civil Case No. 109 of 2001 (Unreported); *M/S Greenway Co. Ltd. v. Tanzania Breweries Ltd.*, High Court of Tanzania at Dar es Salaam, Misc. Civil Case No. 4 of 1997 (Unreported); and *Tanzania Harbours Authority v. Mathew Mtakula & 8 Others*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 46 of 1999 (Unreported).

101 The "zero-sum" game means a situation whereby whatever is gained by one side is lost by the other. The definition is available at http://www.answers.com/topic/zero-sum-game?cat=technology (accessed 16 February 2012).

102 Kamau. Op. cit, p. 337.

103 Act No. 6 of 2004.

104 *See* particularly *Kwila Peter Nkwama v. General Manager, Marine Services Company Ltd.*, High Court of Tanzania (Commercial Division) at Mwanza, Labour Revision No. 229 of 2008 (Unreported).

In addition, section 101 of the Law of Marriage Act (1971)[105], as a general rule, obliges disputants in a marriage dispute to first refer the matter to the Marriage Conciliation Board, which should reconcile parties, upon failure of which it should certify the failure to the court. In terms of section 106(2) of this law, every petition for divorce to be filed in court must be accompanied by a certificate issued by the Board within six month.

ADR has been increasingly used alongside, and integrated formally, into legal systems internationally in order to capitalize on the typical advantages of ADR over litigation. In this purpose, ADR is suitable for multi-party disputes; and it is flexible in terms of procedure-the process is determined and controlled by the parties the dispute. Unlike formal litigation, ADR lowers costs to both the disputing parties and mediator in that it is less complex.

In ADR, parties choose a neutral third party to direct negotiations, which is of particular importance. In ADR there is a likelihood and speed of settlements and practical solutions are tailored to parties' interests and needs (not rights and wants, as they may perceive them). In addition, in ADR there is durability of agreements and parties to a dispute tend to feel they own them. There is also great emphasis of the principle of confidentiality; and the preservation of relationships; and the preservation of reputations of the disputing parties.

105 Cap. 29 R.E. 2002. This law is discussed at length in Mashamba, C., *Introduction to Family Law in Tanzania*. Dar es Salaam: nola/IPPL, 2010.