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Alternative Dispute Resolution in Tanzania

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Chapter Three

Alternative Dispute Resolution (ADR) in the African Cultural Context

3.0 INTRODUCTION

In Chapter Two we observed that modern ADR mechanisms were borrowed, with modifications, from the traditional African justice systems that are entrenched on restorative justice. From Africa, ADR was refined, formalized and developed in the West to the extent and form seen today. To date, it is increasingly acknowledged that there is a close relationship between dispute resolution and cultural practices. Culture has an important role in shaping dispute resolution processes, practices and outcomes. In this chapter we, therefore, discuss the place of culture in dispute resolution in the African context.

3.1 THE ROLE OF CULTURE IN DISPUTE RESOLUTION

3.1.1 The Place of Culture in Conflict

Culture is an essential part of conflict and conflict resolution. Disputing is cultural behaviour and the normative framework in a society will shape the way people conceptualise problems, the ways they pursue them, and the kinds of solutions they look for. As Merry contends,

> *[C]ulture can affect when and how parties enter into conflict, what conflict means for the individual and the community, the perception of when a conflict requires intervention of another person, and the expectations placed on the parties to work things out by themselves.*[106]

As Michelle LeBaron observes: 'Culture is an essential part of conflict and conflict resolution. Cultures are like underground rivers that run through our lives and relationships, giving us messages that shape our perceptions, attributions, judgments, and ideas of self and others.'[107] Faure and Rubin define culture as 'a set of shared and enduring meanings, values, and beliefs that characterize national, ethnic, and other groups, and orient their behavior.'[108] According to Shamir,

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106 Merry, S.E. "Disputing Without Culture." 100 *Harvard Law Review*, 1987. 2060.

107 LeBaron, M., "Culture and Conflict." Available at htt://www.beyondintractibility.org/essay/culture_conflict. Assessed 16 February 2011.

108 Faure, G. and Rubin, J., *Culture and Negotiation*. London: Sage, 1993.

> *There are cultural differences between the individual and the collective. There are countries and cultures that stress the high value of collective responsibility and commitment to the group, while in others the stress is on individualism and responsibility to oneself.*[109]

3.1.2 The Cultural Orientation of Parties to a Dispute

Anthropological studies have indicated, first, that when parties are bound together by multi-stranded social relationships they will seek a compromise for their differences, whereas parties who have only single-stranded social ties will tend to seek an adversarial approach.[110] Among working-class and middle-class in America: while people are not necessarily eager to run to court for every infraction, they tend to view problems in terms of rights and principles. Second, that disputes in many African societies are viewed in terms of restoration of harmony in community, with emphasis on reciprocal obligations and duties, rather than vindication of individual's rights.[111] As Ann Skelton argues,

> *With the emphasis on 'problems' rather than offences, traditional structures [in Africa] hear the stories of the parties involved and then make decisions regarding outcomes. These outcomes aim to heal relationships, and they ensure restitution or compensation to victims. Symbolic gestures such as sacrifice of animals and the sharing of a meal indicate that the crime has been expiated and the offender can now be reintegrated.*[112]

Kamau[113] identifies two constructs in scientific studies on the role of culture in dispute resolution: individualism/collectivism and high-context/low-context.

(a) Individualism or Collectivism

This is characterised by individual's adherence to group norms and emphasis on group harmony and interests. In this regard, collectivistic cultures value duty, interdependence and obedience to the group/

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109 Shamir. Op. cit, p. 12.

110 Gluckman, M., *The Judicial Process Among the Barotse of Northern Rhodesia*. 1955.

111 Skelton, A., "Restorative Justice in Child Justice Systems in Africa," in Sloth-Nielsen, J. (ed.), *Children's Rights in Africa: A Legal Perspective*. Hampshire, Ashgate Publishing Limited, 2008, pp. 129–146, at p. 131.

112 Ibid. *See* also Kgosimore, D., "Restorative Justice as an Alternative to Dealing with Crime." Report of a National Conference held on 18–20 November 2002 under the auspices of the National Crime Prevention Strategy. Available at www.childjustice.gov.za.

113 Kamau, W., "Law, Culture and Dispute Resolution: Prospects for Alternative Dispute Resolution (ADR) in Africa." Op. cit.

community; whereby disputants look for solutions that promote the group's norms and well-being. Disputants resist solutions that cause other members of the group, particularly superiors, "to lose face."[114]

(b) High-context or Low-context or Individualism

This is characterised by emphasis on individual's personal goals over their group. Individualistic cultures prize self-reliance and independent thinking. In this sense, disputants look for solutions that promote personal [not group's] interest and well-being.

Therefore, while choosing an effective alternative dispute settlement method, one should understand the cultural context or orientation of the disputants. For instance, most of the African traditional justice systems are based on restorative justice and transformative principles in conflict resolution: emphasis is on achieving peaceful resolution of disputes rather than on adherence to rules as the basis of determining disputes.

3.1.3 Cultural Aspects are Prevalent in Every Conflict Situation

The explanation above, underpins the notion advanced by LeBaron in the context that: 'Cultures are embedded in every conflict because conflicts arise in human relations. Cultures affect the ways we name, frame, blame, and attempt to tame conflicts.'[115] According to LeBaron,

> *Whether a conflict exists at all is a cultural question. In an interview conducted in Canada, an elderly Chinese man indicated he had experienced no conflict at all for the previous 40 years.*[116] *Among the possible reasons for his denial was a cultural preference to see the world through lenses of harmony rather than conflict, as encouraged by his Confucian upbringing. Labelling of our interactions as conflicts and analyzing them into smaller component parts is a distinctly Western approach that may obscure other aspects of relationships.*[117]

Thus, in most conflict situations culture is a vital factor, 'whether it plays a central role or influences it subtly and gently.'[118] Even in conflicts that

114 Ibid.
115 LeBaron. Op. cit.
116 LeBaron, M. and Grundison, B., *Conflict and Culture: Research in Five Communities in British Columbia*. Victoria, British Columbia: University of Victoria Institute for Dispute Resolution, 1993.
117 LeBaron. Op. cit.
118 Ibid.

seem politically-grounded – like the Israeli-Palestinian conflict or the India-Pakistan conflict over Kashmir – there is the cultural factor that goes beyond the territorial boundary and/or sovereignty issues. These conflicts 'are also about acknowledgement, representation, and legitimization of different identities and ways of living, being, and making meaning,'[119] which form essential components of culture. Although culture does not cause conflicts, it is inextricable from conflict.

Indeed, 'When differences surface in families, organizations, or communities, culture is always present, shaping perceptions, attitudes, behaviours, and outcomes.'[120] Seen in this context, culture should be acknowledged in conflict or dispute resolution. This is so argued because: 'Unless we develop comfort with culture as an integral part of conflict, we may find ourselves tangled in its net of complexity, limited by our own cultural lenses. Cultural fluency is a key tool for disentangling and managing multilayered, cultural conflicts.'[121]

3.2 THE ROLE OF *UBUNTU* IN DISPUTE RESOLUTION IN AFRICA

3.2.1 The Place of Restorative Justice in Dispute Resolution in Africa

Before the imposition of the colonial justice system in Sub-Saharan Africa, African indigenous or traditional justice system was community-based and human-centred, which employed restorative justice and transformative principles in dispute settlement.[122] Elechi observes that,

> *The African indigenous justice system is community based, human centred and employs restorative and transformative principles in conflict resolution. Restorative justice is negotiative and democratic; hence it empowers the community to mediate in conflicts. Ideally, the African indigenous justice systems provide opportunities for dialogue amongst the victim, the offender, their families and friends, and the community. Conflict provides opportunities for primary stake-holders to examine and bring about changes to the society's social, institutional and economic structure.*[123]

119 Ibid.

120 Ibid.

121 Ibid.

122 Elechi, O., "Human Rights and the African Indigenous Justice System." An unpublished paper presented at the International Conference of the International Society for the Reform of Criminal Law, Montreal, Quebec, 8–12 August, 2004. Available at www.isrd.org/pspers (accessed 13 January 2011).

123 Ibid.

The Western concept of criminal justice, as Bishop Tutu has remarked, is largely retributive and relies heavily on punishing the offender. This sense of justice is contrary to the African restorative justice, which (as Bishop Tutu says) 'is restorative of the dignity of the people'.[124] Bishop Tutu says that retributive justice is largely Western, 'and the African understanding is far more restorative – not so much to punish as to redress or restore a balance that has been knocked askew.'[125] In this regard, Himonga notes that this sense of African justice has occupied a central role in the regulation of Africans' lives for hundreds of years.[126]

According to a publication by Penal Reform International, entitled: *Access to Justice in Sub-Saharan Africa* (2001)[127], African non-state traditional justice systems have the following salient features:

- The problem is viewed as that of the entire community or group;
- There is an emphasis on reconciliation and restoring social harmony;
- Traditional arbitrators are appointed from within the community;
- There is a high degree of public participation;
- Customary law is merely one factor to be considered in reaching a compromise;
- The rules of evidence and procedure are flexible;
- There is no professional legal representation;
- The process is voluntary and the decisions made are based on agreement;
- There is an emphasis on restorative penalties;
- The enforcement of decisions is secured through social pressure; and
- The decision is confirmed through rituals aimed at reintegration.[128]

Interestingly, Stevens adds yet another remarkable feature of African traditional justice system: i.e. like cases need not be treated alike.[129] That is to say, African traditional justice systems are not bound by

124 Quoted in Minow, M., *Between Vengeance and Forgiveness*. Boston: Beacon Press, 1998, p. 81.

125 Skelton, A., "Restorative Justice in Child Justice Systems in Africa." Op. cit, p. 132.

126 Himonga, C., "African Customary Law and Children's Rights: Intersections and Domains in a New Era." In Sloth-Nielsen, J. (ed.), *Children's Rights in Africa: A Legal Perspective*. Hampshire, Ashgate Publishing Company, 2008, pp. 73–90, p. 73.

127 Stevens, J., *Access to Justice in Sub-Saharan Africa*. London, Penal Reform International, 2001.

128 Skelton. Op. cit, p. 132.

129 Ibid.

the Western legal and procedural requirements like the common law doctrines of *stare decisis* and precedents[130].

3.2.2 The Place of Ubuntu in Dispute Resolution in Africa

The foregoing conception of the African indigenous justice system underpins the African communal value, which is better explained in the concept of *Ubuntu*.[131] *Ubuntu*, as a significant factor in African community solidarity on survival and justice issues, was better judiciously defined in *S. V. Makwanyane*[132] by the South African Constitutional Court as,

> *[A] culture which places some emphasis on communality and on the interdependence of the members of a community. It recognizes a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.*[133]

Ubuntu, as an important African communal ethic, was also given judicial consideration by the Court of Appeal of Tanzania in *DPP v. Daudi Pete*.[134] In this case, the Court considered the African communal ethic to be,

> *… the co-existence of the individual and society, and also the reality of co-existence of rights and duties of the individual on the one hand, and the collective of communitarian rights and duties of society on the [which in effect] means that the rights and duties of the individual are limited by the rights and duties of society, and vice versa.*

130 The doctrines of precedents and *stare decisis* entail that all courts and tribunals below the higher courts in Tanzania (i.e. the High Court and the Court of Appeal), are bound by decisions of the Court regardless of their correctness. *See* particularly *Jumuiya ya Wafanyakazi Tanzania v Kiwanda cha Uchapishaji cha Taifa* [1988] TLR 146 (CA); and *Dodhia v National Grindlays Bank Ltd. & Another* [1970] E.A. 195.

131 This *Bantu* word is also explained in some *Bantu* vernaculars as *Umuntu*, *ubunhu*, *ngumuntu*, *ngabantu*, etc.

132 Op. cit.

133 Ibid, para. 224.

134 [1993] TLR 22 (CA).

In the view of Mokgoro, *Ubuntu* is a key social value which emphasises 'group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity.'[135] Connecting *Ubuntu* and the concept of extended family in Africa, Mokgoro points out that: 'a society based on *Ubuntu* places strong emphasis on family obligations.

3.3 COMPARISON BETWEEN FORMAL ADR AND TRADITIONAL JUSTICE SYSTEMS IN AFRICA

3.3.1 Emphasis on Informality of Procedures

As we have already seen, modern or formal ADR has its roots in traditional African justice systems. Like traditional African justice systems, formal ADR operates outside the adjudicatory court process. Interestingly, all systems informally use mediation in resolving disputes, placing much emphasis on informality in procedure and the use of non-professionals in dispute resolution.[136] In principle,

> *Both ADR and African systems of justice are, at least in theory, non-coercive and voluntary in their nature. ADR and African indigenous dispute settlement are both premised on the ideal of compromise and settlement rather than adjudication, and both-emphasize "win-lose" situations and prefer flexible mechanisms of obtaining fair results rather than following strict rules of law. Both systems are participatory in nature, and in general, disputants play a central role in the decision making process. There is emphasis on harmony and preservation of ongoing relations. Principles of restorative justice such as compensation, restitution and informal social pressures, rather than penal sanctions of fines and imprisonment, are employed.*[137]

3.3.2 Methods of Dispute Resolution in Traditional Africa

The two systems of dispute resolution are distinguishable in a number of ways. Kamau contends that 'ADR draws from methods and mechanisms developed in the West, without certain assumptions about disputes.'[138] On the other hand, traditional African justice systems are developed locally and 'draw on local customs, norms and practices.'[139]

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135 Mokgoro, Y.J., "Ubuntu and the Law in South Africa." *Buffalo Human Rights Law Review*. Vol. 4, 1998.
136 Kamau. Op. cit, p. 354.
137 Ibid.
138 Ibid.
139 Ibid.

3.3.3 Neutrality of the Mediator in Traditional Africa Dispute Settlement

In terms of the concept of a mediator, the ADR model emphasizes that the mediators must be a neutral third party, who should have no connection to party. They should have undergone some special training in mediation, and in some jurisdictions they should have certification from the court.[140] In this regard, 'the authority of mediators is based on their training and expertise of mediation, and not on their status in society or knowledge of the dispute or the parties.'[141] In modern ADR,

> *A mediator is valued for his or her ability to remain detached from the conflict, asserting a commitment only to the value of the process itself.*[142] *Thus mediators in the ADR model North America are required to be strangers to the disputants in order to secure their neutrality and impartiality. This means that the mediator has no previous knowledge of the dispute or its history, or the character of the disputants, and must struggle to develop a coherent account from conflicting and ambiguous stories, and to assess the characters of both parties on the basis of their talk and presentation in the mediation session itself.*[143]

To the contrary, mediators in traditional African justice are respected and influential members of the community 'with experience and acknowledged expertise in settling disputes. They are not outside authorities but leaders of kin groups, age grades, and other social groupings, and are usually of higher social status than the disputants.'[144] Kamau points out that,

> *Being experts in village social relationships and genealogies, they bring to the dispute a vast store of such knowledge. Their authority to intervene in conflict situations rests on kinship connections, political position, religious merit, previous experience, and knowledge of customs and community.*[145] *Mediators in the African context, although generally neutral, are rarely disinterested in the dispute, and are not complete strangers to the disputants. Their impartiality is secured by cross-cutting ties that link them to both sides. Neutrality*

140 Ibid, pp. 354–5. *See* also Merry, S.E. "Disputing Without Culture." 100 *Harvard Law Review*, 1987. 2060.
141 Kamau. Ibid, p. 355.
142 Merry. Op. cit.
143 Kamau. Op. Cit, p. 355. *See* also Merry. Op. cit.
144 Ibid.
145 Merry. Op. cit.

is also enhanced by their positions as representatives of an entire village or community or of an important component, such as a lineage or age group.[146]

Nonetheless, this does not necessarily mean that mediators in the traditional African justice system are not always biased. In most cases, traditional African mediators are tasked to impose a decision, unlike in Western ADR where mediators are not 'expected to impose a decision on the parties even in the event that the parties are unable to resolve the dispute themselves.'[147]

3.3.4 The Notion of Privacy and Confidentiality *vis-à-vis* Conflict of Interest of Mediators in the African Traditional Dispute Resolution

Another difference between the Western ADR and traditional African mediation systems is found in the notion of privacy and confidentiality of proceedings. Whereas in the Western ADR sessions and proceedings are strictly private and generally for only disputing parties to appear before the mediator, in the African mediation setting other (particularly family) members are allowed to participate in the sessions.[148] In addition, the role of the mediator in the ADR process is to achieve 'a lasting settlement than enforcing societal norms. During their training, mediators are enjoined by their trainers not to make moral statements or judgments and are encouraged to seek a mutually acceptable outcome, regardless of their notions of relevant laws or norms.'[149] They are not expected to have a shared value system or agreement on normative standards, and such mediators are 'not able to or expected to operate in terms of a shared moral system.'[150]

By contrast, mediators in the African situation 'tend to represent the norms and values of their communities and usually advocate a settlement that accords with commonly accepted notions of justice, couched in terms of custom, virtue and fairness, and reflecting community judgments about appropriate behaviour.[151] As Merry points out, unlike

146 Kamau. Op. cit, p. 355.
147 Ibid. *See* also Weller, J.A., et al. "Fostering Culturally Responsive Courts: The Case Family Dispute Resolution for Latinos." *Family Court Review*. Vol. 39 No. 185, 2001, pp. 188–89.
148 Kamau. Ibid, pp. 355–6.
149 Ibid, p. 356.
150 Ibid. Pp. 356. *See* also Merry. Op. cit, p. 33.
151 Kamau. Ibid.

in Western ADR, mediators in the African setting usually deliver moral lectures to the disputants.[152] In the Western setting, mediators tend to keep parties focused on the particular issues to be resolved[153], which 'may be contrasted with the holistic approach taken in African dispute resolution, in which other issues are often tied up with the issue at the dispute forum.'[154]

3.3.5 The Need to Maintain Cohesion and Collaboration

Kamau argues that 'disputants in Western societies are rarely embedded in a close cohesive social system where they need to maintain co-operative relationships, and even where they are from the same neighbourhood, their conflict in one relationship does not necessarily have repercussions for other relationships.'[155] In this regard, 'the community pressure necessary to induce disputants to accept a compromise settlement is generally lacking.'[156] Thus: 'In the absence of societal pressure, mediators in the West employ the coercive powers of the State apparatus, particularly courts, to back up or "give teeth" to mediated settlements.'[157]

This is in contrast with the African mediation, where 'the overriding need in African societies to maintain harmonious relationships renders the disputing process amenable to the exertion of social pressure on disputants even without the backup of formal State structures.'[158] In this context, the mediator or negotiator is thus 'able to exert his or her influence on the parties in order to bring the parties to a point of settlement, while community pressure in the form of gossip, scandal, threat of ostracism and fear of supernatural sanctions serve as a powerful incentive to restoring amicable relations.'[159]

152 Merry. Op. cit.
153 Weller, et al. Op. cit, p. 196.
154 Kamau. Op. cit.
155 Ibid.
156 Merry, S.E., "The Social Organisation of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America." In Abel, R.L. (ed.), *The Politics of Informal Justice: Comparative Perspectives*. 1982, p. 39.
157 Kamau. Op. cit, p. 357.
158 Ibid.
159 Ibid.