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Chapter Four

Transplanting ADR into Tanzania from the West

4.0 INTRODUCTION

As we saw in Chapters One and Two, modern ADR is a modification of African traditional ways of dispute settlement, which were advanced by the West in the 1970s and later transplanted back to Africa. As the late Francis Nyalali, former Chief Justice of Tanzania, once remarked,

> *The use of customs, special rules and communal practice to resolve disputes is not a strange idea. It is common in most African communities and in commercial communities the world over.*

As in other African countries, the introduction of ADR in Tanzania was just reinforcing the already existing traditional ways of settling disputes. As we discussed in Chapter Two, ADR was transplanted into the African legal systems in the 1980's and 1990's as a result of the liberalisation of the economies, which was accompanied by such conditionality as reform of the justice and legal sectors, under the Structural Adjustment Programmes (SAP's).

However, most of the methods of ADR that are being promoted by the Western countries to be included in the African legal systems are similar to the post-colonial African dispute settlement mechanisms that encourage[d] restoration of harmony and social bonds in the justice system. This Chapter, therefore, briefly discusses the introduction and the practice of modern ADR in the justice system in Tanzania since 1994 to date. It also discusses the challenges facing the practice of ADR in Tanzanian courts since then.

4.1 RETENTION OF THE COLONIAL LEGAL SYSTEM AND ITS IMPACT ON DISPUTE RESOLUTION IN AFRICA

4.1.1 General Overview

In Chapter One we observed that the introduction of colonialism in Africa brought with it the introduction of the European model of formal legal institutions for settlement of disputes largely in the form of courts of law. Notably, the 'new judicial system introduced formality, complex and complicated procedures almost incomprehensible

to the average [African] litigant.'[160] Tanganyika (which later in 1964 united with Zanzibar to form Tanzania) was not spared from this kind of development. When the British colonialists occupied Tanganyika after the World War II in 1919, they brought with them the law and justice institutions that were based on the common law system as applied in Great Britain or its dominions/colonies such as Nigeria and India.

Tanganyika (as was the case with other Sub-Saharan African countries) retained the colonially inherited laws in a dual legal system at independence; by particularly codifying customary laws, abandoning the duo court system and abolishing the customary courts altogether. In this respect, the colonial justice system was retained with "minor" modifications. Read argues that in Sub-Saharan African countries under the British colonial rule, newly independent states retained the colonial justice system in two senses: first, by adhering to the principles of English law; and, second, by retaining the rules of interpretation prevalent in the English law.[161]

4.1.2 The Rationale for the Retention of the Colonial Justice System

Shaidi[162] and Bowd[163] offer a philosophical explanation on the reason behind the retention of colonially inherited justice systems in post-independent Sub-Saharan Africa. It is ironic, viewed from the face of the matter, that African leaders adopted the colonial legal regimes irrespective of the fact that during colonialism in Africa colonial rulers enacted laws and established criminal justice agencies that coerced, repressed and helped to exploit Africans.[164] As Shaidi argues, at independence most of Sub-Saharan African states retained these coercive, repressive and exploitative justice systems because

160 Global Justice Solutions, "Alternative Dispute Resolution (ADR) Training Manual." Dar es Salaam: Project for the Court of Appeal of Tanzania, 2010.

161 Read, J.S., "Criminal Law in the Africa of Today and Tomorrow." *Journal of African Law*. Vol. 7 No. 1, 1963, pp. 5–17.

162 Shaidi, L.P., "Traditional, Colonial and Present-day Administration of Criminal Justice." In Mushanga, T.M. (ed.), *Criminology in Africa*. UNICRI Series: Criminology in Developing Countries, Publication No. 47, 1992.

163 Bowd. Op. cit, pp. 41–48.

164 Ibid. See also Shivji, I.G., "State and Constitutionalism in Africa: A New Democratic Perspective." *International Journal of Sociology of Law*. 18, 1990, pp. 381–408; Alemika, E.E.O., "Colonialism, State and Policing in Nigeria." *Crime, Law and Social Change*. 20, 1993, pp. 187–219; and Sumner, C. (ed.), *Crime, Justice and Underdevelopment*. London, Heinemann, 1982.

they were 'found to be useful by the new ruling class, [though] the subordinate classes could only accept the arrangement from a position of weakness.' To him, as post-colonial states 'are based on a very shaky foundation, coercion is more widely practiced compared to more stable developed countries.'[165]

Profoundly, Bowd contends, the new African elites retained and continued to apply the coercive colonial criminal laws, for example, 'because throughout the period of colonialism it was these elites who had been tasked with the management of the country under supervision of a semi-absent landlord.'[166] To Bowd, in maintaining the existing colonial legal systems, these elites,

> *'found themselves in advantageous position from which they could, with relative ease, ensure their position and consolidate their power: not always for the benefit of the populations they were meant to be serving.'*[167]

4.1.3 The Implications of the Retention of the Colonial Justice System in Dispute Resolution in Africa

Interestingly, the colonially inherited laws in post-independent Africa[168] have undergone certain developments in response to various challenges and problems facing the continent. Some of the problems facing the countries in Sub-Saharan Africa cited by the United Nations Office on Drugs and Crime (UNODC), include those caused by high income inequality, rapid urbanisation, high youth unemployment and poorly resourced criminal justice systems.[169]

Besides, the retention of the colonial criminal justice systems in post-independent Sub-Saharan African states has only brought about adverse ramifications on preservation of peace, harmony and security in society. Bowd points out that, this inherited colonial criminal justice law insisted on protecting those in power at the expense of their subjects. For instance, the philosophical underpinnings of this criminal justice system lean on retributive prosecution and punishment of a poor thief, while upholding the value of private property of those in power or wealthy individuals in society.[170]

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165 Shaidi. Op. cit, p. 16.

166 Bowd, R., "Status quo or Traditional Resurgence: What is Best for Africa's Criminal Justice Systems?" Op. cit, p. 43.

167 Ibid.

168 Bowd. Op. cit, p. 41.

169 UNODC, "Crime and Development in Africa." Available at http://www.unodc.org/pdf/Africa_report.pdf (accessed 14 January 2011).

170 Ibid.

In the long run, this kind of socio-legal relationship tends to degenerate into a growing gap between the *have's* and the *have-not's* in society, rendering this kind of criminal justice system a perpetrator of social problems instead of maintaining order and peace as well as facilitating to resolution of disputes. But for the elites in Sub-Saharan Africa, this kind of criminal justice system helped (and it still helps) them to hold the 'ability to preserve their position through control of systems that can contribute to structural and political violence.'[171]

The foregoing argument by Bowd can be vindicated by the fact that crime rate in Sub-Saharan Africa – including Tanzania – has been on the increase, and the harsher punishments provided for in the colonially inherited criminal laws[172] have never been able to wield enough clout to prevent this situation.[173]

So, as Bowd argues, this situation has an implication of situating the colonially inherited justice system 'with the referent being the individual, thus removing justice from the social [fabric].'[174] To Bowd,

> *In pursuing an aggressive retributive … justice, there is a danger of undermining the social fabric of African communities. … [J]ustice, rather than being held in the domain of the community in order to restore societal relations and protect social cohesion, becomes rooted in the ideals of individualism.*[175]

As already explained above, the retention of the retributive and socially-insensitive justice system after independence has resulted in increased litigation that does not match with the case disposal rate by our courts. Indeed,

> *This increase in litigation, compounded by delays in disposal of cases by our courts at all levels, often attributed to time-consuming intricate and technical rules of procedure obtaining in the traditional judicial system hitherto relied on for the settlement of civil disputes, compounded by scarce resources, had precipitated an almost choking congestion of cases at all levels of the court system. All these have contributed not only to delays in justice delivery in our courts but also adversely affected the quality of that justice.*[176]

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171 Ibid.

172 Coldham, S., "Criminal Justice Policies in Commonwealth Africa: Trends and Prospects." *Journal of African Law*. Vol. 44, 2000, pp. 218–238, p. 218.

173 UNODC. Op. cit.

174 Bowd. Op. cit, p. 44.

175 Ibid.

176 Global Justice Solutions, "Alternative Dispute Resolution (ADR) Training Manual." Op. cit.

These problems "compelled" the Government to take some measures, both statutory and administrative, to improve the situation. In the subsequent parts we briefly look at these measures.

4.2 PRELUDE TO THE INTRODUCTION OF ADR IN TANZANIA

4.2.1 Early Measures to Reduce Caseloads in Civil Courts

In order address the problems facing the justice system in Tanzania, several measurers were devised and put into action, including the enactment of the Ward Tribunals Act in 1985. *Inter alia*, this law vests limited judicial power onto ward tribunals, emphasising the need to use mediation as much as possible in resolving disputes brought before them. As a recent evaluation report notes: 'The effect of this [law], to say the least, was minimal.'[177]

Furthermore, the minister responsible for justice ordered the Law Reform Commission of Tanzania to carry out a study on delays and backlogs of civil cases in 1986. The study was envisaged to find out the major causes of the inordinate delays in determination of civil cases and advise on how to get rid of this problem. The study found, *inter alia*, that delays in disposing civil cases as well as the mounting case backlogs were increasingly becoming unbearable and an immediate lasting solution was needed to address these problems.[178]

Another measure undertaken to address the challenges facing the legal system in the country was the gazetting of Government Notice No. 508 of 1991, which severely 'restricted the granting of adjournments in civil cases.'[179] Administratively, there was devised the Shift System, which was introduced 'to ensure maximum use of the available resources by having morning and afternoon court sessions. That was soon followed by the Individual Calendar system whereby a case assigned to a particular Judge had to be dealt with by that Judge to its finality so as to reinforce accountability and reduce confusion and misplacement of case files.'[180]

177 Global Justice Solutions, "Alternative Dispute Resolution (ADR) Training Manual." Op. cit.

178 United Republic of Tanzania, "Delays in the Disposal of Civil Suits." Dar es Salaam: Law Reform Commission of Tanzania, 1986, p. 4.

179 Global Justice Solutions, "Alternative Dispute Resolution (ADR) Training Manual." Op. cit.

180 Ibid.

Along these administrative measures, there was devised another administrative action relating to the setting up of Case Management Committees from district level to national level that involve the Judiciary, Police, Prisons and the Office of the Attorney General, who 'are charged with the task of finding out causes of delay in each case and suggesting measures to tackle the problem. These committees have achieved some measure of success. Their emphasis, however, has been on criminal rather than civil cases.'[181] Remarkably, the evaluation report notes that,

> *'In spite of all these measures and others, public outcry grew about court congestion and inordinate delays in the dispensation of justice in the country. This brought to the fore the concept of finding alternative methods of resolving civil disputes to complement the traditional judicial system.'*[182]

4.2.2 The Need for ADR in Tanzania

One of the measures that were to be devised at this stage was ADR. In the next section, we look briefly at the early efforts for the resort to modern ADR and later at the legal incorporation of ADR in the civil justice system in Tanzania. As we have just observed above, although the Government and the Judiciary introduced both legislative as well as administrative measures, still the civil justice system continued to grapple with a number of chronic problems, including inordinate delays in disposing cases and caseload congestion. This meant that the Tanzanian Judiciary and the Government had to continue the search for appropriate and effective dispute resolution mechanisms.

During one of his visits to the United States of America, the late Chief Justice of Tanzania, Francis Nyalali, came across the practice of ADR in the Superior Court of Washington, DC, which appealed to him.[183] Consequently, in April 1993 he invited two Judges[184] from the Superior Court of Washington, DC, to attend a Judges' Conference held in Arusha.[185] At that Conference, the two American Judges presented Papers on the practice of ADR in the US. That presentation inspired the participants of the Conference, who resolved, *inter alia*,

181 Ibid.
182 Ibid.
183 Ibid.
184 Namely, Judge Nun Huhn and Judge Robert Shuker.
185 Mroso, J., "ADR as a Tool of Administration of Justice." *Tanzania Lawyer*. February–May 1997, p. 16.

that Tanzania should find out if some forms of ADR would fit local circumstances[186] as part of the Judiciary's bid to get rid of delays in disposal of cases.

As a follow up on this resolution, the Chief Justice appointed a Committee of three High Court Judges chaired by Hon. Mr. Justice Mroso (now retired).[187] Among the Terms of Reference of the Committee were: first, to compile and recommend strategies and tactics to be used in a "Programme" for elimination of court delays in the disposal of cases in the High Court and courts subordinate thereto. Second, to consider the possibility of adopting in the country a system of administering justice by using ADR mechanisms in the form of negotiation, conciliation, and arbitration as part of the civil justice system or outside the court system (out of court settlements) as practiced in the Superior Court of Washington, DC. Third, to consider how the strategies and tactics used so far in Tanzania can continue in operation parallel to the ADR.[188]

Eventually, the Mroso Committee recommended the adoption of ADR in the form of negotiation, conciliation, mediation, case evaluation, and arbitration, which was already given legislative recognition in the Arbitration Act[189]. Consequently, this recommendation was adopted; and so ADR was to be introduced in the in those forms 'but, as it turned out, with emphasis on mediation, and that such mediation would be court-annexed with Judges and Magistrates as the Mediators.'[190]

4.3 INTRODUCTION OF ADR IN TANZANIA

4.3.1 General Overview

In Tanzania ADR was introduced in 1994 through Government Notice No. 422, which amended the First Schedule to the Civil Procedure Code Act (1966)[191] as a result of the Mroso Committee's

186 Global Justice Solutions, "Alternative Dispute Resolution (ADR) Training Manual." Op. cit.

187 Other committee members were Judge William Maina (retired) and Judge Anthony Bahati (retired).

188 Ibid.

189 Cap. 15 R.E. 2002.

190 Global Justice Solutions, "Alternative Dispute Resolution (ADR) Training Manual." Op. cit.

191 Cap. 33 R.E. 2002. See particularly Civil Procedure Code (Amendment of Schedules) Rules (1994), which were published in the Tanzania Government Gazette under G.N. No. 422 of 1994; and came into operation on 1st November, 1994.

recommendation. However, the Mroso Committee did not recommend the incorporation of ADR in the civil justice system. But it was decided that in order to give ADR some sort of legal authenticity it should be incorporated in the Civil Procedure Code.[192] This move brought in amendments to Orders IV, V, and VIII, and introduced new Orders – i.e. Orders VIIIA, VIIIB and VIIIC to the First Schedule. The provisions of Order VIIIA 'can be said to be the main provisions which statutorily introduced ADR in the Tanzania civil justice system.'[193]

4.3.2 Consequences of the 1994 Amendments to the Civil Procedure Code

One of the major legal consequences of the foregoing amendments to the CPC is the mandatory requirement for civil cases to be first referred to mediation before full trial is conducted. The amendment to the CPC introduced new stages between the completion of pleadings and trial in given cases.[194] However, not all types of cases are amenable or suitable for mediation; there are some types of cases which,

> *… by their very nature, are unsuitable for mediation. These include, cases in which constitutional relief is sought, cases in which a definitive interpretation of the law is necessary, cases in injunctive relief or [where] declaratory judgments are sought, and in applications for prerogative orders. These types of cases constitute only a small fraction of all cases filed in the courts. So, the majority of the cases are amenable to mediation and so have to go through the mediation process.*[195]

In Tanzania's court-annexed mediation, 'a case is said to be ready for mediation when all the pleadings have been duly filed and there are no pending applications or any other preliminary matter to be disposed of. In effect, it is when the case would ordinarily be said to be ready for trial.'[196]

Just before the coming into force of Government Notice No. 422 of 1994, a few Judges and Magistrates were sent to the United States of America to be trained as Mediators. Subsequently: 'In 1994, some four Judges of the High Court and two Resident Magistrates were sent

192 Global Justice Solutions, "Alternative Dispute Resolution (ADR) Training Manual." Op. cit.
193 Ibid.
194 Chipeta, B.D. Op. cit.
195 Global Justice Solutions, "Alternative Dispute Resolution (ADR) Training Manual." Op. cit.
196 Ibid.

to the United States of America where they were trained as Mediator Trainers. On their return, they taught other Judges and Magistrates as Mediators.'[197]

However, as the evaluation report of the ADR practice noted in 2010, 'following retirements, only one remains'[198] out of the four judicial officials. It was only recently that an extensive training of judicial officers took place under a World Bank-supported project.[199] The objectives of this project were:

- To provide the Judiciary, Ministry of Justice and Constitutional Affairs, and Tanganyika Law Society with an evaluation of the successes and failures of the ADR mechanism to date. To thereafter provide recommendations of any legislative, procedural, administrative, or managerial improvements to the ADR mechanism set out in the Civil Procedure Code 1966;
- To develop a plan for sustaining long term ADR training in Tanzania;
- To design a comprehensive training programme for the training of ADR trainers; and
- To conduct training of 50 trainers as selected by the Client.[200]

Apart from conducting an in-depth evaluation of the ADR practice in Tanzania, under this project about 50 officials of the court were instructed in a capacity- building tailor-made training programme on ADR. The major aims of this training were,

- To provide participants with appropriate knowledge of ADR concepts, principles and techniques; and
- To provide the participants with the opportunity to acquire skills in facilitating ADR training programmes and to enhance their abilities as trainers in order to enable them to transmit their knowledge and experience of ADR to others.[201]

However, the amendment did not provide guidance on the procedure for practising ADR.

197 Ibid.
198 Ibid.
199 Ibid.
200 Ibid.
201 Ibid, pp. 7–8.

4.4 CHALLENGES FACING ADR IN TANZANIA: FINDINGS OF THE ADR EVALUATION REPORT

The ADR evaluation report released by Global Justice Solutions and Open University of Tanzania in 2010 contains the following key findings:

- Government Notice No. 422 of 1994 which amended the Civil Procedure Code of 1966 only affected the First Schedule in particular Order VIIIA (and not the substantive part of the Act) and therefore did not impact on the efficacy of the ADR mechanism in Tanzania.
- The Second Schedule to the Civil Procedure Code permits resort to arbitration in Rule 1(1) where the parties agree that any matter of difference between them shall be referred to arbitration at any time before judgment is pronounced. This may be done by applying to the court for an order of reference; and, in such case, the court is required not to deal with the matter pending the finalization of arbitration. To date, however, these provisions have not been commonly applied in practice.
- To some extent the ADR mechanism in Tanzania has been successful and the objective fulfilled from the perspective of the Judges and Magistrates as mediators. However, the success rate is not as high as might have been expected. ADR, as currently practiced in Tanzania, has not substantially resulted in expeditious disposal of cases. One contributing factor is lack of effective case management practices; a situation that does not correspond with ADR international best practice.
- ADR successes in the Commercial Court can be attributed to support to the program by the Chief Justice and commitment by Judges to mediate and success at Kisutu RM's Court can be attributed to the fact that ADR was piloted in that location between 1994 and 1999 and Magistrates received had some training in mediation.
- When the ADR program was formally introduced in the country in 1994, only four judges and two magistrates were trained and equipped with ADR skills and only one of whom remained in active practice by end of 2010.
- ADR training has not been sustained in Tanzania and has therefore not prepared sufficient numbers of skilled mediators.
- Lack of skills and interest on the part of mediators and lack of training may have significantly contributed to failure of some mediation cases in Tanzania.

- The value of Judges and Magistrates mediating has also been questioned. 75 % of questionnaire respondents believed that ADR should be conducted by officers other than Judges and Magistrates, but the ADR mechanism should remain court annexed. Of the 41 relevant judicial stakeholders consulted only one person supported the prospect of an ADR mechanism external to the court.
- Although ADR ordinarily refers to mediation, negotiation, arbitration and conciliation, in Tanzania only mediation is actively practiced by the courts under the auspices of the Civil Procedure Code as it was amended by Government Notice No. 422 of 1994.
- Tanzania has not explored other potential support options such as the use of professional organizations like the Tanzania Institute of Arbitrators, Contractors Registration Board or the Tanzania Chamber of Commerce, Industries and Agriculture to resolve disputes through mediation and/or arbitration. These bodies could play a significant role in soliciting and preparing a pool of personnel (other than Judges and Magistrates) who could discharge the ADR function.[202]

4.5 RECOMMENDATIONS OF THE ADR EVALUATION REPORT

As a step forward in addressing the foregoing challenges, the ADR evaluation report provided the following recommendations:

- The strategy for sustaining long-term ADR training in Tanzania developed during the execution of this project should be adopted and applied;
- In the interests of sustainability, a review and evaluation of ADR understanding and practices should be performed within the first 3 months of 2011 to determine the effectiveness and impact of the ADR training implemented by this project;
- ADR training should be provided to additional Judges, Magistrates, State Attorneys and Advocates and this should be achieved by optimizing the resources developed during the course of this project. That is, utilising the trainers trained to facilitate and deliver further training through the application of the ADR Training Curriculum and Training Manual;
- In order to sustain the pool of skilled trainers and practitioners, periodic ADR training should be provided;

202 Ibid, pp. 6–7.

- Refresher training should, at some point, be provided to those already trained to ensure that contemporary ADR knowledge and skills are maintained and emerging issues are addressed;
- A submission should be made to the Council for Legal Education to suggest inclusion of the subject of Arbitration as one of the compulsory subjects within Diploma level courses to provide graduating Primary Court Magistrates with the relevant foundational knowledge;
- The ADR mechanism in Tanzania should remain court-annexed; however, the introduction of a model which sees cases referred to mediators who are not serving Judges or Magistrates should be considered. If adopted, this model should still require the court to determine if a case is amenable to mediation, refer cases to the mediators and make enforcement determinations if required;
- An ADR Case Management Officer should be appointed by the Chief Justice to manage and record cases within an ADR system, monitor mediation progress and identify any emerging issues or shortfall within the ADR mechanism;
- The Tanganyika Law Society (TLS), Tanzania Institute of Arbitrators (TIA), the Tanzania Chamber of Commerce, Industries and Agriculture (TCCIA) and the Contractors Registration Board should be engaged to establish the administrative steps required to enable practitioners and retired Judges and Magistrates to act as mediators and arbitrators and an independent body should be established to regulate the conduct of those practicing mediation and arbitration on behalf of the court;
- The court should continue to require parties to undertake a mediation process;
- Judges and Magistrates should be made aware of the provisions of Rule 1(1) of the Second Schedule to the Civil Procedure Code and if possible be encouraged to apply it; and
- A marketing strategy is required urgently to sensitise the judicial community and general public. Information communicated through various media should include the importance of ADR, an overview of the ADR mechanism and the proactive steps which have been taken to enhance ADR in Tanzania.[203]

203 Ibid. P. 11.