POLICY AND GOVERNMENT'S ROLE IN CONSTRUCTIVE ADR DEVELOPMENTS IN AFRICA

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Introduction

Where a **dispute** exists between two or more parties, there are several ways in which parties may choose to resolve it. They may attempt to **ignore** it, **negotiate** among themselves, get an independent **third party** to mediate, or adjudicate the dispute, or the parties may resort to **violence**. Some of the above mechanisms for resolving disputes are more commonly used depending on the setting and nature of the dispute. In Africa it is almost impossible to think about disputes without acknowledging that in many instances, especially since the end of the Cold War in the late 80's, parties have resorted to using violence as a means of resolving disputes. Some examples of countries where this occurred include Liberia, Sierra Leone, Rwanda, Angola, Sudan, Burundi, the Democratic Republic of Congo, Cote d Ivore and Mali to name just a few. This may lead one to believe that violence is the only mechanism known to Africans for resolving disputes. However the use of violence as a means to resolve disputes in Africa is dependent not only on the people involved in the dispute, but largely on the nature and root cause of the dispute.

The word **"dispute"** is often used interchangeably with the word **"conflict"** to mean the same thing. However there is a slight, but important distinction between the two words. This distinction often informs the mechanisms and procedures used to resolve the dispute/conflicts. The Oxford Dictionary[2] defines **dispute** to mean; *"a disagreement or argument; to argue about something; to question whether alleged facts are true or valid; and to compete for, strive to win"*. **Conflict** is defined as; *"a serious disagreement or argument, typically a protracted one; a prolonged arm struggle; or serious incompatibility between two or more opinions, principles or interests, to clash".*

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[2] Edited by John A. Simpson;2010; Oxford University Press;UK

John Burton[3] distinguishes the two terms by defining **disputes** as a "*short term disagreement involving negotiable terms"* while **conflicts** *are concerned with long term, deep rooted issues that are non- negotiable, issues that relate to ontological human needs that cannot be compromised.*

John Burton suggests that because disputes are negotiable they are therefore subject to adjudication through the courts or through arbitration. However conflict requires a more analytical problem solving approach and for conflict to be resolved the human needs must be satisfied[4]. He further suggests that conflict resolution is a fundamentally different exercise from any settlement processes. It is concerned with policy formation based on a political philosophy that asserts that the satisfaction of human needs that are universal must be the ultimate goal of survivable societies[5].

From the above definitions it is clear that both conflict and dispute involve a disagreement between two or more parties. The distinction between the two words is in the length and nature of the disagreement. Disagreements in the African countries highlighted above which often lead to parties opting to use violence, usually stem from ontological human needs such as identity and freedom and would therefore be categorized as conflicts rather than disputes. Disputes may be present in the midst of conflict and can escalate into a conflict if they remain unresolved. For the purposes of this paper I will be focusing on disputes and the role of African Governments in dispute resolution as opposed to conflict resolution.

History of ADR in Africa

Disputes have always existed among human beings and Africa is no exception. In African societies, ADR is not a new concept but one which has been practiced for many years by most African traditional/indigenous institutions and communities[6]. These institutions are rooted in the culture and history of the societies, and are usually built around the concepts of reconciliation, accountability, truth telling and reparation[7]. In observing these principles of dispute resolution, traditional communities use mediation, negotiation and arbitration[8]. They make use of local actors

3 John W. Burton; Chapter 4:" Conflict Resolution as a Political Philosophy" Conflict Resolution as a Political System; 1988; 55-64. CRP11081208

[4] Burton pg 57

[5] Burton pg 60

[6] Dr Martha Mutisi; The Abunzi Mediation in Rwanda: Opportunities for Engaging with Traditional Institutions of Conflict Resolution; ACCORD Policy and Practice Brief; 2011; Issue #12

[7] Edited by Luc Huyse and Salter M; Traditional Justice and Reconciliation After Violent Conflict; Learning from African Experiences; 2008 International IDEA; Sweden

[8] Elisabetta Grande; Alternative Dispute Resolution; Africa and the structure of Law and Power; The horn in Context; Journal of African Law 43; 1999 School of Oriental and African Studies; pg 65

and institutions with authority, such as community elders, family elders and/or the chiefs and kinship to make decisions, manage and resolve daily disputes. These may include theft, marital and family disputes, bride price disputes, inheritance disputes, commercial transaction disputes, water and land rights disputes and other criminal matters such as rape and murder[9].

These authorities are tasked with maintaining social cohesion in their communities. The process of dispute resolution is usually a collective effort, involving at varying levels, various community stakeholders and held at a neutral, public and open space such as the village square, market square or an open hut[10]. Parties get an opportunity to express themselves without direct confrontation. Other members of the community may also be allowed to make representation. However the last word still belongs to them. After making a decision, the elders or chief will obtain the consent of the parties to the dispute and of the community to legitimise their decisions[11].

African dispute resolution mechanisms focus on principles of reconciliation and maintaining social cohesion as opposed to punitive justice. Any punishment meted on an offender was always meant to bring healing to the victim, the victim's family and the community[12]. Punishment is often delivered in the form of compensation which includes an apology or atonement by the offender to the victim and the community[13]. Compensation also includes associated gestures and rituals such as dancing, drinking traditional beer and slaughtering animals. Preparation for dispute resolution involved consultation, invitations sent to the appropriate persons, the gathering of materials for rituals such as sacrificial animals, local brew for consumption after the process is complete and selection of a date that does not clash with events like market days or farming[14].

African communities did not have a centralised power as is the case in the model of a state. They therefore organised themselves according to communities, clans and tribes. Therefore almost all African communities have a traditional dispute resolution mechanism and below are a few examples from different countries and cultures which embody the same basic principles of collective dispute resolution, focusing on reconciliation, healing and social cohesion using traditional ADR mechanisms.

Ethiopia – in traditional settings communities use the council of elders known as the *Shimangele*.

[9] Edited by Betty Radar and Karimi M; Indigenous Democracy; Traditional Conflict Resolution Mechanisms; Pokot, Turkana, Samburu and Marakwet; 2004; a publication of ITDG-EA
[10] Kennedy Ejiwonke Umunadi ; The Efficiency of Mediation and Negotiation Methods for Dispute Resolution in Delta State; Sacha Journal of Policy and Strategic Studies, Volume 1 Number 2 (2011), pg 65
[11] Grande; pg 64
[12] O. Oko Elechi; Human Rights and the African Indigenous Justice System; A paper for presentation at the 18th International Conference of the International Reform of Criminal Law; August 2004; Montreal, Quebec, Canada
[13] Ibid pg 18
[14] Kennedy Ejiwonke Umunadi ; pg 65

Uganda – in the Baganda tribe the kinship is responsible for managing conflict resolution in the community through a process called *Ekika*. In the Acholi tribe of Northern Uganda *Mato Oput* is a process used for dispute resolution. It consists of traditional leaders who act as arbitrators but allow everyone to air their opinion. The dispute resolution process is then concluded by drinking the bitter herb made from the Oput tree[15].

South Africa – in the rural settings, disputes are brought to a king, queen, senior traditional leader, headman, headwoman or a member of a royal family. When a gathering is held to resolve disputes, it usually includes a forum of community elders and is known as *Inkundla* (isiXhosa) *Lekgotla* (Setwana) and *Khoro* (Tshivenda).[16]

Kenya - in the cattle rustling communities in North Rift Kenya, the Marakwet and Pokot use the council of elders called *Kokwo*. Turkanas use extended families and clan members called the *Adakar* and the Samburu use extended family, neighbours and the clan members called *Manyatta*[17].

Government's role in the development of ADR in Africa

As stated above the use of ADR in Africa is not a new concept. However what is relatively new and gaining momentum is the promotion and incorporation of the use of ADR in the formal justice systems. It is argued that the reason for this new found interest of ADR the formal justice system in Africa, is that, formal justice grounded in adversarial litigation court processes, is seen as too expensive for the majority of people. It is also perceived as being too formal, too slow and very different from the traditional justice systems which people are accustomed to because it is based on colonial principles of justice. It also requires a level of literacy which many African often do not have. In some countries judges are accused of being corrupt which further threatens the legitimacy and effectiveness of formal justice[18]. However the biggest driving force which can be attributed to the growth, interest and use of ADR is that it complements the formal justice system by providing better access to justice. A 2009 survey conducted in Liberia found that only 3% of criminal and civil disputes were taken to a formal court. Over 40% sought resolution through informal mechanisms

[15] Brigit Brock –Utner; Indigenous conflict resolution in Africa; presented to the week-end seminar on indigenous solutions to conflicts held at the University of Oslo, Institute for Educational Research 23 – 24 of February 2001
[16] Traditional Court daft Bill As introduced in the National Council of Provinces (proposed section 76), on requestof the Minister of Justice and Constitutional Development; explanatory summary of Bill published in Government Gazette No. 34850 of 13 December 2011)
[17] Ibid Betty Radar pg 88
[18] Richard Cook; The State and Accessible Justice in Africa. Is Ghana Unique? Policy Brief 03; Africa Power and Politics ; November 2011.

and the remaining 55% went to no forum at all. This included cases where claimants felt the need to take justice into their own hands, often with violent consequences[19].

As a result of this, African governments are increasingly adopting policies which use ADR to complement the formal justice system thereby promoting access to justice for people who otherwise would not have access because of insufficient income or lack of understanding and confidence in the formal justice system. Below are some highlights indicating policies and practices put in place by governments in Africa to promote the use of ADR in the formal justice system and others where traditional justice institutions have been incorporated into the formal justice system.

Uganda

Uganda is one of few countries in Africa to have successfully introduced and implemented the use of a court annexed mediation programme. This approach started in the Commercial Division of the High Court in 2003 and has now been implemented in other divisions of the High Court.

Court connected ADR was born into the Ugandan Judicial system in the mid 1990s following the 1994 *Justice Platt Report on Judicial Reform*[20]. This report recommended the increased use of ADR alongside litigation. In 1996 the Chief Justice issued a Practice Direction No.1 of 1996 which established the Commercial Division of the High Court. In 1998, the Civil Procedure Rules were amended to include Order 10B which introduced into the Ugandan Judicial system the use of a pre-trial scheduling conference. The purpose of this order was to allow parties an opportunity to hold a pre-trial conference which will sort out points of agreement and disagreement and possibly to mediate, arbitrate or use other forms of ADR to resolve the matter. This order together with Statutory Instrument No. 71 2003, The Commercial Court Division (Mediation Pilot Project) Rules 2003, were a milestone in promoting the use of court connected ADR and the pilot mediation project in the Commercial Court in 2003. Following this, a pilot on court annexed mediation was introduced in the commercial court in 2007. By 2011, 100 corporate court users, 70 advocates and 20 court accredited mediators had been trained. Of the 20 mediators trained, 9 commenced work as part time mediators in the commercial court in 2011. In 2012 the Commercial Division increased the number of court accredited mediators, from to 17. All court accredited mediators are advocates registered with the law society who have undergone the prescribed mediation training and provide

19 Erneste Uwazie; Alternative Dispute Resolution in Africa; Preventing Confict and Enhancing Stability; Policy Brief No. 16 from the African Security Brief November 2011

20 Geoffrey Kiryabwire, The Development of the Commercial Judicial System in Uganda: A Study of the Commercial Court Division, High Court of Uganda, 2 J. Bus. Entrepreneurship & L. (2009); http://digitalcommons.pepperdine.edu/jbel/vol2/iss2/3

their services on a voluntary basis[21]. This eventually gave rise to the Statutory Instrument 2013 No. 10**.** The Judicature (Mediation) Rules 2013 which enables the use of mediation for civil actions filed in the High Court of Uganda and other subordinate court to the High Court[22].

Uganda also put in place an Arbitration and Conciliation Act Cap 4 2000 which incorporates the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards therefore making it attractive for foreign investment. The Act also provides for the creation of the Centre for Arbitration and Dispute Resolution (CADER). CADER was initially funded by the United States Aid for International Development (USAID) but encountered some financial problems when the funding came to an end in 2003. This came about because of an agreement between USAID and the Ugandan Government that the funding of CADER would become the responsibility of the government after 2003. The government amended the Arbitration and Conciliation Act in 2008 to make provision for the funding of CADER which is now a fully functional institution providing drafting services and mediation and arbitration services to parties. Most of CADERS income now comes from the payment which parties to the arbitration or mediation pay to CADER. There is an increased number of parties who use CADER to assist them draft arbitration clauses to be added into their contracts. This means that in the event of a dispute the parties have to refer the matter to arbitration as opposed to court. The Ugandan courts have referred many matters to arbitrations because of lack of jurisdiction as a result of the arbitration clause in a contract.

Rwanda

Rwanda has opted to use traditional justice to complement the formal justice system. This is done through the reinstitution and recognition of the *"comite y'abunzi*" (abunzi) which was mandated by Article 159 of the Constitution, and the Organic Law No. 31/2006 and Organic Law No. 02/2010/OL[23]. Abunzi is a Kinyarwanda word meaning "those who reconcile and provides for a system using trained mediators to resolve disputes in communities". The Abunzi are defined as 'an organ meant for providing a framework of obligatory mediation prior to submission of a case before the first degree courts'. In essence, the provisions of the Organic Law are such that the formal courts will not consider a dispute unless the *abunzi* has first considered and ruled on the dispute, especially if the disputed property value is below 3 million Rwandese Francs (approximately $3000)[24].

[21] Commercial Court Annual Report 2012

22 Statutory Instrument 2013 No 10. The Judicature (Mediation) Rules 2013 s2

[23] African Dialogue; Monograph Series No. 2/2012; Integrating Traditional and Modern Ronflict Resolution; Experiences from selected cases in Eastern and The Horn of Africa

[24] Ibid; African Dialogue

The *abunzi's* which were officially launched in 2004, form part of the local government structures (the Cells and the Sectors)[25] and fall under the Ministry of Justice with the Ministry of Local Government performing an administrative oversight. The A*bunzi's*, are trained to mediate disputes in the community. One of the distinct features about governance institutions in Rwanda is that they are required under the constitution to have 30% participation by women. This is also true for the Abunzi.

According to the Rwanda Governance Advisory Council (RGAC) and the Ministry of Justice Rwanda has a total of 32 400 Abunzi Committee members across 2 150 cells, and within 30 districts[26].
Some of the achievements of this initiative are that there has been a 75% drop in land disputes referred for adjudication. A survey conducted by Transparency International Rwanda reported that 81.6% of the communities are satisfied with the use of these committees to mediate matters because it promotes access to justice[27]. On the other hand, in comparison with the ordinary courts, the most highlighted indicators are the reduction of time spent to settle cases (86.7%); a reduction of economic costs of cases in jurisdictions (84.2%); and mitigation of disputes between parties (80.1%)[28].

Rwanda has also gone further to introduce the Kigali International Arbitration Centre (KIAC) which was set up in 2012 following extensive consultation on how best to improve arbitration in Rwanda[29]. The Centre aims to attract and create opportunities for arbitration, not solely in Rwanda but also with neighbouring countries in the East African Community (comprising Burundi, Kenya, Tanzania, Rwanda and Uganda) and from the Common Market of Eastern and Southern Africa (comprising twenty countries stretching from Libya to Zimbabwe).

Ghana

The Ghanaian government has been supporting the growth of ADR and other forms of informal justice, both in formal judicial institutions (through a programme of court-connected ADR), and in two new institutions outside the Judicial Service such as the **Customary Land Secretariats (CLSs)**,

25 Doughty Kristin; Centre for Programs on Contemporary Writing University of Pennsylvania; for Conference on "The Potential Role of Transitional Justice in Active Conflicts," Hebrew University of Jerusalem, November 2011;
[26] Ibid; Dr. Martha Mutesi
[27] http://www.newtimes.co.rw/news/views/article_print.php?&a=34460&icon=Print and http://www.rgb.rw/main-menu/innovation/abunzi.html
[28] Jean-Christophe Nsanzimana; *"Abunzi and land use were a success research finds";* Rwanda Focus; 25th May 2012; http://focus.rw/wp/2012/05/abunzi-and-land-use-were-a-success-research-finds/
[29] Thomas Kendra; Launch of the Kigali International Arbitration Centre:Hogan Lovells http://www.hoganlovellsafrica.com/_uploads/Publications/Africa_September_2012_newsletter-_KIAC_article.pdf

based on traditional chieftaincy authorities which was set up by Ghana's Ministry of Lands to settle disputes arising over the ownership and demarcation of land held under customary tenure which constitutes 80% of all land[30]. Mediation is practiced in the Commercial Division of the High Court of Ghana under the High Court Civil Procedure Rules (C.I. 47) as a mandatory pre-settlement procedure. In 2000 a pilot programme on court annexed mediation was put in place using trained mediators attached to selected courts to assist parties to resolve their disputes and it achieved an average settlement rate of above 60% on all cases mediated[31]. As part of judicial reform, Ghana introduced "settlement week" which was held in 2003 where 300 cases pending in the court in Accra were mediated and concluded in 5 days. This effort was a major success and was replicated in 2007 where 100 out of 155 cases were successfully mediated over 4 days. This was done again in 2008 where 2500 cases were mediated in more than 40 districts where over 50% were settled rate[32]. Ghana aims to have functional mediation services in all district, circuit and high courts by the end of 2013 which will significantly reduce the pressure and backlog in the Ghanaian court system[33]. This positive experience with ADR in the courts has influenced the creation of the country's landmark Alternative Dispute Resolution Act No. 798 of 2010 which was finalized after nearly 10 years of consultations, consensus-building, bill drafting, and multiple changes in government leadership and in the judiciary[34].

Another successful use of ADR in Ghana is in the National Labour Commission (NLC) of Ghana similar to the CCMA in South Africa. This was established by the Labour Act in 2003 to facilitate the settlement of industrial disputes and to investigate labour related complaints, and take steps to prevent labour disputes in the country. The NLC uses the services of mediators and arbitrators to resolve disputes[35].

Arbitration is also a popular way of resolving disputes in Ghana and has been in practice since the passage of the Arbitration Act, 1961 (Act 38). Commercial and Labour Arbitration are the common forms of Arbitration being practiced in Ghana currently.

South Africa

[30] Ibid; Richard Crook

31 Senyo Adijabeng; Alternative Dispute Resolution in Ghana; 2007; Mediate.com; http://www.mediate.com/articles/adjabengs3.cfm

32 Ibid Erneste Uwazie

33 "Strategic Plan for Judicial Service ADR Programme 2008–2013," The Judicial Service of Ghana, available at <http://www.judicial.gov.gh/

34 Ibid Senyo Adijabeng

35 Ibid Senyo Adijabeng

ADR in South Africa is not a new concept and has been around since the 1960's. South Africa has an arbitration framework regulated by the Arbitration Act No. 42 of 1965 and in 1976 South Africa became a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, after which it enacted the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. This means that foreign arbitration awards are recognised and enforceable in South Africa.

One of the flagship uses of ADR programmes which promotes the use of mediation and arbitration in South Africa is the Commission for Conciliation Mediation and Arbitration **(CCMA)** their functions are among others to conciliate/mediate and arbitrate work place disputes as set out in the Labour Relations Act No. 66 of 1995. The Act makes it mandatory for disputing parties in employment disputes to use conciliation/mediation and requires that certain disputes which remain unresolved during conciliation, be referred for arbitration. This system limits the use of legal representation thereby affording parties access to justice without the high costs it is often associated with.

There are various other policies which encourage the use of ADR either though mediation or arbitration. The **Children's Act 38 of 2005,** which came into effect in 2007, encourages the use of mediation in family disputes involving children. In some instances the Act makes mediation mandatory[36], unless the matter is urgent or there are allegations of abuse or sexual abuse. The Act also makes provision for court to make a punitive order where one of the parties refused to attempt mediation or where the party was uncooperative during the mediation process[37].

The use of mediation and arbitration is also built into the various pieces of **land legislation**. S18 (3), s19, s20 and s36 of the Land Reform (Labour Tenants) Act 3 of 1996 provides for the use of mediation and arbitration, s10 (2) of the Communal Property Association Act of 1996 provides for the use of mediation, s 21 and 22 of the Extension of Security of Tenure provide for mediation and arbitration respectively, and s13 of the Restitution of Land Rights Act of 1994 makes provision for settlement of disputes through mediation.

The Department of Justice and Constitutional Development is also in the process of putting in place a **court connected mediation** process. The plan is to introduce voluntary court-annexed mediation. Draft rules to regulate the procedure for civil disputes were published and the profession was given an opportunity to comment in early 2013.

[36] The Children's Act s 21 and s33
[37] The Children's Act, s48(1)(d), empowers the children's court to 'make appropriate orders as to costs in matters before the court

Furthermore in recognition of the role of traditional institutions in resolving disputes, the government is in the process of incorporating the traditional justice systems based on customary law with the formal justice by introducing the Traditional Courts Draft Bill whose purpose is to recognise the traditional justice system and its values, based on restorative justice and reconciliation and to provide for the structure and functioning of traditional courts in line with constitutional imperatives and values[38].

Challenges

The growth of ADR in its present form on the continent is certainly an overall positive step for the promotion of access to justice. However ADR is not without its own challenges. From my experience in implementing the Court Annexed mediation programme in Uganda several challenges were identified;

1. **Resistance by legal professionals to participate in ADR processes**. This was largely driven by lack of knowledge of ADR and the perception that because using ADR is said to reduce the time it takes to resolve the dispute, it will result in a loss of revenue. Furthermore, there was a concern that using ADR will erode jurisprudence. In all process of change many people will first resist the change before embracing it and seeing its positive aspects. Even where lawyers have embraced ADR, because of the litigious nature of legal training, many who accompany their clients to court for mediation conduct themselves in an adversarial manner.
2. **Lawyers also argued that ADR is not necessarily a time saver**. This is because court connected mediation was seen as an additional step in the litigation process because if parties do not settle the matter, it still needs to be referred to court. As a result time is wasted on mediation when it could have been placed on the roll in that period.
3. **The structure of modern day ADR is different from traditional justice system**. Traditional Justice is based on collective interest not only of the victim but also that of the community. It also takes place in an informal public setting. Whereas modern ADR is still base on individual interest and takes place in the court house or government structure. Because of these differences it cannot be assumed that by making ADR available people will understand what it is

[38] Ibid;

and how it functions. People still find the court house intimidating and this leaves people with the feeling that the justice system is alien and they would therefore not prefer to use it.

4. **ADR professionals require training**. ADR is a skill and cannot be conducted by persons simply because they have knowledge of the law. Lack of training can have a detrimental effect on the public's attitude towards ADR. Once a mediator does something in the mediation process which results in mistrust by the parties, it is near difficult to get the parties to have a positive attitude towards ADR. The converse is that where traditional institutions or local government structures are incorporated into the formal justice system as is the case in Rwanda (Abunzi), Uganda (local counsellors) and South Africa (traditional leaders), it is important to train the people who will be making decisions in the ADR process. In many instances this group of people has punitive powers and without proper training not only of ADR but of the laws, they may make decisions which incorrectly but adversely affect the parties. This was one of the complaints made by Human Rights Watch when commenting about the Gacaca courts introduced in Rwanda as to deal with the aftermath of the genocide. They claimed that most of the judges had little or no formal education and, in the vast majority of cases, no formal legal experience or training[39].
5. Where the cost of ADR is not covered by the courts, it is important for the public to be willing to remunerate the ADR professionals.
6. At times, where traditional institutions are incorporated to complement the formal justice systems, **questions of human rights** comes up. This was the case in Rwanda about the Gacaca court system and is constantly the case in South Africa with the House of Traditional Leaders which is seen by some to be an undemocratic structure of unelected people who are unaccountable to anyone and uphold discriminatory cultures which exclude women[40].

Conclusion

ADR may have its challenges however I do not believe that they are greater than the current formal system of justice. Justice is a cornerstone to a thriving democracy and where access to justice is limited it poses a threat to the continued stability and democracy of that country.

[39] Justice Compromised;The Legacy of Rwanda's Community-Based Gacaca Courts; Human Right Watch; 2011; pg 4; http://www.hrw.org/sites/default/files/reports/rwanda0511webwcover_0.pdf
[40] Pearl Sithole and Thamsanqa Mbele; Fifteen Year Review on Traditional Leadership A Research Paper; 2008