ADR IN AFRICA:

Contending with Multiple Legal Orders for Wholesome Dispute Resolution

By

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Introduction

ADR mechanisms in Africa trace back to the very origin of mankind. Today, the spectrum of dispute resolution mechanisms in Africa is shaped by multiple legal orders, which include: (a) informal community-based justice systems; (b) traditional dispute resolution mechanisms; (c) commercial arbitration and ADR (either backed by statute or founded on contractual relations); and (d) the conventional judicial system. It is believed that only a small fraction of disputes escalate and find their way into conventional judicial institutions while most are resolved through a diverse range of ADR mechanisms.

The fact that conflicts are an integral part of human rrelations, their effective management and the resolution of ensuing disputes become critical to the maintenance of social order and the very existence of communal life. It is no wonder that conflict management and dispute resolution strategies have evolved over the centuries in response to the diverse social needs, norms and standards of fairness in their endeavor to balance and resolve competing interests.

The establishment of conventional judicial institutions in developing common law jurisdictions were closely linked to British colonial administrative strategies. They were founded on the English legal system with minor modifications to accommodate local circumstances.[1] The concept of legal justice as understood in the context of sociological jurisprudence of the day was locally adapted and applied to suit the colonial agenda and satisfy the demands of the emerging economies. The ensuing rapid growth in the private-sector-driven commerce and industry in the urban centres coupled with the complexity of

[1] Kwach, R. O. (Hon. Mr. Justice) (1998) "Report Of The Committee On The Administration of Justice" p.6.

the ever-changing social-economic environment began to make pressing demands for effective management and resolution of increasing conflicts. The ensuing complexity of social-economic relations was characterized by competition and friction generating new demands, claims and wants[2] overwhelming the conventional judicial systems which are largely viewed as outdated and incapable of expeditious and effective management and resolution of conflicts. This has resulted in crisis in litigation.[3] Hence the urgent call for strategic review and reform to recreate "a competent, efficient and effective judiciary"[4] backed by ADR.

Developed common law jurisdictions shared similar history prompting far-reaching reforms and change in policy and practice culminating in international best practices. They adopted alternative strategies for conflict management and dispute resolution hitherto unknown to the conventional adversarial civil justice systems, and set the pace for reform in other jurisdictions.".[5] As Slapper et al (1996) observe, these reforms have greatly improved the machinery of civil justice by eliminating impeding factors such as administrative irregularities and inadequacies, prohibitive costs of litigation, clogged systems due to endemic delay in conclusion of civil proceedings and the intimidating solemnity, not to mention the complexity of largely incomprehensible substantive law and rules of adversarial procedure with which lay parties had to contend[6] and which are still common in developing jurisdictions. Kwach (1998) also highlights psychological, information, economic, physical, geographical and literacy barriers as additional obstacles that inhibit access to justice.[7]

Over the years, it was hoped that ADR would offer practical solutions to the impediments that characterize the administration of civil justice in commonwealth Africa. Indeed, ADR was often viewed as a universal remedy for the afflictions with which our modern-day civil justice systems are identified. However, this supposed panacea has itself fallen ill with multiple wounds inflicted by ill-fitting policy, legal and institutional frameworks, not to mention the slow pace at which the legal profession and court users move towards internalizing the value of alternatives to litigation. It is true to say that the journey has been long and the promised land far from view.

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2 Pound, R. (1921) "A Theory of Social Interests" 15 Proceedings American Sociological Society, p.1.

3 Kwach, R. O. (1998) at p.47 observes that there is "an increased growth of the Kenyan population and its urbanisation" (among other factors) resulting in delay and backlog of cases that bedevl the administration of justice.

4 Kwach, R. O. (1998), p.7.

5 Slapper, G. & Kelly, D. (1996) "Source Book On English Legal System" Cavendish Publishing Ltd., p.195.

6 ibid.

7 Kwach, R. O. (1998), p.54.

While modern-day ADR strategies reflect age-old practices common in local communities and traditional societies, they are slowly losing their efficacy as they take on the burdens perpetually borne by the conventional judicial system. Lawyers who delight in litigation to demonstrate their dexterity often to the financial, emotional and relational detriment of their contending clients have lately shifted their battlefields to the arena of commercial arbitration. In the end, arbitral tribunals are transformed into private courts completely robed in dilatory conduct, complexity and disproportionate costs, which ADR seeks to purge. Likewise, other ADR mechanisms do not enjoy their fair share of popularity in the prevailing atmosphere of strife. These challenges are compounded by the apparent lack of enthusiasm to embrace and promote tested ADR strategies for conflict management and dispute resolution. The question remains as to what holistic approaches are at our disposal to address these issues and challenges.

Seeking the Ideal

The primary goal of an ideal civil justice system is the effective management of conflicts and just resolution of disputes through a fair but swift process at a reasonable expense. It recognizes the fact that delay and excessive expense invariably negates the value of an otherwise just resolution. Similarly, systemic delay and expense common in litigation render the system inaccessible. Even though there is no absolute measure of a reasonable expense, jurisdictions world over subscribe to the basic principle that the cost of resolving a dispute should be proportional to its magnitude, value, importance and complexity. These are the standards that market mechanisms seek to achieve in order to provide alternatives to civil litigation.

ADR practitioners and proponents of appropriate market mechanisms find reason in the assertion that it is not enough that the resolution of a dispute is fair. In addition to expedition and cost-effectiveness, two other considerations are vital to quality outcomes. To achieve quality outcomes, a sound balance must be struck between: (a)a rights-based approach; and (b) an interest-based approach. While a rights-based approach (characteristic of adversarial judicial systems) strictly upholds the legal rights and obligations of the parties, as do arbitral proceedings, an interest-based approach characteristic of negotiation and mediation aims at a just resolution of a dispute that meets the interests and needs of all parties.

In contrast, an adversarial system of dispute resolution is not designed with expedition and cost-effectiveness in mind; it is designed to resolve conflict by a competition of adversaries. It is no wonder that delay, case backlogs and disproportionate costs of litigation are frequently cited as some of the main factors that impede effective resolution of disputes. In addition, the complexity of rules and the intricate architecture of the legal framework limits party control and sets the stage for legal counsel, whose adversarial approach to zealously champion the legal rights and downplay the corresponding obligations of their clients erodes the possibility of promoting and protecting the parties' needs and interests. In the end, extensive advocacy is rewarded regardless of the outcome or value of the case. Accordingly, the judicial system fails on all counts to provide efficient and effective justice. If unchecked, arbitral proceedings are likely to go down the same bumpy lane.

this paper recommends a progressive shift towards an approach that balances legal rights and obligations on the one hand and needs and interests of the parties on the other. Such reforms require review of sectoral policy and legislation to promote market mechanisms and community justice systems (including traditional dispute resolution mechanisms) to complement the conventional judicial system. This would maximise *inter alia*: (a) proportionality; (b) party control; (c) expedition; (d) quality procedures and outcomes; and (e) consumer satisfaction. The need for the formulation and implementation of a judicial policy to guide- (i) pre-action protocols; and (ii) court-mandated ADR, cannot be overemphasized. The primary goal is to establish a policy and legislative framework for the promotion of early dispute resolution, whether by adjudicatory, facilitative or evaluative means within the ADR spectrum.

Harnessing Multiple Strategies in the Modernday Legal Framework

Multiple legal orders are a common feature of most jurisdictions in Africa. The conventional judicial system operates alongside a diverse range of community justice systems and other alternative dispute resolution strategies that continue to offer practical alternatives to judicial services. While community justice systems were largely designed to restore and repair relationships in the context of restorative and distributive justice, the emergent market mechanisms that comprise what is commonly referred to as ADR are well suited to achieve comparable ends whether with or without judicial intervention. Hence the pressing need to reconstruct our policy and legal frameworks to guarantee quality procedures and outcomes in conflict management and dispute resolution. The question is: How?

We must recognize at the outset that conflict management and dispute resolution takes place on a daily basis in and outside the conventional judicial system with which we appear to have been unduly preoccupied. Secondly, it must be borne in mind that most community justice systems are largely unregulated. Thirdly, the extant judicial policies and legal frameworks in accordance with which commercial arbitration and ADR practitioners operate regulate conflict management and dispute resolution in only a small fraction of business and social relations. Finally, the existence of multiple legal orders calls for a holistic approach to dispute resolution. To this end, the beneficial example of Kenya sets the pace for the desired policy and legislation for the promotion and regulation of ADR practice in Africa.

The formal and informal justice systems that operate in tandem are either voluntary or coercive in nature and effect. This paper focuses on the voluntary dispute

resolution mechanisms comprising what is commonly known as ADR. The spectrum of ADR in the community justice systems and the conventional market mechanisms with which ADR practitioners are familiar may be viewed as a recipe for the realization of the constitutional right of access to justice at an affordable cost.[8] The market mechanisms (which range from negotiation, conciliation, mediation, early neutral evaluation, adjudication and commercial arbitration, only to mention a few) emerged to address the need for expeditious resolution of disputes at proportionate costs. Over the years, ADR practitioners and professional bodies have sought to institutionalize and promote the establishment of policy and legal frameworks for the regulation of ADR and to insulate their professional practice from the age-old community justice systems that are largely self regulating.

> The Constitution of Kenya, 2010 recognises the value of the extant multiple legal orders and seeks to place limitations on their outcomes. It lays down the principles of judicial authority and provides the foundation for the promotion and support of informal ADR mechanisms. To this end, the Constitution provides that, in exercising judicial authority, the courts and tribunals shall be guided by the principles that: (a) justice shall be done to all**,** irrespective of status; (b) justice shall not be delayed; (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); and (d) justice shall be administered without undue regard to procedural technicalities.[9]
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> Clause (3) sets conditions on which traditional dispute resolution (TDR) mechanisms may be applied. It provides that TDR mechanisms shall not be used in a way that: (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with the Constitution or any written law.[10]
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> Whether or not replicated in identical terms, these constitutional ideals are not alien to comparable jurisdictions in Africa. Indeed, most commonwealth jurisdictions in Africa share Kenya's experience with respect to the legislative and institutional frameworks under which ADR is practised. While only a few of these jurisdictions have comprehensive statute law dedicated to ADR in its widest sense, they nevertheless recognise the value of market mechanisms in

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8 The Constitution of Kenya, 2010 art 48.
9 ibid art 159(2).
10 ibid cl (3).

the management of conflicts and resolution of contractual disputes at proportionate costs. More and more jurisdictions are recognising the pressing need to establish a holistic ADR framework that enjoys comprehensive statutory and other regulatory support mechanisms in recognition of the existence of multiple legal orders that characterise our multicultural society.

Shaping the Future of ADR in Africa

Introduction

The future of ADR and its efficacy in guaranteeing quality procedures and quality outcomes in conflict management and dispute resolution depends on the architecture of our policy, legal and institutional frameworks. These frameworks should be suitably designed to promote and support ADR mechanisms as practised in community justice systems and in the conventional judicial system. Recognition of the multiple legal orders offers a firm foundation for appropriate policy and legislation.

Promoting and Supporting ADR in Community Justice Systems

The fact that community justice systems are essentially self regulating and self enforcing dictates that policy and legislation be appropriately designed to promote and support these mechanisms without the need to regulate them. The only regulatory content of such policies and legislation should be aimed at ensuring that:

(a) the process and outcomes of community justice systems and their ADR mechanisms do not violate the Bill of Rights;

(b) such processes are not repugnant to justice and morality, and that they do not offend the Constitution or any written law;

(c) ADR practitioners in the communities are sensatised on- (i) the relevant constitutional standards (such as the effect of article 159(3) of the Constitution of Kenya); and (ii) the law;

(d) There are defined jurisdictional limits and powers of ADR tribunals in making awards or sanctioning the criminal conduct of those persons subject to the community justice system;

(e) there is in force a code of ethics and standards of conduct for ADR practitioners;

(f) all practitioners of community-based ADR mechanisms adhere to the prescribed standards of ethical conduct;

(g) unethical conduct by ADR practitioners is sanctioned by law;

(h) any person whose fundamental rights and freedoms are violated in any of the ADR processes has access to judicial intervention and redress;

(i) the ADR mechanisms are accessible by all on an equal basis and for a minimal fee, if any;

(j) the outcomes of ADR provide effective remedies and party satisfaction; and

(k) that there are simplified procedures for judicial intervention to enforce mediated settlements or agreements voluntarily entered into in resolution of disputes.

Promoting Market Mechanisms for Effective Dispute Resolution

It is noteworthy that most common law jurisdictions have a defined legal framework for the conduct of commercial arbitration. Accordingly, little remains to be said about this market mechanism, save that commercial arbitration needs to be salvaged from the apparent drift towards highly formal adversarial justice systems, which has the likelihood of making arbitration bereft of quality procedures and outcomes on account of disproportionate costs.

While other ADR mechanisms are essentially voluntary and contractual by nature, a holistic conflict management and dispute resolution framework would be an invaluable complement to the conventional judicial system. To this end, court mandated/annexed ADR requires enabling policy and legislation to guide judicial officers and tribunals in the promotion of ADR pursuant to article 159(2)(c) of the Constitution. Even though most jurisdictions have rules of civil procedure that regulate ADR as part of the judicial process, few have comprehensive legislative and administrative frameworks dedicated to ADR. Such rules of procedure do not go beyond declaratory statement of their overriding objectives of *inter alia* expeditious disposal of proceedings[11] and the expression of authority to refer disputes for resolution by a specified ADR mechanism under an order of the court.[12] In effect, court-annexed ADR plays a significant role in the resolution of disputes submitted for adjudication in judicial proceedings.

In addition to the policy and legislative measures proposed in section 4.3 above, there is pressing need for African states to undertake reforms in policy and legislation to regulate ADR professionals and professional bodies. This would guarantee quality service delivery in and outside the

11 Sections 1A and 1B of the Civil Procedure Act (Cap. 21 Laws of Kenya).

12 Order 46 of the Civil Procedure Rules, 2010.

conventional judicial system. The beneficial example of Kenya is worth mentioning. This example is considered fitting with the presumption that most common law jurisdictions in Africa are characterised by multiple legal orders in accordance with which individuals and local communities manage conflicts and resolve disputes.

In a recently concluded study by the Commission for the Implementation of the Constitution in Kenya, it was recommended that reforms in policy and legislation be undertaken to, among other things: (a) promote, strengthen and support the application of ADR and TDr mechanisms in various communities to give effect to article 159(2)(c) and (3) of the Constitution; (b) set minimum standards of conduct and conditions for the application of ADR and TDR by local communities; (c) define the jurisdictional limits and powers of community justice systems in civil and criminal disputes; and (d) regulate the application of market mechanisms in dispute resolution by ADR practitioners and professional organisations.

While it is desirable that ADR practitioners and professional organisations be self regulated, the need for enabling policy and legislation cannot be overemphasised. A comprehensive ADR policy would be instrumental in, among other things: (a) guiding the development and implementation of programmes, plans and actions for the training of judicial officers in the application of court mandated/annexed ADR strategies; (b) guiding the development of programmes for the sensitisation of ADR practitioners on the constitutional standards and conditions for the application of ADR mechanisms; (c) guide the formulation of a code of ethics for ADR practitioners and disciplinary procedures to be applied by professional organisations; and (d) guide the adoption or development and enforcement of universally accepted standards of ADR practice generally.

In addition to the proposed policy, a comprehensive legislative framework would provide the statutory basis for, among other things:

(a) regulating the registration of professional organisations involved in the promotion and practice of ADR;

(b) regulating the registration of centres for domestic and international commercial arbitration and dispute resolution;

(c) regulating the registration and accreditation of ADR practitioners;

(d) setting standards of conduct for ADR practitioners;

(e) prescribing the procedure for the application of ADR in matters subject to judicial proceedings;

(f) defining the jurisdictional limits of ADR mechanisms, particularly in relation to community justice systems;

(g) defining the role of courts in the promotion and support of ADR mechanisms; and

(h) limiting court intervention in the application of various market mechanisms for dispute resolution and claim adjudication.

In addition to the proposed policy and law reform measures, it is recommended that judicial institutions adopt strategic interventions designed to ensure full and equal access to justice by application of appropriate ADR strategies . These include the need to:

(a) formulate an integrated judicial and access to justice policy that recognises ADR and TDR as invaluable complements to the conventional judicial system;
(b) formulate and implement effective programmes, plans and actions designed to guarantee full and equal access to justice;
(c) undertake law reform and review of administrative procedures designed to guide effective and accessible judicial and ADR services in all decentralised units of governance;
(d) simplify procedures and promote party autonomy/control in the process of adjudication of competing claims, which would in turn enhance expedition and minimize the cost of litigation in the adjudication of disputes;
(e) develop appropriate programmes, plans and actions for the promotion and support of alternative and Traditional Dispute resolution mechanisms; and
(f) simplify and strengthen judicial mechanisms for the enforcement of orders and awards of ADR tribunals.

Conclusion

The recommendations made in this paper are by no means exhaustive. Neither is it suggested that they are applicable to each and every jurisdiction in Africa in identical terms. Rather, they are design to provoke thinking and exploration of possibilities for policy, law and institutional reforms to promote and strengthen ADR mechanisms alongside the conventional judicial system. The paper recognizes the need to set minimum standards for the regulation of ADR practitioners and the related professional organisations without undermining their paramount right to self regulation. It recognizes the existence of multiple legal orders for the administration of justice and the need to promote and support community justice systems and conventional market mechanisms that have recently emerged to address the need for expeditious dispute resolution and claim adjudication through quality procedures to the ends of quality outcomes at proportionate costs. This presentation covers only a few of what I

consider to be the conceptual imperatives for full and equal access to civil justice by means of which ADR and TDR are a significant part. Hence the need to promote and support ADR and TDR for a holistic dispute resolution framework.