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ADR in the World: an African perspective on community mediation

By Brenda Brainch

Good morning Ladies and Gentlemen and a very happy New Year to you all! Little did I know, when I met Kathy Vaughan just a few months ago here in Nairobi that I would end up talking to a group of mediators in New York! So I would like to start by thanking Kathy for creating this opportunity to reach across the globe and share with you some of Africa's ADR experiences; and I also thank the New York Unified Court System for enabling this.

I am impressed by your network of community mediation centres in New York. Our ADR systems have not evolved to that degree and we have a lot to learn from your initiatives; but in many ways the nature of ADR is more familiar to Africans ... entrenched in traditional modes of dispute resolution. Informal dispute resolution is recognised in the Customary Law of a number of jurisdictions, so much so that those of us seeking to incorporate ADR in formal legal systems naively assumed, at the outset, that we would not have to confront the same obstacles you faced in the West. This has not been the case as, throughout Africa, lawyers have been (and often continue to be) just as recalcitrant, judges just as suspicious, governments just as reluctant, users just as slow and access to justice just as elusive.

Traditionally, Africans boast strong local justice systems where elders and chiefs consult with relevant parties in seeking peaceful solutions, but few of these customary institutions have evolved in tandem with development or appreciation of human rights. By way of example, a rapist might be required by the village elder to give three goats to the father of his victim in order to put the matter to rest, without any acknowledgement or comfort for the traumatised girl. These local mechanisms are still today subject to bias, intimidation, lack of legal knowledge and lack of case recording; and the alternatives are largely inaccessible. Nevertheless, 51% of Kenyans prefer to report problems to community leaders rather than the police and 60% don't ever use the courts; Sierra Leone's Customary Courts handle 90% of land matters; the village courts of Uganda deal with 80% of all civil and criminal disputes; in Malawi, 85%. These statistics reflect not only the organic nature of Customary Law, which is familiar to a community and designed to respond to its particular needs, but they also reflect the inaccessibility of formal institutions and consequent dependence on local, non-state institutions.

By 'inaccessible', I'm referring to a range of physical, financial, administrative and linguistic factors that challenge our communities in accessing formal institutions: these comprise the all-too familiar delays, costs, antagonism, lack of flexibility, limits of legal solutions and loss of control in the litigation process although the essence of these factors is likely to be different from yours in New York. A typical subsistence farmer, for instance, may have to travel many miles without public transport to a distant

courtroom only to have his case adjourned because of administrative backlogs or because a court official wants some kind of financial incentive to ensure the case is heard. An entire village can be compromised by raising funds for his court fees, his transport, accommodation and lawyer's fees; and he'll be asked to do it again in a couple of months, maybe with the same outcome. He may resort to bribery but it's no guarantee he'll have his case heard quicker as he may just have to pay every time he goes to the courtroom. And so it goes on ... usually for years. If he can't settle the dispute and pay back the community, there's a social cost as he loses face as well as friends and other disputes may spin-off as a result. He'll probably believe he needs a lawyer to help him through the morass of the court system as he may be illiterate, maybe doesn't understand the system, the language, or even know the way from the bus stop. If his lawyer lacks integrity, the farmer may never see a cent from any settlement. Women rarely have the opportunity to leave the village to have their disputes dealt with, leaving them subject to the uncertainty of local, non-state, male-dominated justice delivery systems. So, ironically, it's the justice system itself which has become the biggest vehicle for injustice.

Our goal – and yours – is to provide our citizens with justice which is Accessible, Adaptable, Available and Acceptable. Inroads have been made in parts of Africa which have started the ball rolling and change is certainly in the air. Our judiciaries have witnessed the positive effect of ADR in the US and have watched how England has adapted to far-reaching reforms over the past 6 years. Tanzania and Uganda have incorporated ADR into their Commercial Courts and promise to extend to others; Zambia is using Settlement Weeks in the High Court in conjunction with their mediation centre to clear case backlogs; Mozambique and Uganda have passed Arbitration, Conciliation and Mediation Acts to legitimise both non-court and court-connected ADR (Nigeria's is presently under review); Malawi boasts a court-connected mediation scheme and a dynamic paralegal programme which trains community-based mediators; and Ghana has extended court-connected mediation schemes from the Commercial Court to her urban and rural Magistrates Courts. Nigeria is the shining beacon for the rest of Africa, where firmly-rooted traditional systems are likely to be a major factor in Nigerians' quicker acceptance of structured ADR. So far, three of their 33 States have amended Civil Procedure Rules to incorporate the Harvard Multi-Door Courthouse model and others are slated to follow suit. The Lagos government-sponsored Citizens Mediation Centre offers grassroots ADR but to a limited population in one urban State. South Africa has been using mediation since the thirties to resolve labour disputes in the gold mines but has not extended the practice to its court system.

On the whole, we are not delivering enough to enough people, but our solution doesn't lie in replicating systems and networks that are successful in other jurisdictions on the assumption that they'll work in Africa. We need to understand the economic, political and social rationale of the communities that want our help, as well-meaning but misguided assistance can cause more conflict than it seeks to resolve. For instance: cattle rustling in the Northern Kenya/ Somalia region is often referred to as 'traditional conflict' because it follows an age-old tribal custom. Today, that conflict is fuelled by the current economics of the nation State and the ill-conceived response of a donor community which benevolently

delivers food to starving people but none for starving animals. If the animals were saved from death, the people wouldn't need to replace them by rustling.

Likewise with our justice systems. Total access to justice is dependent on the interaction of several formal and a large number of informal institutions. In the longer term, this institutionalism requires pluralistic and well-integrated justice systems which combine traditional values with international human rights standards and the rule of law. Traditional forms of reconciliation have been seen to be effective in post-conflict situations, such as the Gacaca courts of Rwanda and the Mato Oput rituals in Northern Uganda, where perpetrators of violence, including child soldiers, face up to their deeds and are reintegrated in their community. Paralegal institutions and healing rituals do offer opportunities for repentance and need to be respected although they are not a panacea for peace. Strengthening local initiatives and principles of non-confrontation as well as access to effective justice provides a grassroots dimension to successful multi-level dispute resolution processes. By waiting for legal reform and a change of thinking in our judiciaries to spawn effective awareness programmes, we are responding to the demands of bureaucracy and ignoring our capacity to respond to the communities' immediate needs, being to access forms of justice which are relevant to their own societies.

We can achieve our goals by partnering with local organisations and training mediators at community level through a cyclical, monitored programme based on video and supporting written materials in the local language, and ensuring that the scenarios are relevant to their lifestyle, be it pastoral, urban, agricultural or war-torn. We can introduce systems for recording settlements and, ultimately, train trainers. By project-close, targeted communities will have absolute 'ownership' of their own community mediation programme which can be rolled-over to neighbouring communities. In this way, we can build a body of mediators at grassroots level who will begin – next week, next month – to change their communities' approach to resolving disputes, imbibe citizens with a culture of non-confrontation and neighbourliness and restore their confidence in an impartial, unbiased and effective locally available process. These mediators will be sufficiently skilled and experienced to support ADR programmes in local and Magistrates Courts, as and when they are introduced.

The chief impediment to economic growth in Africa is the chronic weakness of our justice systems and its institutions. Providing justice to our communities and its micro enterprise through informal ADR mechanisms will play a critical role in regenerating our economies and relieving poverty. ADR is a vital key to social, economic as well as judicial reform. Nevertheless, we at DRC continue to be astounded by the reluctance of donors and our government, despite the enthusiasm of communities, to pay more than lipservice to the concept. It's high time they reviewed their own definition of 'sustainability' to embrace the value and rewards of poor people accessing evergreen justice systems which respond to their specific needs and cultures, which protect relationships and engender peace in a continent torn apart by conflict. There's a saying in Somalia that the cost of peace is \$1 and the cost of war \$100.

Economically, this system will provide employment for mediators and free up cash within the community to be used productively.

May I thank you for your kind attention and wish you all a successful conference and a peaceful and prosperous 2007.

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