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RESEARCH ARTICLE

The Pursuit of an Appropriate Dispute Resolution Philosophy for Africa

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Abstract

Appropriate Dispute Resolution (ADR) is rooted in Africa. However, this is not reflected in scholarship and practice. The last few decades have witnessed the supposed introduction of ADR in Africa, masquerading as an innovation imported from the USA and aiming to extend access to justice. This is a pure revisionism. While African communities rely on ADR to solve disputes, ADR epistemology has not developed in its scientific form. Hence, there is a dearth of literature on what emic unadulterated justice would look like in Africa. This article seeks to provide a framework for how to think about ADR in Africa by presenting five normative conceptions that are latent in African ADR: dispute avoidance; reconciliation; all-inclusive justice; consensus building; and matching disputes to the best process.

Keywords: alternative dispute resolution; appropriate dispute resolution; customary law; African law; decolonization; access to justice

Introduction

This article, grounded in the decolonization agenda, explores the philosophy and existence of an emic appropriate dispute resolution (ADR) system on the African continent. It contends that Africa has a unique ADR philosophy that predates the Western paradigm. Even when writing about African countries, scholars dedicated to ADR have focused on adopting and adapting Western philosophy in African jurisdictions. Unfortunately, these scholars have (in most instances) neither questioned the origins of the Western paradigm, which early anthropologists have traced to the African continent, nor the characteristics of the dispute resolution system, along with its accompanying processes. The question of the existence of an emic ADR philosophy in Africa has drawn little attention within or outside academia, a question this article places in the limelight.

So, why investigate this question? First, it is an essential question for legal scholars and practitioners, which has received little attention. Secondly, it is a necessary and inevitable question for anyone creating or reforming an area of law or the legal / justice system. The author was first confronted with this question when researching ways to improve access to justice in Zimbabwe as part of his PhD dissertation. Even among African scholars, ADR is mostly presented as a Western concept that African countries must adopt and adapt to achieve efficiency within their justice systems. However, the ADR processes in the literature the author reviewed for his dissertation were similar to the traditional African processes that his ("illiterate") grandparents utilized in their village.

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Hence, it quickly became apparent that Western scholars represented ADR as a new epistemology, packaged as an innovation and exported around the world. It is a classic case of "old wine in new bottles"! African scholars, on the other hand, do not seem to challenge authoritatively what appears to be revisionism, but take at face value that ADR is a Western concept. Responding to the question of whether an emic African ADR philosophy exists is, therefore, central to this article. Because dispute resolution is normative, cultural and part of a way of life, African processes cannot be categorized along the same lines as Western processes. The article, therefore, challenges the adoption and or adaptation of the conventional / mainstream Western ADR paradigm on the African continent.

In addition, the proliferation of mainstream ADR in African countries[1] gives the impression and feeds into the narrative that pre-colonial African society did not have a functional justice system.[2] Similarly, new legislation,[3] organizations,[4] governing bodies[5] and the renamed ADR processes are celebrated as innovative transfers from north to south, which African countries should embrace.[6] Such narratives perpetuate the neo-colonial agenda.[7] While there have been calls to decolonize such narratives, very few such calls have been channelled toward law in Africa.[8] This is what this article aims to change. Nonetheless, the topic is so broad that a large-volume book could be written on it. Therefore, the article aims to develop and systematize the African ADR philosophy. In doing so, it sheds light on the existence of an emic ADR philosophy in Africa, which has been marginalized due to the persistent effects of neo-colonialism. By decolonizing the neo-colonial agenda and highlighting the emic ADR philosophy, the article establishes a framework for understanding and implementing ADR practices in the African context. Achieving the primary objective means deliberately choosing to set a research agenda that should and will be expanded in the future, because the question of ADR in Africa will continue to surface.

1 West Africa alone has over 16 regional and local ADR centres serving investors and over 65 law firms offering ADR services. For a complete overview, see T Sutherland and G Sezneck "Alternative dispute resolution services in West Africa: A guide for investors" (sponsored by the Commercial Law Development Program, US Department of Commerce, 2003).

2 J Bassey "The indigenous knowledge of law in pre-colonial Akwa Ibom area: A comparative study of the similarities and differences between the English and the African legal system" in S Oloruntoba, A Afolayan and O Yacob-Haliso (eds) *Indigenous Knowledge Systems and Development in Africa* (2019, Palgrave Macmillan) 207 at 209–11 compares the system in South-South Nigeria with English law and finds similarities embedded in each history, although the English system was more brutal and violent than the Nigerian system.

3 The National Industrial Court of Nigeria Civil Procedure Rules 2017 make provisions for an Alternative Dispute Resolution Centre. The High Court of Lagos State (Civil Procedure) Rules 2019 lay down a comprehensive procedural structure for ADR in Lagos State; Order 28 provides for ADR proceedings.

4 Africa ADR is a non-profit dispute resolution administering authority, established in 2009. A multinational steering committee initially managed it under the leadership of the Arbitration Foundation of Southern Africa.

5 The Organisation for the Harmonization of Business Law in Africa is a supranational organization comprising 16 sub-Saharan African member states. Its major purpose is to promote regional integration and economic growth, and ensure a secure legal environment through harmonizing business laws among its member states. In Cameroon, it is normal for commercial institutions to use arbitration, conciliation and mediation. The government is prone to use arbitration and mediation as well. Private law firms practise arbitration, mediation and conciliation on an ad hoc basis. This is due to the Code of Civil and Commercial Procedure, arts 3 and 4, which require conciliation as the first step to resolving disputes in the country. See Laws No 2003/009 of 10 July 2003, No 2007/001 of 19 April 2007 and No 2002/004 of 19 April 2002.

6 B Owasanoye "Dispute resolution mechanisms and constitutional rights in sub-Saharan Africa" (paper written following a UNITAR sub-regional workshop on arbitration and dispute resolution, Harare, 11–15 September 2000) at 15. In Uganda, the 2000 Arbitration and Conciliation Act allows for new judicial powers, allowing judges to submit cases to mediation for amicable resolution. Senegal has enacted several national laws that establish ADR in various sectors: Law No 87-47 (Customs Code), title XII, arts 332–39 has provisions for the arbitration of customs disputes; Law No 97-17 (Labour Code); Decree No 2002-550 deals with ADR in the Code of Public Markets.

7 S Tamale *Decolonisation and Afro-Feminism* (2020, Daraja Press) at 34, 89 and 245.

8 T Falola "We must decolonise African legal systems" (lecture delivered to the College of Law's Centre for Indigenous Knowledge, University of South Africa, 6 May 2021); id, Tamale at 285–339.

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The primary question is tackled in five steps: asking why the question is a valid one; providing an overview of the nature of ADR by presenting three schools of thought; delineating the state of ADR on the African continent; systematizing the emic ADR philosophy in Africa through five normative conceptions; and analysing the impact of systematizing an emic African ADR philosophy on the justice system and, more broadly, on the access to justice discourse in Africa. The article's aims are reflected, complementing and mutually reinforcing each other, throughout these five steps. For example, developing and systematizing the African ADR philosophy helps to decolonize the neo-colonial agenda by showing that African ADR is a valid and well-developed approach to dispute resolution. Similarly, bringing the existence of an emic ADR philosophy in Africa to the limelight helps to develop and systematize the African ADR philosophy by providing more information and resources about it.

The article next delineates the validity of the primary question, rejecting the portrayal of African ADR as an alternative to the colonial general law system.

Step one: Is it a valid question to ask?

Rejection of the "alternative" description

Most constitutions in the former Anglo-Saxon colonies contain a Bill of Rights and rely on Roman-Dutch and English common law traditions. It is worth stating that there is nothing common about common law in these African jurisdictions because it is effectively indigenous English common law that was transplanted and imposed during colonial rule. African law is now called customary law and was distorted during the colonial period.[9] Also, very little can be called customary in contemporary African customary law. This is because colonists applied the repugnancy test, which accepted only those rules that did not contradict European belief systems.[10] Living customary law is a better conception of African law because it stems from each community's way of life and has evolved organically over time.[11] Regardless of this evolution, living customary law remains largely informal across the continent. Since colonization, African countries have had plural legal systems, which find expression today in the schism between state and non-state dispute resolution platforms.

Western influence on the continent has subdued the African dispute resolution system and epistemologies. There seems to be a semi-lacuna in examining the impact of colonialism on the legal systems in Africa. Therefore, African law cannot continue to be discussed using the same alternative perspective. African issues have been and continue to be subjected to the validation of Western views before they are considered legitimate. ADR is no exception. Barret and Barret[12] provide a point of departure for the article, with a timeline that traces ADR in Africa to 1400 BC. As such, the question "does an emic African ADR philosophy exist?" constitutes the fundamental pillar on which this article is based.

Influence of colonialism on the African justice system

Many African jurisdictions divide the justice system into criminal and civil justice, with litigation as the predominant and often only jurisprudential dispute resolution process. Through their training,

9 S Gutto "Decolonising the law: Do we have a choice?" (presentation at the International Conference on Decolonising Our Universities, Penang, June 2011) at 42–43; D Kohlhagen "Alternative dispute resolution and mediation: The experience of French-speaking countries" (presentation to Ethiopian Arbitration and Conciliation Center, 17–18 April 2006) argues (at 8) that what was understood as customary law was generally defined by anthropologists, missionaries or lawyers from France or Belgium (in the French colonies) and their misunderstanding of the local hierarchies and local mechanisms led to a gap between recognized customary law and actual legal practice.

10 Tamale *Decolonisation*, above at note 7 at 141.

11 Id at 142–43.

12 T Barrett and J Barrett *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement* (2004, Jossey-Bass) at xxv–xxx.

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lawyers think of a trial as the default dispute resolution process. However, we know that drawing hard lines between the various dispute resolution processes is something of an illusion. Lawyers are all too aware that a contractual matter can be negotiated by the parties alone, mediated or arbitrated by a neutral third party (in the presence or absence of lawyers) or subjected to a trial. Yet, in all four dispute resolution processes, the ordinary law of contract is applied.

The influence of the African way of life challenges the justice system that African countries inherited from the colonial period. This is because many of the one billion Africans do not rely on the formal justice system to solve their problems, whether strictly legal or social justice.[13] Instead, the indigenous processes that were relegated during the colonial period have continued to serve the different African communities, albeit informally and without state recognition.[14] The relegation of the African justice system to become informal for those processes that did not pass the colonial repugnancy test marks the beginning of legal expropriation. Dispute resolution processes such as negotiation, mediation and arbitration have their history on the African continent.[15] Still, due to their relegation, they are now being transplanted from Western jurisdictions and reintroduced with state recognition on the continent.[16] Moreover, some Western scholars have written (rather condescendingly) on the impossibility of "primitive" African societies exporting dispute resolution processes to the "modernized" world.[17] Such thinking cannot be allowed to go unchecked any longer.

In response to the enduring impact of colonialism on African societies, the author aligns with the broader discourse put forth by literary and academic figures. Mudimbe advocates embracing one's intrinsic identity, distinct from the colonial mode of existence (metaphorical father's scent).[18] Similarly, Bulawayo calls for a fresh conceptualization of African realities.[19] Amin, Mignolo and Quijano collectively stress the need to construct innovative conceptual frameworks as a pivotal step in epistemic de-linking from the dominant colonial power matrix.[20] This transformative process necessitates an ethos of epistemic disobedience, ultimately fostering pluri-versality.[21]

Within the context of ADR and law more broadly, the endeavour to systematize an emic African ADR philosophy signifies the development of a conceptual framework that is developed without reliance on Eurocentric validation. This has implications for the methodological decisions explained further in step two below. In unison, Mudimbe, Bulawayo, Amin, Mignolo and Quijano coalesce in

13 J Oloka-Onyango *When Courts Do Politics: Public Interest Law and Litigation in East Africa* (2017, Cambridge Scholars Publishing) at 205; see generally the discussion of *Martin Charo v Republic* in P Kameri-Mbote "Contending norms in a plural legal system: The limits of formal law" (unpublished LLD dissertation, University of Nairobi, 2019).

14 E Grande "Alternative dispute resolution, Africa and the structure of law and power: The horn in context" (1999) 43 *Journal of African Law* 63 at 64.

15 Barret and Barret *A History of ADR*, above note 12 at xxv–xxx.

16 Countries that have introduced an Arbitration Act following the UNCITRAL Model Law (see note 66 below) include Zimbabwe, Zambia, South Africa and Ghana.

17 Grande "The horn in context", above at note 14 at 64. Grande's critique of the African dispute resolution system is referred to further below.

18 V Mudimbe *The Scent of the Father* (2023, Polity Press).

19 N Bulawayo *We Need New Names* (2013, Back Bay Books).

20 S Amin *Delinking: Towards a Polycentric World* (1990, Zed Books); WD Mignolo *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (2011, Duke University Press); A Quijano "Coloniality and modernity / rationality" (2007) 21/2–3 *Cultural Studies* 168. De-linking represents breaking away from the Eurocentric and colonial framework that has historically shaped global power structures, reclaiming agency and reimagining "new" pathways. Epistemic disobedience refers to challenging the conventional epistemic authority of comparing terms and concepts, and weighing advantages over disadvantages. Pluri-versality emphasizes the existence of multiple, diverse and coexisting knowledge systems in different societies.

21 A Escobar *Pluriversal Politics: The Real and the Possible* (2020, Duke University Press) at 9 describes the pluriverse as "a world where many worlds fit". WD Mignolo "Delinking: The rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality" (2007) 21/2–3 *Cultural Studies* 449. The concept of pluri-versality is discussed further below and related to the analysis throughout this article.

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advocating for a profound transformation of African perspectives and practices.[22] Their collective argument posits that Africans should assertively reclaim their intrinsic identities, severing ties with Eurocentric influences while establishing fresh conceptual frameworks rooted in indigenous knowledge and traditions.[23] These intellectual currents are pivotal in shaping an authentic African ADR philosophy that places African self-determination at the centre and seamlessly incorporates indigenous values.

Emphasis on the imperative of reconceptualizing African realities further reinforces the call for Africans to craft their narratives, breaking free from reliance on Western depictions.[24] This perspective magnifies the significance of African voices within the development of an emic African ADR philosophy, ensuring it mirrors the experiences and needs of the African populace while embracing indigenous values and traditions.

Furthermore, the critique of the exploitative nature of the global capitalist system resonates with the call for the development and systematization of African ADR that is independent from Western capitalist principles, thus emphasizing African self-reliance.[25] Similarly, the argument against Western knowledge hegemony aligns with the imperative to formulate ADR methodologies firmly grounded in African indigenous knowledge and traditions, specifically emphasizing the embracing of epistemic diversity.[26] Moreover, the analysis of the colonial matrix of power as responsible for the systematic oppression of marginalized groups such as Africans buttresses the necessity of decolonization and the development of ADR approaches emancipated from Eurocentric values and principles.[27] Collectively, these scholars advocate for a comprehensive transformation of African thought and practice, paving the way towards a more culturally rooted and equitable ADR philosophy.

Emphasizing traditional African dispute resolution

Having refuted, albeit briefly, the narrative of African law as practised by indigenous people as alternative and presenting the impact colonization had on its development, it is now time to delineate the traditional elements making up African law. First, disputes are related to a people's way of life, which determines the types of disputes that arise and their settlement.[28] The socio-cultural values, customs and philosophies of traditional[29] societies (which to some extent continue in contemporary African society) supported their dispute management approaches.[30] In Zimbabwe, for example, dispute resolution efforts largely utilized negotiated settlements [*kutaurirana*],[31] mediation [*kuyananiswa*],[32] reconciliation [*kuregererana*][33] and adjudication [*kutongwa* /

22 Mudimbe *The Scent of the Father*, above at note 18; Bulawayo *We Need New Names*, above at note 19; Amin *Delinking: Towards*, above at note 20; Mignolo *The Darker Side*, above at note 20; Quijano "Coloniality and modernity / rationality," above at note 20.

23 Ibid.

24 Bulawayo *We Need New Names*, above at note 19.

25 Amin *Delinking: Towards*, above at note 20.

26 Mignolo *The Darker Side*, above at note 20; Mignolo "Delinking", above at note 21.

27 Quijano "Coloniality and modernity / rationality," above at note 20.

28 S Ndlovu and L Ndlovu "Mediation as conflict resolution in traditional Ndebele society" (2012) 6 *Africana* 168.

29 As part of the decolonization agenda and in the absence of better terms, it is important not to refer to African societies in relation to the racist period or use terms such as pre-colonial or post-colonial. This article, therefore, refers to what is generally regarded as pre-colonial society as traditional African society; it refers to what is referred to as the post-colonial period as contemporary African society.

30 O Dodo, A Muzenje and M Zihanju "Endogenous conflict resolution in Zimbabwe: A comparison of selected Shona mechanisms in Zimbabwe" (2017) 39–40 *Ethnic Studies Review* 135 at 136.

31 For example, when two people with a disagreement talk to each other and attempt to reach a solution they can both accept and live with.

32 This usually occurred when two people failed to arrive at a mutually agreed solution to a dispute. The two people then agree to engage a third person to help them reach a solution they can both accept.

33 This is similar to mediation but with a stronger emphasis on forgiveness and maintaining the relationship between the people in dispute, akin to consensus building.

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kutongeswa].[34] Describing African ADR would mean searching all the different topics or types of disputes for rules regulating the different community relationships. Doing so would only be possible with an understanding of what ADR is or means in Africa.

Thus, one needs to know what it is one is looking for. Prior studies have either ignored this question or addressed it only partially. Consequently, Western epistemologies are accepted without questioning their history or merit for resolving disputes within African communities. The needle should be well-defined before diving into the hayrick. By enquiring about the African ADR philosophy, the author presumes that there is such a thing as an emic African ADR philosophy, which is part of the justice system (whether formally or informally) and can be differentiated from other dispute resolution systems, delimited and labelled ADR. The next section broadly delineates ADR to provide a global context before focusing on African ADR.

Step two: What is appropriate dispute resolution?

There is currently no single philosophy or consensus that any one of the mainstream ADR processes can properly and authentically represent the "true spirit" of ADR.[35] On the one hand, the term "alternative dispute resolution" is said to denote all forms of dispute resolution other than full-scale court processes.[36] However, framing ADR processes in a dichotomous relationship with adjudication processes rests on an oversimplified logic that assumes that all ADR processes are alternatives to the litigation process.[37] Such logic further assumes that all ADR processes are non-litigious, leading to an adulteration of terminology, and diluting the scope and function of ADR processes.[38] Further, ADR has also been defined as "the use of private parties to resolve disputes that might otherwise be litigated".[39] However, it is not clear from reading Tarpley whether a judge, for example, taking up the role of mediator, is also a private party. A case in point is the US federal and state courts, which provide public ADR. In 1998, Congress resolved to equip every federal district court with ADR.[40]

A reading of the ADR literature suggests that a critical consideration when defining ADR is that it provides an opportunity to resolve disputes by utilizing a process or technique best suited to the dispute. To match specific disputes to an appropriate process, ADR needs a normative theory of the circumstances to be considered in routing each dispute to a matched process.[41] The theoretical

34 Typically, the issue(s) in dispute and the disputing parties were brought before the community, and the chief and their assessors resolved the issue(s). Community members also had to be satisfied with the outcome. Importantly, matters that came to this forum ceased to be private. The author utilizes the ChiShona language from Zimbabwe as that is his mother tongue. Nonetheless, these processes are present across virtually the whole of Africa. It is also important to highlight the importance of oral traditions when discussing historical events and processes in Africa, because that was one of the major ways in which traditions, customs and ways of living were transmitted from generation to generation. This article relies on both personal oral history and that from other African countries, inspired by J Ki-Zerbo "The oral tradition as a source of African history" (1969) 17/67 *Diogenes* 110.

35 H Brown and L Marriot *Alternative Dispute Resolution Principles and Practice* (3rd ed, 2011, Sweet & Maxwell) at 9.

36 S Brown, C Cervenak and D Fairman *Alternative Dispute Resolution Practitioners Guide* (1998, Center for Democracy and Government) at 4.

37 J Faris "An analysis of the theory and principles of alternative dispute resolution" (unpublished PhD thesis, University of South Africa, 1995) at 9.

38 Id at 18–19. The ADR / litigation dichotomy is based upon the distinction between non-litigious and litigious processes, hence dividing the field of application into court-based processes and ADR processes. A similar view is held by R Bush "Defining quality in dispute resolution" (1989) 66 *Denver University Law Review* 335, who argues (at 342–43) that "the litigation / ADR dichotomy obscures the many important distinctions between different ADR processes, lumping them together as if ADR was one homogeneous institution set apart from the courts".

39 J Tarpley "Alternative dispute resolution, jurisprudence, and myth" (2001) 17 *Ohio State Journal on Dispute Resolution* 113 at 114.

40 R Reuben "Constitutional gravity: A unitary theory of ADR and public civil justice" (2000) 47 *UCLA Law Review* 949 at 954.

41 K Kruse "Learning from practice: What ADR needs from a theory of justice" (2004) 5 *Nevada Law Journal* 389 at 392.

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identification of conditions and circumstances for the ADR ideals or goals may help establish a framework for evaluating ADR. Such an evaluative framework may perhaps be a better and more scientific way to measure the efficacy of dispute resolution processes than the current reliance on measuring the satisfaction of disputing parties. Three schools of thought elaborate more on how ADR is currently conceptualized and defined.

The different schools of thought in the ADR discourse

There are three schools of thought regarding ADR discourse in mainstream legal scholarship, with the first arguing that courts are the "alternative" mechanism. This school of thought resonates with practical or grassroots dispute resolution in African jurisdictions, given that only a small percentage of the African population resolves their disputes using litigation and general law courts.[42] The general law system was primarily used as an instrument of "civilized" repression rather than the archetype of justice in the colonial period[43] and African customs that were viewed as "barbaric" were banned.[44] This meant Africans could not rely on a system they regarded as illegitimate for their justice needs. Therefore, communities continued utilizing indigenous dispute resolution processes, which dominate African societies today.[45]

The first school of thought marks a differentiating point between the Western and African ADR paradigms. Understood as "alternative dispute resolution", ADR is a concept developed in the USA and other countries with legal traditions that differ considerably from the social realities in Africa.[46] The so-called "alternative" methods are already present in Africa and cannot be said to be alternative. One might say court processes are the "additional" or "alternative" mechanisms in African jurisdictions where, historically, facilitative and determinative mechanisms have and continue to provide justice to most people.

The second school of thought propounds that the acronym ADR should be taken to mean "appropriate dispute resolution" instead of the widely used term "alternative dispute resolution".[47] This school of thought does not differentiate between formal and informal dispute resolution, and is part of Cappelletti's third wave of access to justice reform.[48] Disputes may be grouped into many categories, depending on several factors affecting their nature and range. The differences between the types of disputes are also present in disputes belonging to the same category. Such is the nature of disputes. It is easy to appreciate why no single dispute resolution mechanism can resolve all types of disputes.

The third school of thought is from ADR proponents who proffer that the term "alternative" is used in the sense that whatever mechanism is utilized to resolve a dispute is only one among many available mechanisms.[49] These scholars occupy a middle position between the first two schools of

42 S Sibanda "An analysis of traditional leadership, customary law and access to justice in Zimbabwe's constitutional framework" (paper for Raoul Wallenberg Institute of Human Rights and Humanitarian Law symposium, 2019) found that only 20% of the Zimbabwean population utilize general law courts, while the other 80%, who are mostly rural, rely on traditional dispute resolution processes. See C Himonga "The future of living customary law in African legal systems in the twenty-first century and beyond, with special reference to South Africa" in J Fenrich, P Galizzi and T Higgins (eds) *The Future of African Customary Law* (2011, Cambridge University Press) 31 at 32.

43 Black Administration Act 38 of 1927, sec 11A (South Africa).

44 M Hinz "Legal pluralism in jurisprudential perspective" in M Hinz and K Patemann (eds) *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective* (2006, LIT Verlag) 29 at 41.

45 Gutto "Decolonising the law", above at note 9.

46 Ibid.

47 J Steyn "Alternative dispute resolution" (South African Law Commission issue paper 8, Project 94, 1997).

48 M Cappelletti and B Garth "Access to justice: The worldwide movement to make rights effective: A general report" in M Cappelletti and B Garth (eds) *Access to Justice Vol I: A World Survey (Book I & II)* (1978, Giuffrè Editore / Sijthoff / Noordhoff) 5.

49 F Sander "Alternative methods of dispute resolution: An overview" (1985) 37 *Florida Law Review* 1 at 1 suggests that a better acronym would perhaps be AMDR (alternative methods of dispute resolution).

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thought and rely on the concept of process pluralism, mainly within the formal justice system. ADR is procedural; it is about how a claim must be processed and the forum in which a dispute is to be resolved.[50] ADR does not dictate the substantive content of the law to be applied and, thus, there are no competing or conflicting systems of law.[51] As alluded to above, a dispute may be litigated in the general law court, negotiated, mediated or subjected to arbitration. In all four cases, the governing laws related to the dispute will apply and justice will have been served regardless of the process followed.

Even in the absence of a single philosophy globally, many proponents of ADR agree that the term "alternative" is inappropriate.[52] ADR derives its value from the plurality or range of dispute resolution mechanisms that add to and enhance instead of replacing litigation, even in colonized countries where litigation was imposed.[53] From this perspective, it becomes logical to support the argument by proponents of "appropriate" in the acronym ADR. Although an in-depth discussion is beyond the scope of this article, it is important to highlight that some disputes "may" be difficult to resolve using ADR mechanisms, for example, constitutional or other fundamental rights issues, intentional torts and criminal activity.

Many ADR processes are voluntary and can only be effective to the extent that the parties involved are willing to participate in good faith. In many countries, ADR processes cannot be used to set precedents and do not result in a formal judicial ruling on an existing point of law. These and other factors can make ADR processes unsuitable, although they may sometimes be appropriate. Significantly, ADR processes may be unsuitable at the beginning of a dispute, but one or more ADR processes may become suitable during the dispute. This means that a contemporary functional legal system should not pit general law mechanisms against ADR processes because these are all complementary dispute resolution systems with the potential to co-exist within the formal and institutionalized justice system,[54] thereby embracing the concept of pluri-versality. This is highlighted to demonstrate that this article is not an anti-court, anti-litigation or anti-lawyer campaign. Neither is it an attempt to push a narrative of a return to a pre-colonial era. However, if we are to decolonize generally, including African law, we should understand colonial history and its supporting discourses.[55] There is a general acceptance that African society has evolved because of and despite colonization.

The core point in discussing these different schools of thought is not simply to show that the "A" in the acronym ADR represents the word "appropriate" instead of the word "alternative". The kernel of the argument is that the term "alternative dispute resolution" connotes a different dispute resolution system altogether from the "appropriate dispute resolution" system found within African countries. These are two different systems. The Western acronym represents an alternative to the adversarial model of resolving disputes within general law. In contrast, the African acronym represents an emic dispute resolution model grounded in the traditional African way of life. The African way of life has continued in contemporary society, albeit outside state law. It must be emphasized, however, that society evolves, and so have the traditional processes.[56] Therefore, even the emic

50 S Faruqi "Justice outside the courts: Alternative dispute resolution and legal pluralism" (2000) *Universiti Teknologi MARA* 1.

51 Id at 6.

52 K Mackie (ed) *A Handbook of Dispute Resolution: ADR in Action* (1991, Routledge) at 3.

53 So much time has passed that there is no merit in completely reversing the imposed legal order. Some authors, with whom the author agrees, argue that the best course of action would be an amalgamation of the traditional legal system incorporating local customs and norms with Roman-Dutch law, English common law, French civil law or Islamic law, depending on the specific African community.

54 R Reuben "Public justice: Toward a state action theory of alternative dispute resolution" (1997) 85 *California Law Review* 577 offers a unified theory of justice and dispute resolution, where society stands to benefit more from utilizing the different approaches to overcoming conflict in a tiered system within the constitution, starting with facilitative techniques before using evaluative mechanisms.

55 Tamale *Decolonisation*, above at note 7 at 1–2.

56 Id at 142–43.

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African processes have been modified over time to keep up with the evolving way of life and associated legal and social justice needs of different communities.

In this agenda-setting article, it is both a methodological and theoretical decision to avoid dedicating too much time comparing the Western alternative dispute resolution paradigm with the African ADR paradigm in any depth. Doing so would reinforce the superiority of the Western epistemology narrative and further entrench the colonial repugnancy test. As part of the decolonization process, including decolonizing African law, it would be a methodological, theoretical and analytical blunder to fall into the trap of evaluating the African ADR philosophy solely through the lens of Western epistemologies. We, therefore, must de-link from the colonial epistemology[57] and free ourselves from the influence of colonial legacies.[58] This approach involves embracing our (African) perspectives.

Importantly, this method involves a deliberate socio-legal act of "epistemic disobedience",[59] intentionally avoiding a comparison of similarities and differences between the two paradigms (as is expected in academic writing). The chosen methodology is guided by the concept of "pluri-versality" and the principle of epistemic diversity.[60] Pluri-versality rejects the notion of universalizing thinking, although it does not reject universality. Thus, there is an acceptance that many worlds / ontologies exist. No one paradigm is superior to the other, and the misrepresentation of African ADR as an alternative or as non-existent within the Western-centric discourse must be corrected. In the context of this article, the existence of an emic African ADR philosophy and its narrative of decolonization connect through the common African experience, which is used as the basis for a common epistemology: one that is free from influence by colonial forces.

Some will undoubtedly criticize the chosen methodological and theoretical decisions, but others will use the framework to supplement the various themes and premises. Both would be healthy developments because they would demonstrate that an emic African ADR philosophy does exist and can perhaps mature into a systematic field of science with a coherent system of thought and a systematic frame of reference. This article now turns to the state of ADR on the African continent, which historicizes and provides a foundation for the upcoming framework.

Step three: The state of ADR in Africa

In the absence of authoritative literature specifically considering African ADR, the author has found the Aboriginal context in Australia to be the closest to the African ADR philosophy.[61] He also considered an analysis of Confucian principles at the heart of Chinese mediation, described as "designed to seek harmony and not truth".[62] Behrendt and Kelly assess ADR broadly, contrasting Menkel-Meadow, who uses a single ADR process (mediation) as a unit of analysis. Aboriginal and African communities are communitarian;[63] they have gone through colonization and experienced disruption to their way of life, including how they dispute and settle. Moreover, their way of life has continued informally without state recognition. These societies have seen legal transplants imposed and adapted that have ultimately failed to achieve the normative conceptions of justice.

Imposed order of dispute resolution

Dispute resolution by the Western-inspired and Western-based paradigm of ADR is the first of three models. It resembles the imposed order following the work of French legal anthropologists

57 Mignolo *The Darker Side*, above at note 20 at 54.
58 Mudimbe *The Scent of the Father*, above at note 18.
59 Mignolo *The Darker Side*, above at note 20 at 54.
60 Mignolo "Delinking", above at note 21 at 449, 453 and 497.
61 L Behrendt and L Kelly *Resolving Indigenous Disputes: Land Conflict and Beyond* (2008, Federation Press).
62 Menkel-Meadow *Mediation and Its Applications for Good Decision Making and Dispute Resolution* (2016, Intersentia) at 30.
63 Both societies have an overriding philosophy that the group is the centre of all social, political and economic life. Individualism plays a very insignificant role.

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in West Africa when describing ADR on the African continent.[64] Legal systems have been imposed across most of the colonized world, including Australia. The imposition of legal systems ignored the autonomy of Aboriginal people, who were treated as an assimilated section of the new colonial Australian community.[65] These sentiments are well captured in the literature discussed in this article, which reveals that imposing the Western dispute resolution model on African jurisdictions causes a clash of cultures. Examples of this model include the UNCITRAL Model Law,[66] adopted by many African countries with arbitration statutes. This model law, the benefits of which include international recognition, serves the local people less than it serves multinational corporations.[67] In the context of matters involving ethnic groups, mediators, conciliators or arbitrators still represent the dominant transplanted colonial culture and language. Consequently, indigenous groups consider the transplanted ADR processes formalistic and alienating because they remain firmly embedded within the Western paradigm.[68] For instance, Western arbitration is open to obfuscation and delays, just like a trial.[69] Therefore, it continues to raise questions of justice and citizens' access to justice.

Negotiated order of dispute resolution

The second model is an indigenized Western ADR model incorporating culturally appropriate dispute resolution methods. It is commendable that this indigenized Western model of ADR embodies cultural values and processes acceptable to some local people. However, if the principles therein are applied on an ad hoc basis, they further the colonial project.[70] As with the failed transplantation of the Roman-Dutch system of law, an indigenized ADR model implemented ad hoc will potentially adopt only the aspects of indigenous knowledge, values and processes that do not conflict with Western values, knowledge and processes.[71] Problems relating to the balance of power and privilege will continue to arise when ADR processes are controlled by either non-indigenous people or locals who have exclusively received training on the Western paradigm. An example of an indigenized ADR model is the contemporary chief's court in many African countries, which has (in some instances) constitutional recognition but remains ceremonial in practice.[72] Thus, it does not serve as an effective instrument for citizens' access to justice.

Accepted order of dispute resolution

The third model refers to dispute resolution according to the culture or customs of the parties involved.[73] To qualify as an emic dispute resolution model, the approach must reflect the connection between ethnic cultural values and dispute resolution practices. In Africa, each group within the different communities had and continues to have unique ways of resolving disputes. This article

64 Kohlhagen "Alternative dispute resolution", above at note 9 at 7.

65 Behrendt and Kelly *Resolving Indigenous Disputes*, above at note 61.

66 Model Law on International Commercial Arbitration (1985), adopted by the UN Commission on International Trade Law.

67 It is largely concerned with commercial disputes and privatized justice. Commercial arbitration remains just as expensive and exclusive as the general law courts in many African countries.

68 S Cifti and D Howard-Wagner "Integrating indigenous justice into ADR practices: A case study of the Aboriginal Care Circle Pilot Programme in Nowra" (2012) 16 *Australian Indigenous Law Review* 2 at 83.

69 D Kahane "What is culture? Generalising about Aboriginal and newcomer perspectives" in C Bell and D Kahane (eds) *Intercultural Dispute Resolution in Aboriginal Contexts* (2004, University of British Columbia Press) 28 at 33.

70 Behrendt and Kelly *Resolving Indigenous Disputes*, above at note 61.

71 Grande "The horn in context", above at note 14 at 63. With colonization came the Western-style justice system and its major fallout (incompatibility with traditional justice processes), which colonists considered grossly inadequate.

72 In Ghana, the Courts Act of 1993, sec 72(1) mandates the court to adopt an ADR process to match the case to promote reconciliation of parties. The Amended Commercial Court Rules of 2004 reinforce this mandate by compelling parties to attend a pre-trial conference outside the court system, and the settlement terms are entered as a court judgment.

73 Behrendt and Kelly *Resolving Indigenous Disputes*, above at note 61.

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acknowledges the diversity of African societies and by no means suggest a single tradition across the continent. The author writes in general terms to paint a panoramic view of a common African phenomenon.

Emic ADR in communitarian societies must provide a space for community, egalitarianism, oral presentation, cooperation, respect for elders (including female elders), consensus and flexibility of procedure.[74] Three core criteria must be met for a model to constitute these values: procedures must be facilitated by a council of indigenous elders;[75] proceedings should occur within the community; and indigenous elders should control the proceedings. From these guidelines, the article next attempts to theorize a systematized version of the emic African ADR philosophy that already exists in practice.

Step four: Systematizing ADR in Africa: Normative conceptions

Western forms of dispute resolution, including mainstream ADR, have received substantial academic enquiry, while traditional African dispute resolution systems are yet to find their footing in scholarship. Western ADR scholarship has sometimes exhibited inherent racist and oppressive traits, impacting negatively on Africans or the so-called "Global South" and how they access resources such as human rights and justice. This fact is worth acknowledging to avoid analytical bias. What follows are five normative conceptions of the emic African ADR philosophy, which are important to delineate the (perhaps unadulterated) vision of justice on the continent.

(1) Dispute avoidance

Finding a written legal basis in any African country for traditional African dispute resolution is difficult.[76] Rather, the legal basis in each African country is embedded in the way of life of different communities. In these unique communities, custom determines or creates the governing rules: semi-autonomous social fields.[77] Over time, norms and customs of each community create dispute resolution rules and regulations to be followed in specific circumstances or, more broadly, rules that provide a just ordering of society, along with sanctions for wrongdoing, etc. While different traditional African societies resolved their disputes in a similar fashion, each group[78] utilized a unique methodology and the outcomes were often different.[79] Among the Ndebele people,[80] for example, mediation was not employed when disputes occurred, but in anticipation of different types and forms of dispute.[81] As such, the types of disputes were known in advance, and mediators for various types of disputes were trained from birth and put in place to resolve disputes that may occur. The Ndebele had a functional dispute resolution system that was negatively influenced by colonialism, which dispersed the traditional communal groups and disrupted their way of life.[82] Nonetheless, dispute avoidance was and continues to be the foundation of African ADR.

74 Ibid.

75 Who becomes an "elder" differs from community to community. In some communities, it is through family lineage and age seniority, among other factors. It is important to mention that both male and female members can become elders.

76 The South African Constitutional Court has come a long way to recognizing the African way of life and observing the dignity of people through the African philosophy of *ubuntu* [humanity to others] expressed through living customary law. See *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) at 65. Also see *Mthembu v Letsela* 2000 (3) All SA 219 (A).

77 S Moore "Law and social change: The semi-autonomous social field as an appropriate subject of study" (1973) *Law & Society Review* 719 at 722–23.

78 Traditional African societies lived along ethnic, clan and village lines.

79 Ndlovu and Ndlovu "Mediation as conflict resolution", above at note 28 at 168.

80 A sub-group that is part of the Nguni group of people found across southern Africa.

81 Ndlovu and Ndlovu "Mediation as conflict resolution", above at note 28 at 168.

82 Id at 170.

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(2) Reconciliation

Traditional African dispute resolution processes appear to have been constructed with an understanding that "truths" are multiple and "truth-finding" or the "right" result is not a sustainable primary objective. This thesis is, however, subject to the antithesis that there are parts of Africa where dispute resolution rests on the foundation of prior disclosure of the truth.[83] Even where there are multiple truths, or where a party is economical with the truth, there are traditional ways of getting to the truth; for example, the presence of ancestral forces[84] enables praise or blame to be apportioned in preparation for resolution or reconciliation. Although seemingly contradictory, the strength of both the thesis and the antithesis lies in the acknowledgement that there are varying approaches and diversity in dispute resolution practices on the continent, ie, acknowledgement of pluri-versality. This theme is returned to below when discussing the fifth normative conception of matching disputes to the appropriate procedure.

Notwithstanding the antithesis, the author is convinced of the validity of the thesis and maintains that, like another communitarian society, the Chinese Confucian system, traditional African dispute resolution did not and does not have recourse to "truth" as the primary goal. This means that African communities needed and have continued to need a vision of what justice should look like. Thus, a normative concept derived from the primary goal of reconciliation emerged and continues to exist today. To illustrate, the Ndebele King ruled through chiefs, who ruled over at least ten villages, each under a headman. Conflict between two people was resolved through passive mediation and, if *ukuxolisana* [reconciliation] failed at this stage, the issue was taken to the village headman. Passive mediation, as used and understood in the Ndebele culture, is akin to a facilitated negotiation, whereby parties, through a neutral third party (family member or headman), discuss issues causing the dispute, with a view to reconciliation. The headman had three elders to help them mediate fairly, with the goal of *ukugezelana induna* [to wash each other's scars], which helped with forgiveness and living together once the dispute was concluded.[85]

The author anticipates critique on this point from scholars,[86] who are cautious of goals like reconciliation because such goals are open to normative challenges.[87] These scholars perceive the pursuit of harmony in dispute resolution as a way of pacifying the assertion of rights and inadvertently reasserting social control over individuals. Such critique is not wrong in analysing Western legal systems. In African communities, however, the vision of reconciliation intrinsically distinguishes between the resolution of disputes and dispute suppression. Accordingly, mechanisms are in place to ensure that the principal and primary goal of dispute resolution and reconciliation are not abused. Elliot found the following on the nature of the traditional African legal system:

> "To guard against abuse of power in centralized societies, even though ultimate power was vested in one individual or a group of individuals, the leaders appointed subordinates. These assistants had certain powers to maintain the practice of fairness by the head. In Yorubaland, for instance, if the king misused his office, his chiefs could ask him to go into exile or 'open the calabash', a euphemism for suicide. Moreover, if the chiefs acted against the interest of the people, the sovereign with the support of the other subordinates could

83 AT Ajayi and LO Buhari "Methods of conflict resolution in African traditional society" (2014) 8/2 *African Research Review* 138 at 142.

84 Ibid.

85 Ndlovu and Ndlovu "Mediation as conflict resolution", above at note 28 at 178.

86 L Nader "Controlling processes in the practice of law: Hierarchy and pacification in the movement to re-form dispute ideology" (1993) 9 *Ohio State Journal on Dispute Resolution* 1; M Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996, Princeton University Press).

87 C Menkel-Meadow "From legal disputes to conflict resolution and human problem solving: Legal dispute resolution in a multidisciplinary context" (2004) 54 *Journal of Legal Education* 1 at 9.

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> remove such chief. This provided for checks and balances in the system of governance and ensured that public opinion fed into the governance of the community".[88]

The African ADR system has no centralized power, courts or lawyers. This means that issues considered when deciding the outcome are broad and settlement of interests is a win-win solution,[89] not a zero-sum game.

(3) All-inclusive justice

African dispute resolution ensures genuine participation of the disputing parties, including strategic use of the dispute resolution processes. In its purest form, African ADR rises above common challenges associated with Western processes of strategic manipulation by the parties, legal representation or decision-makers. The normative conception of all-inclusive / bottom-up justice provides a roadmap for evaluating the authentic use of African ADR. In each community, available processes, which are used for known types of disputes, can be measured against some normative ideal of what genuine, legitimate and fair participation looks like. For example, the role of the neutral third party (conciliator, mediator or arbitrator) is typically assumed by a family member, spirit medium, an elder or group of elders, or the chief and their assessors. The resolutions from the process are meant to maintain social cohesion in the community. For example:

> "Any person who is concerned that a dispute between parties threatened the peace of the community could initiate the process. In the process, parties have the opportunity to state their case and their expectations, but the final decision is that of the elders (for cases that involved elders). Customary (African) arbitration is not private, but is organised to socialise the whole society, therefore, the community is present. Parties could arise from the whole process and maintain their relationship and, where one party got an award, the whole society was witness and saw to it that it was enforced. Social exclusion or ostracism was a potent sanction for any erring party; therefore, enforcement of an award was not a problem".[90]

Private and individualistic principles like self-determination are all trounced by traditional African ADR or living customary law principles, where the dispute belongs to the whole community.[91] How society is set up in African communities lends itself to community members relying on the structures around them for survival. Accordingly, the family unit and religious and political leaders play a pivotal role in the everyday life of Africans, including in managing and resolving disputes.[92] The author acknowledges that this might be an oversimplification because it does not consider the type of dispute being resolved. However, family disputes have, for example, always been held in secret, which provides the confidentiality element found in Western ADR.

In addition, the African philosophy of *ubuntu* [humanity to others] demonstrates the communal value in disputing and settlement. The philosophy seeks to find a balance between the self and the other, as well as between good and bad.[93] In fact, *ubuntu* moves away from conceptualizing social

88 T Elias *The Nature of African Customary Law* (1956, Creative Media Partners) at 18–19.

89 C Rautenbach "Therapeutic jurisprudence in the customary courts of South Africa: Traditional authority courts as therapeutic agents" (2009) 21 *South African Journal on Human Rights* 323 at 330–32.

90 Owasanoye "Dispute resolution mechanisms", above at note 6.

91 Tamale *Decolonisation*, above at note 7 at 12 and 139; R Michaels "The re-statement of non-state law: The state, choice of law, and the challenge from global legal pluralism" (2005) 51 *Wayne Law Review* 1209 at 1251.

92 African law, or what is now known as customary dispute resolution, is motivated by settling disputes by facilitating resolutions that are acceptable to the parties involved and fostering group harmony. For further reading, see J Ubink and B van Rooij "Towards customary legal empowerment: An introduction" in J Ubink and T McInerney (eds) *Customary Justice: Perspectives on Legal Empowerment* (2011, International Development Law Organization) 11.

93 N Masina "Xhosa practices of *ubuntu* for South Africa" in W Zartman (ed) *Traditional Cures for Modern Conflicts: African Conflict "Medicine"* (2000, Lynne Rienner) 181.

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relations in dualistic opposition, pitting good versus bad, for example, when seeking to resolve underlying issues causing the dispute.[94] The philosophy of *ubuntu* is present across the African continent, although in different languages; for example, in the Zimbabwe ChiShona language, it is known as *hunhu* or *unhu*; the Baganda in Uganda know it as *obontu*, while the Yoruba in Nigeria know it as *iwapele* and the KiSwahili-speaking people of East Africa embody the term *ujamaa* or *untu*.[95] In all these different communities, *ubuntu*, as it relates to dispute resolution, emphasizes cooperation rather than competition and promotes just harmony within the community.

(4) Consensus building

Because reconciliation is the primary goal informing disputing and settlement in African communities, it is important that parties are satisfied with the path to justice as well as the outcome. When done in this way, enforcement becomes easy, almost self-policing. The San of the Kalahari are instructive on this. When a major dispute that a neutral third party cannot resolve ensues, the community comes together and talks through the issue, often for several days. The process is open and inclusive, and the issue causing the dispute is discussed "until it is literally talked out".[96]

In Nigeria, traditional Yorubaland had a functional and fair judicial system without Western input.[97] The Alaafin (King) sat as the chief judge for serious matters, while a council of chiefs (the Balogun, Basorun, Iyalode, Asipa) sat for other matters. Significantly, fairness was intrinsically part of the system then, because consensus was the backbone of the system and legitimacy was derived from deep individual and group participation.[98] It also meant that justice was hardly ever delayed or denied.[99] Despite the onslaught from colonial powers and then by the black elite who took over after independence, these systems have continued to thrive and have developed sophisticated approaches founded and maintained on consensus in reaching decisions.[100] Consensus building was and continues to be key in African communities' way of life, including how disputes are managed and resolved. There is, therefore, a close relationship between this normative conception and the vision of justice in African communities and notions of participatory democracy.

(5) Matching disputes to the correct procedure

The types of disputes that occur within African communities are known in advance. Community members participate in the system's design and evolution and are effectively the custodians who hold incumbents accountable. Anticipating disputes allows for the matching of disputes to appropriate dispute resolution processes, including the training of third parties who facilitate the different processes. African ADR has always had visions of the disputing and settlement path, guided by

94 Ibid.

95 M Nkulu-N'Sengha "Bumuntu paradigm and gender justice: Sexist and anti-sexist trends in African traditional religions" in J Raines and D Maguire (eds) *What Men Owe to Women: Men's Voices from World Religions* (2001, State University of New York Press) 69.

96 Barret and Barret *A History of ADR*, above at note 12 at 3.

97 Falola "We must decolonise", above at note 8; Bassey "The indigenous knowledge of law", above at note 2.

98 The traditional African justice system seeks a consensual outcome, operating on the principles of "community participation, consultation, consensus, and an acceptable level of transparency through the village council or open, consultative meetings": N Holomisa *According to Tradition: A Cultural Perspective on Current Affairs* (2009, Compress) at 139. See also T Bennett *Customary Law in South Africa* (2004, Juta) at 4.

99 Falola "We must decolonise", above at note 8. Traditional tribunals favour the contextual application of rules, as agreed upon by many community members, to secure a substantively fair decision for the parties instead of a procedurally accurate outcome.

100 In Elias *The Nature of African Customary Law*, above at note 88 at 34–35, Elias found that the former chief justice of the Gold Coast and Nigeria attested to the fact that the laws and customs in traditional African societies were essential to the types of indigenous systems practised by the people.

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tradition, values, norms and custom. It is through such fulfilled visions of appropriate fit over generations that the dispute resolution processes derive their legitimacy and acceptance, which speaks to why enforcement, for example, is not a major challenge. The Western ADR paradigm borrowed this normative concept of matching disputes to appropriate procedures, culminating in the "multi-door courthouse".[101] Choosing a process remains an art rather than a science, something inherent within the African ADR system.[102]

Matching disputes to appropriate processes for their resolution leads to the embracing of process pluralism. As such, accepting and systematizing the matching of disputes to the appropriate process enhances our understanding of process pluralism. From an African perspective, this would take a shape and form different from the Western ancestor: the multi-door courthouse. As noted above, this article is not an anti-court campaign. It acknowledges that reversing the Roman-Dutch and English common law, French civil law or religious law systems may be impractical in contemporary African society. Therefore, when African ADR is systematized within the formal justice system, general law courts and litigation become just but one process to resolve disputes in a pluri-versal world. The Republic of Benin, for instance, has specialized conciliation tribunals across the country. Records from the tribunals are transmitted to courts of first instance, which confirm agreements or assume jurisdiction if conciliation fails.[103] Benin provides an example of an integrated (pluri-versal and diverse) system mixing conciliation, arbitration and litigation. This demonstrates the potential of embracing traditional African dispute resolution processes when allowed to evolve naturally.

This normative conception of an emic African ADR philosophy clearly outlines a standard measuring tool for the authentic use of the different ADR processes that African communities matched with various types of disputes, of which they were aware in advance and for which they trained neutral third parties from childhood. The theoretical foundation of an emic African ADR philosophy has been established. What remains to be done is establishing an evaluative framework to serve as a scientific way of measuring the efficacy of the emic African ADR philosophy. An evaluative framework allows more scientific rigour than the current reliance on measuring the historical satisfaction of individual parties.

The Ideal Type

Combined and collectively, the normative conceptions outlined above help build an emic African ADR philosophy. The author has approached ADR in its scientific form within socio-legal scholarship and deliberately excluded descriptions of individual ADR processes. Further, the author does not prescribe specific skills that third parties require in the different ADR processes.[104] The article confines itself to unearthing, categorizing, developing and systematizing what the author argues are the core building blocks of an emic ADR philosophy in Africa. Weber's Ideal Type[105] inspired the author for the proposed ADR philosophy, which serves as a method for establishing objective possibility and validity of the five normative conceptions used to develop and systematize an emic African ADR philosophy. The Ideal Type as a methodological tool facilitated the acquisition and subsequent presentation of objectively valid knowledge about African dispute resolution from an African standpoint. This knowledge and dispute resolution system exists in practice but is largely absent in scholarship.

101 F Sander "Varieties of dispute processing in the Pound Conference: Perspectives on justice in the future" (proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 1979) 86.

102 F Sander and L Rozdeiczerd "Matching cases and dispute resolution procedures: Detailed analysis leading to a mediation-centered approach" (2006) 11 *Harvard Negotiation Law Review* 1 at 2.

103 Kohlhagen "Alternative dispute resolution", above at note 9.

104 ADR processes within the African and Western paradigms are referred to above. It is beyond the scope of this article to explore in any meaningful depth each of the ADR processes and then discern the type of skills that third parties require to fulfil the roles.

105 M Weber "Objectivity in social science and social policy" in E Shils and H Finch (eds and translators) *The Methodology of the Social Sciences* (1949, Free Press) 90.

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In relation to this article and African ADR philosophy, the Ideal Type means representing compressed characteristics that help structure an analysis. The Barotse in Zambia provides a good description of what the author attempts to capture with the African ADR philosophy inspired by the Ideal Type:

> "Among the characteristics frequently alleged as typifying traditional African procedures are: simplicity and lack of formality; reliance on 'irrational' modes of proof and decision; the fact that the parties are normally involved in complex or multiplex relations outside the court-forum, relations which existed before and continue after the crucial appearance in court, and which largely determine the form that a judicial hearing takes; a common-sense as opposed to legalistic approach to problem-solving; the underlying desire to promote reconciliation of the contesting parties, rather than merely to rule on the overt dispute which they have brought to court; and the role of religious and ritual beliefs and practices in determining legal responsibility".[106]

An emic African ADR philosophy framework does not exist. What this article presents is meant as an evaluative tool that can be used to theorize and explain a disputing and settlement system present in African countries, some of which are cited as examples in this article. At the same time, the framework highlights the local and national differences among African countries, because, for example, some ADR processes are present in Nigeria but not in Zimbabwe. There is an appreciation of the diversity that exists on the continent. This framework will help to locate these differences and similarities among African countries. It is far from being a perfect framework and it should be critiqued, as already highlighted above and in the next section.

Pre-emptive critique of the emic African ADR philosophy

Some scholars have critiqued traditional dispute resolution processes in Africa. Discussing three criticisms will suffice for our purposes: unmitigated power imbalances; lack of due process; and the primitive nature of traditional systems. These scholars[107] argue that only the loudest voice is heard in such fora.[108] The issue of power imbalances is a legitimate concern that has gripped the minds of scholars and policymakers globally. Indeed, granting parties control over the ADR process may exacerbate existing power disparities between them. Legal anthropologists have raised valid concerns regarding this susceptibility to power imbalances and the absence of intermediary safeguards.[109] For example, in a two-party dispute, the less influential party may have diminished agency and be forced to consent to ADR against their will. Factors such as socio-economic status, cultural background, gender, geographic location and educational level collectively shape the power dynamics of ADR.

For African jurisdictions though, empirical research sheds light on Africans utilizing sound procedures that, for the most part, are not overwhelmed by power imbalances between parties.[110] Describing the nature of the hearing among a Shona-speaking group (Vahera), Holleman[111] found that the hearing followed acceptable due process. Although the Vaheras did not refer to the *audi alteram partem* [listen to the other side] rule as practised in general law, their hearings commenced with the complainant stating their case in accordance with the Vahera saying that

106 M Gluckman *Judicial Process among the Barotse of Northern Rhodesia* (1967, Manchester University Press) at 14. Reconciliation was central in these societies.

107 Nader "Controlling processes", above at note 86.

108 Mamdani *Citizen and Subject*, above at note 86 at 118.

109 K von Benda-Beckmann "Forum shopping and shopping forums: Dispute processing in a Minangkabau village" (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 117 at 139.

110 JF Holleman *Issues in African Law* (1974, Walter de Gruyter) at 5–19.

111 Ibid.

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"the one who has eaten the most is the one that first opens the door".[112] The defendant was then allowed to speak for as long as it took to relay the issues causing the dispute. Witnesses would be called, and then an open discussion of the facts would follow in a process called "throwing the case to the dogs to chew on".[113] The hearing concluded with a restatement of the case's merits before judgment was pronounced. These meticulous procedures ensure that all relevant information is considered before judgment is pronounced, reinforcing the idea that power imbalances are not pervasive in traditional African dispute resolution.

Some scholars[114] have written that African dispute resolution is primitive and it is rhetoric to claim that the West transplanted it to their advanced societies. They argue that African societies never had a harmonious model of dispute resolution to be transplanted in the first place. This article, legal anthropologists and other authors cited in this article have gone some way to refute this thesis. A reading of the above legal anthropological work reveals similarities between general law processes and traditional African processes of law. While the traditional African system is motivated by restoring relationships, it has in common with the general law system the presentation of facts through party testimony and the questioning of witnesses, underscoring the shared commitment to principles of fair hearing and due process. It is essential to recognize the sophistication and effectiveness of these traditional systems, dismissing the notion that they are primitive or incompatible with contemporary legal principles.

A critique of the emic African ADR philosophy is, nonetheless, important because it will help develop further a contemporary framework of the field. Such a critique also shows how this is just the beginning of the discussion! The author proffers that it should be developed even further as the research agenda of decolonizing African law continues to gain momentum. This article has provided a framework for socio-legal scholars to use as we question existing ontologies and spark a discussion with the goal of creating (where none exist) or systematizing African legal epistemologies.

Step five: Impact of systematizing African ADR on access to justice

After more than a century of colonial rule and an African ruling elite that replaced the colonial powers, we must accept some institutional changes. To revert to systems practised before societies were colonized is unrealistic. In contemporary times, aspects of those rule systems and ways of doing things that survived the colonial onslaught on which people continue to rely should be mainstreamed and given state recognition. Even Western states have given up some of their centralized power through institutions such as neighbourhood justice centres and have broadly adopted mainstream ADR.[115] So, African ADR should be brought within the constitutional ambit so that the processes comply with minimum but meaningful due process standards.[116] Systematizing the emic African ADR philosophy is the first step to achieving constitutional recognition.[117]

Systematizing and developing ADR in Africa will positively impact access to justice because it answers hitherto unanswered questions, including: what level of justice do people receive from the transplanted and imposed adversarial legal system? Is the level of justice sufficient? Does the level of justice reflect our traditional value systems of justice, that is, does it align with our way of life as Africans? In *S v Makwanyane*, Sachs J emphasized that a progressive legal system demands "giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice".[118] In so doing, the South African Constitutional Court has attempted to bring dignity

112 Ibid.
113 Ibid.
114 Grande "The horn in context", above at note 14.
115 Ibid.
116 Reuben "Constitutional gravity", above at note 40 at 949.
117 The Constitution of Kenya 2010, art 159(2)(c) sanctions ADR, including traditional African dispute resolution processes.
118 [1995] ZACC 3, para 364.

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and *ubuntu* into its decisions. After all, the decolonial project is anchored on preserving, protecting and promoting human dignity. We, therefore, need to mainstream traditional African systems and philosophy so that they are institutionalized and do not rely on ad hoc application at the discretion of individual judges. Systematizing African ADR furthers the decolonization agenda, a first step to decolonizing the law and the legal / justice system. It is a process of ridding Africans of a system designed to control and oppress them.

With the systematization and development of African ADR, the African justice system will no longer be subdued, and it will have room for genuine growth and development on African terms. At the very least, after the process of de-linking, African legal systems will no longer rely on colonial epistemologies or subject issues in Africa to the validation of Western views before they are considered as achieved by Africans.[119] Systematizing and developing African ADR will also have implications for the practice of law and legal systems, directly impacting the curricula and how the law is taught and practised. Local people may begin to utilize formal dispute resolution channels more, knowing their customs and norms are incorporated and respected. As a result, justice will be much closer to those it seeks to serve.

Moreover, it is important to highlight that, by systematizing the African ADR philosophy into a theory of dispute resolution in Africa, we are not privatizing justice as some scholars have criticized Western ADR. This is yet another social environment difference between Western and African ADR. The group is more important than the individual in most of Africa, where traditional ethos values community over the individual.[120] Restitution, for instance, is made to the group by the offending individual.[121] All these illustrate the horizontal connection between the individual and the community, and the vertical linkage with ancestors and offspring.[122] Africa comprises communitarian societies, the acceptance of which leads one to appreciate the re-conceptualization of the notions of justice, access to justice, etc, achieved through an emic African ADR philosophy.

Conclusion

An article such as this, which sets a research agenda, challenging the mainstream epistemologies and introducing a systematic framework, can only be generic at best. This is so because ADR is a relatively embryonic scientific field on the African continent, although it has existed in practice since time immemorial. Specific examples alluded to in this article may not be applicable in every African community. However, they are indicative of the African ADR features and processes that must be considered in any engagement with dispute resolution systems on the continent.

The primary objective was to develop and systematize an emic African ADR philosophy, achieved through delineating its historical roots on the continent and its key principles. Simultaneously, this article illuminated the presence of an emic ADR philosophy in Africa, emphasizing its contemporary significance and relevance. Furthermore, it addressed the importance of decolonizing the neo-colonial agenda within the ADR framework by scrutinizing colonial legacies and biases in ADR practices. This article synthesized a cohesive narrative where the development of an emic African ADR philosophy and the recognition of indigenous ADR traditions are complementary. This enhances our understanding of ADR and provides practical insights for policymakers, practitioners and scholars in African dispute resolution and African law more broadly. The article contributes to the broader ADR discourse, acknowledging global ADR diversity, ie, pluri-versality, while advocating for an inclusive and culturally sensitive approach in the African context.

119 Falola "We must decolonise", above at note 8.
120 Tamale *Decolonisation*, above at note 7 at 212.
121 Grande "The horn in context", above at note 14.
122 Tamale *Decolonisation*, above at note 7 at 212.

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Going forward and building on the framework outlined above, future research may concentrate on creating a roadmap for six ways that are critical to giving recognition to ADR in Africa:[123] codification of local concepts; integration of local law into the state legal system; incorporation of the local institutions into the state legal system; tolerated self-regulation of the local systems; cooperation in a more explicit manner; and innovation and rehabilitation of traditional dispute resolution systems.[124] It is hoped that the discussions associated with the framework presented in this article can contribute to the decolonization of knowledge and legal systems on the African continent.

Competing interests. None

123 Kohlhagen "Alternative dispute resolution", above at note 9.
124 Ibid.

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