

BEGGING FOR JUSTICE? OR, ADAPTIVE JURISPRUDENCE? INITIAL REFLECTIONS ON MANDATORY ADR TO ENFORCE WOMEN'S RIGHTS IN RWANDA

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I. INTRODUCTION

In September 2004, the author was invited to Rwanda to work with the American Bar Association Africa Law Initiative under a grant by the John D. and Catherine T. MacArthur Foundation¹ to develop a model for culturally appropriate mediation and arbitration. A second component of the project was to train 18,500 volunteers who would implement nationwide the Mediation Committee Act of 2004.² This funded project sought to assure that the dispute resolution model had the capacity to accommodate the special needs of women and children suffering from HIV/AIDS when mediation or arbitration was mandated as the first step in claiming property rights under relatively new national legislation.³ This Article describes that model, placing it within the context of Rwanda's contemporary history and social pressures.

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¹ I wish to thank ABA Africa for its vision and follow-through under the leadership of Vernice Guthrie-Sullivan, J.D., LL.M. and ABA Africa Rwanda for its unflagging support and patience during my work there as we attempted to translate not only words but cultures. The project owes a debt of gratitude to Carolina Rubio-Stol, J.D. OCU Law 2006, who elegantly transformed our mediation concepts into visual images for the training manual. This paper speaks from a scholarly perspective, not as a report on program activities for any entity. All opinions expressed and any errors made are my own, and should not be attributed to any organization.

² Organic Law No. 17/2004 on Organisation, Powers and Functioning of the Mediation Committee, adopted by the Chamber of Deputies in its session on June 8, 2004 and by the Senate in its session of May 4, 2004, signed by Hon. Paul Kagame, President of the Republic June 20, 2004, under the Constitution of the Republic of Rwanda of June 4, 2003, as amended, especially its Art. s 62, 88, 90, 95, 108, 118-7, 159 and 201.

³ Matrimonial Regimes, Liberties and Succession Law of March 2000, C.Civ. No. 22/99 of 12/11/1999. At the time this project began, the land law remained under revision to clarify women's rights and simplify enforcement. An extended treatment of the subject is found in Laurel L. Rose, *Women's Land Access in Post-Conflict Rwanda: Bridging the Gap Between Customary Land Law and Pending Land Legislation*, 13 *TEX. J. WOMEN & L.* 197 (Spring 2004).

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This Article presents the author's personal reflections on the promise and perils involved in blending rules of modern law with traditional values of African culture.⁴ The project began from a basic premise that both Americans and Rwandans should proceed with caution when expanding the privatization of public justice. Nevertheless, an outside observer's caution must be balanced with respect for a nation's right to self-determination, even when those choices may clash with generally accepted ADR theory as developed in the United States. This Article suggests that we can all learn much from Rwanda's bold, pragmatic experiment in redefining the essential nature of justice. Much remains to be seen concerning its future evolution and implementation. The integrity of the mediation or arbitration process depends ultimately upon the physical safety and security of the parties involved, something which is not currently assured.⁵

Rwanda's Mediation Committee Act, as applied to widows' and orphans' land rights, challenges us to envision complementary and fluid roles for statutory justice and personal justice within a legal system. While statutory rights grant a modicum of power to the powerless individual, they represent only a starting point for

⁴ The very concept engenders – or should engender – much debate. The exportation of American-style alternative dispute resolution (ADR) to other nations, especially Africa, has been criticized by some. See Laura Nader & Elisabetta Grande, *Current Illusions and Delusions about Conflict Management – In Africa and Elsewhere*, 27 *LAW & SOC. INQUIRY* 573 (Summer 2002). ABA Africa within the past five years has distinguished itself among rule of law projects by taking a deferential approach toward its involvement. ABA Africa makes it a policy to follow the lead of the host nation, striving to make its contributions a culturally appropriate adjunct to – not a replacement for – existing formal and informal systems of law. Much of the author's work in Rwanda built upon a highly successful model for peacemaking among village women in the Niger Delta region of South Central Nigeria. It was developed with the International Federation of Women Lawyers (FIDA) through a grant by the U.S. State Department to ABA Africa and the ABA Section on Dispute Resolution as an effort at genuine cultural exchange; *i.e.*, that the importation and exportation of ADR models would extend in both directions. A paper describing the essential FIDA village peacemaking model and possible adaptations to farmer-lender mediations in rural America was selected for the 2002 Fellowship of the National Association of Administrative Law Judges. Phyllis E. Bernard, *The Administrative Law Judge as a Bridge Between Law and Culture*, 23 *J. N.A.A.L.J.* (PEPPERDINE UNIV. SCHOOL OF LAW) 1, 33-46, 48-54 (Spring 2003).

⁵ Belatedly, the U.S. has acknowledged the critical need for substantial international assistance and intervention to assure stability in the region. Despite progress, "the country continues to struggle to boost investment and agricultural output, and ethnic reconciliation is complicated by the real and perceived Tutsi political dominance. Kigali's increasing centralization and intolerance of dissent, the nagging Hutu extremist insurgency across the border, and Rwandan involvement in two wars in recent years in the neighboring Democratic Republic of the Congo continue to hinder Rwanda's efforts to escape its bloody legacy." U.S. Central Intelligence Agency World Factbook–Rwanda, <http://www.cia.gov/cia/publications/factbook/geos/rw.html#people> (page last updated Jan. 10, 2006).

justice. Those rights will remain mere abstractions without tangible, lasting results unless the people dynamics surrounding the legal dispute can be resolved in a way that invokes the support of the community.⁶ Ideally, a robust, self-enforcing resolution would not require judicial intervention, although court action probably must remain as a viable option in many cases.⁷ Moreover, a relatively stable level of national security forms the bedrock for any long term success.

II. STATUTORY JUSTICE, PERSONAL JUSTICE AND THE RWANDAN CONSTITUTION

A. A Pragmatic Constitutional Balance between Ideals of Justice, Reconciliation and Allocation of Scarce Resources

Rwanda's tragic history has been well documented in both the popular press and in legal scholarship.⁸ This paper strives — in

⁶ Rwanda has made great strides with regard to women's rights and the representation of women in government. This new republic has the world's largest percentage of women parliamentarians, standing at 48.8% in 2004. This clearly contributed to the passage of the national legislation on land rights, marriage, child rape and violence against women that have attempted to give women increased protection under the law. However, Rwanda is a formidably patriarchal society, traditionally, with customary practices concerning inheritance and land ownership being skewed against women. Generally, women's education lags well behind that of men, further limiting their access to information and ability to achieve empowerment. Amnesty International USA, *Rwanda: "Marked for Death," Rape Survivors Living with HIV/AIDS in Rwanda* at 5 (Apr. 5, 2004), www.amnestyusa.org/countries/rwanda/document.do?id=66BDE29FF59596C980256E67005A4F17.

⁷ The Constitution recognizes this need, where it authorizes the creation of a Mediation Committee in each Sector, but permits a party who is dissatisfied with the settlement to appeal to the courts of law. The settlement proposal developed by the mediators is entered into the appeal record. RWANDAN CONST. title IV, Ch. five, art. 159, §4.

⁸ A trilogy of articles by a law professor who volunteered as a public defender in the Rwandan criminal justice system offers an unusually direct understanding within a scholarly perspective. See Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUMAN RIGHTS L. REV. 545 (Summer 1998) (presenting an excellent historical analysis of the 1994 genocide, its origins and efforts to enforce international human rights standards within Rwanda); Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U.L. REV. 1221 (November 2000) (focusing more on the social and moral dilemmas of reintegrating brutalizers with victims, through a ritualized process of communal shaming, the *gaçaca* tribunals); and Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U.L. REV. 41 (2005) (presenting more recent observations on the genocide trials held thus far in Rwanda, which have produced only a "lim-

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much the same spirit as the current Rwandan government – to look forward while never forgetting the past lest the violence begin anew. The genocide of 1990-1994 remains a profound, pervasive problem which Rwandans will attempt to resolve through a combination of formal international criminal court trials⁹ and informal, traditional *gacaca* courts.¹⁰

Yet, everyday life for Rwandans does not necessarily center on the trials for genocide crimes. Instead, conflicts commanding center stage concern the hard-core realities of subsistence: housing, food, medical care, and school fees. Disputes surround the proper allocation of property and attendant income between returning refugees and those who have seized disputed property during the decade's strife.¹¹ Conflicts emerge in already strained family relations, often erupting into domestic violence.¹² Such situations are ineluc-

ited sense of individual responsibility or blameworthiness among only a minority of prisoners,") *id.* at 48, and (calling for greater flexibility and less legalization in the *gacaca* process to increase the possibility for "therapeutic discussion so needed to heal Rwanda.") *Id.* at 57.

⁹ A rapid but comprehensive resource on this is the *Internet Site of the International Criminal Tribunal for Rwanda* through the United Nations Tribunal at <http://www.ict.org/main.htm> (last visited Apr. 5, 2005).

¹⁰ RWANDAN CONST., title III, ch. Five, art. 152 (establishing Gacaca Courts to try and judge cases "against persons accused of the crime of genocide and crimes against humanity where committed between October 1st 1990 and December 31st, 1994, with the exception of cases jurisdiction in respect of which is vested in other courts." The *gacaca* is a customary institution of Rwandan village life, pre-dating colonization. It literally means "judgment on the grass" – taken from the traditional setting, where village members sat upon the grass to discuss a conflict and to reach a resolution satisfying communal values. See Drumbl, *Law and Atrocity*, *supra* note 8, at 52 (explaining the Organic Law for the Creation of Gacaca Jurisdictions, as adopted by the Republic of Rwanda, March 15, 2001. The *gacaca* courts have received a great deal of attention; some nearly effusively positive, some sternly skeptical – yet nearly all of it thus far presented in a vacuum, since few trials have yet begun. The ideal implementation of *gacaca* would constitute a structure to foster civic culture); See Note, Aneta Wierzynska *Consolidating Democracy Through Transitional Justice: Rwanda's Gacaca Courts*, Aneta Wierzynska, 79 N.Y.U.L. REV. 1934 (November 2004) (expressing this more optimistic view). Contrast with Note: *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, L. Danielle Tully, 26 B.C. INT'L & COMP. L. REV. 385 (Spring 2003) (summarizing the proceduralists' substantial criticisms of the process).

¹¹ As described by Amnesty International, widows often "lost their land when it was reclaimed by their husbands' family or by Rwandese who returned in the months and years following the RPA [Rwandan Patriotic Army] victory, or during the 'villagization' process that sometimes forcibly attempted to group dispersed rural inhabitants into villages. During a decade of refugee returns, displacement, 'villagization' programs and seizures of land by powerful individuals, land has changed hands frequently; women's claim to land, even if codified by law, has been particularly difficult to enforce." See *supra*, note 6.

¹² Women in poverty generally, and in Rwanda particularly, lack economic independence and control over their reproductive health and sexuality. Under the 2004 assessment by Amnesty International, "[d]omestic violence is believed to be rampant, with a high percentage of women suffering routine battery and assaults Domestic violence, or even the threat of

tably imbued with issues of genocide, including unremitting emotional violence and “spirit death.”¹³

One could remain frozen when confronted by such overwhelming trauma. The violence of the genocide left most of the nation’s population severely traumatized. The systematized brutality, mutilation and humiliation imposed upon the Rwandese – women, girls, men and boys – has left survivors with grave psychological injuries.¹⁴ This is undisputed. On the other hand,

violence, decreases a woman’s ability to negotiate her sexual autonomy, making her more vulnerable to HIV infection.” *Supra*, note 6. These same issues make women in poverty or who are otherwise targets for domestic violence especially vulnerable in negotiating legal rights in any setting, whether in court or in mediation, whether in Rwanda or the U.S. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545 (1991), which first raised this issue in a major scholarly treatment. Grillo saw palpable dangers for women when mediation was rushed, where the woman was unrepresented by counsel, and where the mediator also had authority to make recommendations to the judge concerning child custody if the parents were unable to reach a mediated settlement. A similar peculiarity of Colorado courts, which rendered the mediator not only a facilitator of dialogue but a *de facto* adjudicator, raised red flags for Prof. Penelope Bryan. In her trilogy of articles on domestic violence and ADR, she explores the attorney’s role in the process, including the need for representation to re-balance power, and for some cases not to be mediated, but instead negotiated attorney-to-attorney. See Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); *The Coercion of Women in Divorce Settlement Negotiations*, 74 DENV. U. L. REV. 931 (1997); and *Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153 (1999).

¹³ Prof. Adrien Wing’s retelling of the Rwandan story speaks in a more womanist voice than the standard account, focusing on the dynamics of racism and sexism as manifested in power struggles within Rwanda over several generations. Adrien Katherine Wing and Mark Richardson Johnson, *The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries*, 7 MICH. J. RACE & L. 247 (Spring 2002). Wing ably describes the injuries to the psyche and community wrought by Belgian colonialists who manipulated purported racial differences between Hutus and Tutsis to divide and conquer the country. The pitting of tribe against tribe was typified by the archetypal Belgian threat to the Tutsi: “You whip the Hutu or we will whip you.” *Id.* at 257. Here originated a pattern that ultimately spawned the 1994 genocide which was marked by a signal feature: an especially pathological violence where family members and neighbors were ordered to rape, mutilate or kill other family members and neighbors, under threat of death. As the authors relate: “The various accounts and reports of the Rwandan genocide all contain a common thread: each narrative reveals one or more symptoms of spirit injury . . . Symptoms include defilement, silence, denial, shame, guilt, fear, blaming the victim, violence, self-destructive behaviors, acute despair/emotional death, emasculation, trespass, and pollution. . . .” *Id.* at 289. The denomination of “spirit injury” and racism as “spirit murder” derives from the work of Prof. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987).

¹⁴ Amnesty International, *Rwanda: Marked for Death*, *supra* note 6 at 8 and 6-7. The numbers alone may not adequately reflect the human story which inevitably tests the premise of mediated justice when one party has been rendered powerless through intimidation or depression. In the words of one survivor of the massacre of 50,000 Tutsis and moderate Hutus in Bisesero, Rwanda, Elisaphan Ndayisaba, who was 17 at the time of his interview: “*Je suis complètement découragé, je ne trouve rien qui puisse me redonner courage. Je ne vois plus mon*

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one could acknowledge this painful reality yet refuse to remain immobilized. Instead, one could attempt to sift through the physical and psychological rubble in an effort to rebuild the legal system just as the Rwandese people have rebuilt their villages.¹⁵ The Rwandan legislature chose to revivify their legal system, using what resources were available and creating adaptations that fit changed, difficult realities.

The Mediation Committee Act identifies for dialogue immediate, discrete legal issues that could represent otherwise standard matters for civil and family courts in almost any jurisdiction. Fundamental dynamics bear remarkable similarities to cases of court-ordered American ADR that are aggravated – both in the U.S. and in Rwanda – when legal, police and social service resources are in short supply.¹⁶ The ADR process itself can contribute to the abuse of power when purely facilitative styles of mediation stress interest-based, individual-oriented bargaining rather than somewhat more directive styles that focus bargaining around an agreed-upon set of principles that include legal or family duties. This is the approach indicated by the Rwandan Constitution: to reestablish core values representing the highest and best of the new republic and to use

avenir.” (I am completely discouraged, I find nothing that can return my courage. I no longer see a future for me.) RESISTANCE AU GENOCIDE: BISESERO, AVRIL-JUIN 1994, African Rights with photographs by Jenny Matthews, Temoin No. 8 (London, UK 2000) at 78. (Translation is this author’s own.) Gang-rape – often in front of the woman’s children, family or neighbors – was commonplace. The psychological and physical residue include suicidal depths of depression, HIV/AIDS, other sexually transmitted diseases that continue to ravage the body, plus mutilations and other permanent damage to the reproductive organs. An interview with “Adèle” shares the voice of one such woman who has lost the will to live. “I haven’t gone for a medical examination. But I’m very unwell with a cough that won’t go away. I am getting thinner from one day to the next. I’ve had enough of life. It means nothing to me.” AFRICAN RIGHTS, RWANDA: BROKEN BODIES, TORN SPIRITS LIVING WITH GENOCIDE, RAPE AND HIV/AIDS, African Rights (Kigali, Rwanda: April 2004) at 44. The loss of reproductive capacity due to multiple rapes and HIV/AIDS – both aggravated by lack of medical treatment – cripples the will that confront adversaries. As described by “Assumpta”: “Right now, when I think about it, I want to kill myself and die. If only I didn’t have this pain from my womb, because that stops me from doing anything. . . . My suffering isn’t visible, like it is with people who have very noticeable scars or who had limbs chopped off. But my wound is there, inside.” *Id.* at 48.

¹⁵ One of the most impressive memories of Rwanda for this author during her visit in 2004 was the proliferation of reconstruction projects: new paint, brick work, stucco, were everywhere including in provinces most severely ravaged by the ebb and flow of militia activity during 1990-1994. Flowers abounded, although they often covered roadside graves; still, the graves had been made into gardens. Life continued, with courage and beauty. More objectively, the U.S. CIA Factbook notes that ten years after, the nation has “rehabilitated its economy to pre-1994 levels, although poverty levels are higher now,” especially among women, *supra* note 5 at “Economy.”

¹⁶ A truly excellent resource describing these dynamics in full is SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS (Chicago: Univ. of Chicago Press 1990).

dialogue guided by those values to resolve conflicts whenever feasible.

Feasibility, of course, hinges not only upon subject matter but upon financial resources. Herein lies much of the dilemma. Critics and scholars may be properly dubious when ADR is substituted for civil trials. When this has been done in the U.S., it has been criticized as essentially “second-class justice” or “justice on the cheap.”¹⁷ These terms sound harsh when applied to American court-connected processes, but apt, since American courts do not face the same financial constraints as developing countries. Nevertheless, governments in both places confront the same question: when monies to support the judiciary are limited, where should scarce resources be allocated?¹⁸ The answer necessarily suggests a type of legal triage, balancing potentially competing interests of justice and economy, access and efficiency. Typically in the United States this triage does not take place as part of an open, public debate, but rather occurs incrementally, almost unnoticed.¹⁹

Rwanda, on the other hand, has taken a more transparent approach, beginning with its 2003 Constitution. The Constitution incontrovertibly acknowledges that genocide occurred and must be addressed as a crime, punishable through the court system.²⁰ At the

¹⁷ See, e.g., Richard Delgado, et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985) (generally cautioning against private mediations where the protections of procedure, evidence and a professional neutral adjudicator are unavailable to protect the disadvantaged).

¹⁸ The reader should note, however, the scale of deprivation. War had gutted most of Rwanda’s legal infrastructure: “[m]ost courts had been damaged or destroyed during the war and virtually all legal professionals had been killed or were in flight.” Laurel L. Rose, *Orphans’ Land Rights in Post-War Rwanda: The Problem of Guardianship*, 36(5) *Development and Change* 911 (2005) at 918, (raising an important point contributing to her recommendation that Rwandan orphans be represented by a public ombudsman in pursuit of their legal rights).

¹⁹ Consider the extensive review by a leading jurist and ADR specialist, surveying preferred attributes of court-connected ADR programs, and indirectly pointing to the significant expense embodied in achieving these standards. Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. DISP. RES. 715 (1999).

²⁰ Notably, the Constitution begins with the root causes of genocidal conduct: discrimination based on ethnic division. RWANDAN CONST. title I, preamble §2: requires the nation to “fight manifestations of genocide and eradicate ethnic divisions;” “fighting the ideology of genocide and all its manifestations,” *Id.* at ch. two, art. 9, § 1. Again in ch. two, Art. 9, § 2 the Constitution commits the nation to “eradication of ethnic, regional and other divisions and promotion of national unity.” The Constitution unequivocally condemns genocide and the social attitudes that nurtured it. Wisely, the Constitution acknowledges that a democratic society cannot punish people for thoughts alone. The courts are expected to intervene to defend and protect the social norms of peaceful coexistence and national unity; making intervention infeasible until deleterious thoughts have manifested in physical action inimical to public safety. “Revisionism, negativism and trivialisation of genocide are punishable by law,” RWANDAN CONST., title II, ch. one, art.

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same time, the Constitution recognizes the need for tolerance and reconciliation, combined with a revival of the traditional values shared by Rwandans irrespective of tribe, clan or gender.²¹ The Constitution does not side-step the issue of justice versus peace. It delegates to the National Assembly authority to determine when peace – through reconciliation – cannot be achieved without first having justice – through adjudication.²²

In 2004, the Rwandan government determined that national peace could only be built on a foundation of adjudicated justice. The Ministry of Justice requested assistance from ABA Africa to implement the Mediation Committee Act because resources were being shifted to staff trials for approximately 500,000 persons charged with genocide crimes. These arrestees would be held for trial under Rwandan jurisdiction – not the International Criminal Tribunal in Arusha. Civil and family cases, misdemeanor crimes and some felonies not directly identified with genocide moved to the second tier of court resources.²³ These cases were not, however, neglected. Exercising their constitutional authority, the National Assembly identified two areas where traditional values and traditional reconciliation methods might lead to an acceptable resolution; ideally, an even better resolution than would be achieved through the standard court process. Primary among such cases were those involving the land and property rights of women and

13; “propagation of ethnic, regional, racial or discrimination or any other form of division is punishable by law.” *Id.* at title II, ch. one, art. 33; and “Discrimination of whatever kind based on, *inter alia*, ethnic origin, tribe, clan, colour, sex, region, social origin, religion or faith, opinion, economic status, culture, language, social status, physical or mental disability, or any other form of discrimination is prohibited and punishable by law.” *Id.* at title II, ch. one, art. 11.

²¹ “Fighting” the ideology of genocide as commanded under the Constitution does not necessarily take the form of violent, military or police confrontation. Rather, education plays a vital role, including learning that is intended to occur through “the constant quest for solutions through dialogue and consensus.” [RWANDAN CONST., title I, ch. II, art. 9, § 6] The Constitution presents a powerful attestation of faith in a common destiny that can overcome tribal fractioning, where it charges the state with the duty “to safeguard and to promote positive values based on cultural traditions and practices so long as they do not conflict with human rights, public order and good morals.” [RC Title II, Chapter II, Art 51].

²² We shall review the 2003 Constitution and the 2004 Mediation Committee Act in greater detail later in this paper, which together authorize a spectrum of potential procedures for resolving disputes: “There is hereby established in each Sector a ‘Mediation Committee’ responsible for mediating between parties to certain disputes involving matters determined by law prior to the filing of a case with a court of the first instance.” RWANDAN CONST. title IV, ch. five, art. 159, § 4. This constitutional invocation of ADR provides a full range of dispute resolution tools, ranging from rules-bound adjudications with the full panoply of procedural and evidentiary protections administered by a law-trained professional neutral serving as a judge through a variety of informal methods of reconciliation based upon communal folkways.

²³ The Mediation Committee Act, ch. III, section one, art. 7 and Section Two, art. 8.

children, where redress and a lasting resolution could only be achieved through some amount of reconciliation with estranged family members.

B. The Need for Statutory Justice to Secure Land Rights for Women and Children

In the project which this author consulted, the Mediation Committee Act became the gateway to enforce the property rights of women and children under national law. This section of the paper examines the human dynamics which made the statutory protection necessary and, at the same time, so difficult to enforce.

Rwanda is a primarily agricultural nation where most persons rely upon subsistence farming. Ownership and use of land are matters of basic survival. Most land is held in family units and is farmed cooperatively. Because Rwanda's population is large compared to available arable land, families in possession of productive land are especially resistant to claims by any estranged family member.²⁴ Any vulnerable family member who, by dint of their status as a widow or orphan, cannot pursue their claim with the force of law or other, extralegal might, also can expect strong resistance to their claims. In the case of women and children suffering from HIV/AIDS,²⁵ the resistant family members effectively know that time is on the family's side. That is to say, by prolonging the dispute, defendants can outlive plaintiffs in a veritable war of attrition.²⁶

²⁴ "Rwanda is a poor rural country with about 90% of the population engaged in (mainly subsistence) agriculture. It is the most densely populated country in Africa and is landlocked with few natural resources and minimal industry." CIA Fact Book, *supra* note 5, at "Economy."

²⁵ An estimated 5.1% of the population has HIV/AIDS. *Id.* The U.S. Centers for Disease Control present a more detailed and sobering picture. Almost 13% of the adult population is HIV positive; about half this amount (6.5%) have developed AIDS. The statistics are substantially higher in urban areas (32% to 56% depending upon risk category) and do not include children born with or who have contracted HIV. AIDS is the third leading cause of death in Rwanda; reducing life expectancy from 54 to 42 years. Center for Disease Control and Prevention, *The Emergency Plan in Rwanda*, <http://www.cdc.gov/nchstp/od/gap/countries/rwanda.htm> (March 30, 2004).

²⁶ As one wife of a polygamous husband explained: "My husband's family is waiting for my death to recuperate the property. . . . I am very much stigmatized by my family. . . . My family and others in the community think they can be infected even by greeting me." HIV status – and its stigma – become known quickly in a community. The social shunning also results in economic marginalization. As reported by Amnesty International, many persons with HIV/AIDS encounter "difficulty accessing micro-credit or bank loans" because management doubts the loans will be repaid before the borrower dies. The same impediments exist regarding insurance even while

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The scarcity of land coupled with constant pressures to subdivide and overcultivate available land to accommodate the nation's expanding population form the center of an intractable conflict in Rwanda. This conflict is not based primarily on tribal or clan differences, but accentuated by these factors insofar as the families of Hutus and Tutsis had intermarried.²⁷ When families thrived this presented both a blessing and a curse: the more relatives, the more workers, but the more claimants to land. A 1986 study reported by Prof. Laurel Rose explained how land fragmentation that was already underway well before the 1994 genocide contributed to the violence and post-war problems of reintegration. The size of an average small farm in Rwanda in the mid-80's was 1.2 hectares of land, nearly the minimum (1 to 2 hectares) needed to support a family of four at a subsistence level. If a farmer had four sons (a blessing), each son could expect to inherit only 0.3 hectare (a curse). "Ultimately, the sons' future customary land inheritances would be grossly inadequate" for survival.²⁸ The only possible way to survive required cooperation with family members. Still today economic survival in isolation is unlikely. Even if estranged family members cede land or land rights to the widow, wife or daughter, she and her children could not support themselves without assistance.

Customary land law before the civil war of the 1990's generally did not grant women the right to own nor to inherit land directly. Women could exercise only limited rights to control or

the person is asymptomatic, even when the insurance was for minimal amounts, just what would be necessary to pay school fees for surviving children. Priests have been reported as refusing marital rites although both parties are HIV positive. Amnesty International, *RWANDA: MARKED FOR DEATH*, at 33, (April 5, 2004).

²⁷ The reader should note that in border areas, tribal affiliation and land may combine in a more potent tension over land rights. Consider that "access to land is still largely determined along ethnic lines" among the Kivus, Banyarwanda and Banyamulenge in Congo. In areas nears Goma in the Republic of The Congo, which borders Kivu in The Republic of Rwanda, the Huntu "are bound to their ancestral land," but are feeling pressured by both the Hutus, who are perceived as wanting power and land, while the Tutsis of Rwanda are seen as wanting ever larger areas of pasture for their cattle. There is a fear that "what happened in Rwanda in 1994 could happen in Kivu unless there is a process of education." *AFRICAN RIGHTS, THE CONFLICT CYCLE: WHICH WAY OUT IN THE KIVUS?* 179 (December 2000).

²⁸ Rose, *Orphans' Rights*, *supra* Note 18, at 918. In many ways, this story echoes the land inheritance pressures that prompted massive emigrations by Europeans to America; and, once in America, the repeated encouragement to pioneer westward as new settlers. Being landlocked, Rwanda lacks such a "safety valve." Instead, it becomes commonplace for girls, young women and widows to be "turned out of their homes when family incomes were deemed inadequate to provide for everyone." Amnesty International, *RWANDA: MARKED FOR DEATH*, at 10 (April 5, 2004).

dispose of property. To the extent that a woman had land rights, they arose through marriage. She had the right to use the land and to remain in the marital home, but she merely held these rights as trustee for her male children, the actual heirs. Rose's comprehensive review of Rwandan customary practices identified an important economic consequence of this patrilineal tradition: "women could not apply for agricultural credit or loans" since they could not own land.²⁹ This legal disability virtually guaranteed women would remain dependent upon the good will of their families – specifically, their in-laws and often co-wives – for economic survival.

The struggles between families and communities for scarce land resources spun out of control during the disruptions and dislocations of 1994. Huge population shifts "plunged many communities and families into tumultuous, even violent, land competitions."³⁰ Property owners may have fled during the war, living for months or even years in neighboring provinces or countries. Upon their return any number of questions had to be answered about the circumstances surrounding their departure and renewed claim. Had the property been "lawfully" granted or confiscated in trade for the owner's life? Had the property merely been seized unlawfully after the rightful owners had been killed or threatened?

Sometimes property was taken through forced "marriages" where a *genocidaire* (a participant in and perpetrator of genocide crimes) had forcibly taken the owner's wife as his own, ostensibly for "protection."³¹ Had this arrangement been consensual? After the *genocidaire* and his family had gained possession of the property and continued to hold it by force, did consent even matter?³²

²⁹ Rose, *Women's Land Access*, *supra* note 3, at 209.

³⁰ Rose, *Orphans Rights*, *supra* note 18, at 918.

³¹ The coerced exchange of property and forcible sex for alleged protection became so endemic that the practice entered the vernacular: sex for protection among the street orphans became known as "*umuswati* . . . Kinyarwanda slang for the female genital organ." Amnesty International, *RWANDA: MARKED FOR DEATH*, *supra* note 28, at 11. Among women it was also known as "survival sex." *Id.* at 11.

³² The story of "Tabithe" illustrates this pattern. Threats of violence had forced her family to disperse for safety. Seventeen-year-old Tabithe traveled to Kivu province to stay with family friends, a married man, his wife and children, all of whom were highly esteemed. "As I was still young, I didn't think that he would ask me to be his second wife. He set me up in a maisonette, which was very close to his home, and told his wife that it was so he could hide me. Nearly every day, he came and raped me. This carried on from April until August, when he left for Congo." Tabithe had become pregnant through the repeated rapes. The man "dispossessed her of her family's land. When he argued that she was a 'burden' to him during the genocide, the family sold him their land. He is still in exile, but his wife and children have continued to use the land,

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In cases where the land had been held by a now deceased husband, what happened to the rights of the original owner's children, now "paternal" orphans, after their father's death?

Land rights not only for women and children, but for all newly settled or resettled persons, were thrown into disarray. As Rose explains:

The unwritten rules of customary land law, which had evolved over many decades to regulate land relations in stable villages where people were bonded by long-term ties of kinship and cooperative friendship, were not always adequate to accommodate the complex land needs within the reassembled or newly created postwar villages. . . . [T]here were . . . new heterogenous communities composed of strangers to serve, and new authorities to interpret and apply in new ways the rules and practices of customary law.³³

This potentially volatile confluence of needs reached a vortex around property rights for an estranged woman and her offspring. The estrangement may have occurred through mere status as a widow or genocide "wife." The woman and her children may have been branded as being tainted with HIV/AIDS, making the mother even more desperate to assure someone would provide for her children after her demise. Traditionally, it would be the duty of family members to provide for her and for her children. However, as family structures broke down, traditional values collapsed. This is where the Rwandan Constitution envisions mediation and arbitration to help re-articulate, rebuild the family around traditional values that have been overlooked, trampled over during the years of violence and civil strife.

C. Personal Justice and Traditional Values Under the New Constitution

The Rwandan Constitution sees the revival of commonly shared values as essential to restructuring the country as a unified state.³⁴ The Constitution itself does not attempt to define those val-

leaving Tabithe to seek help from others." Africa Rights, *RWANDA: BROKEN BODIES*, at 13-14 (April 2004).

³³ Rose, *Women's Land Access*, *supra* note 3, at 211.

³⁴ The Preamble sets the theme, invoking the nation's "common culture and long shared history which ought to lead to a common vision of our destiny." *RWANDAN CONST.* title I, preamble, § 7. It continues with a call for the Rwandan people to "draw from our centuries old

ues, but marks the general contours. In a nation where people were routinely assaulted and murdered barely ten years before, the Constitution avows that “[t]he human person is sacred and inviolable.”³⁵ Where families had turned violently on their own members, the Constitution reconfirms that “[t]he family is the foundation of Rwandan society and children deserve special protection.”³⁶ Shrewdly, the Constitution recognizes that these values in a post-genocide society cannot simply be mandated, but must develop organically through the people themselves, with enough flexibility to fill the gaps and adjust according to individual needs.

Nevertheless, the Constitution does establish a floor for standards concerning behavior towards the less fortunate, below which accepted conduct should not fall. “The State has the duty to safeguard and to promote positive values based on cultural traditions and practices so long as they do not conflict with human rights, public order, and good morals.”³⁷ Even more intriguing, this country with the world’s highest percentage of women parliamentarians has a constitutional commitment “to ensuring equal rights between Rwandans and between men and women without prejudice to the principle of gender equality and complementarily in national development.”³⁸

Finally, of great import in a nation where hate speech has caused the death of nearly one million people, the Constitution attempts to balance the rights of free speech and freedom of information with the need for “public order and good morals.” Every citizen is seen as having a right “to honour, good reputation, and the privacy of personal and family life.” This is “guaranteed, so long as it does not prejudice the protection of the youth and minors.”³⁹

Are these changes in traditional values? Is this an attempt to impose formal Western values concerning human rights and the status of women over traditional informal social mores? The

history the positive values which characterized our ancestors that must be the basis for the existence and nourishing of our Nation.” RWANDAN CONST. title I, preamble § 8.

³⁵ RWANDAN CONST. title II, ch. one, art. 10.

³⁶ “The family, which is the natural foundation of Rwandan society, is protected by the State . . . The State shall put in place appropriate legislation and institutions for the protection of the family and the mother and child in particular in order to ensure that the family flourishes.” RWANDAN CONST. title II, ch. one, art. 27. Further, “Every child is entitled to special measures of protection by his or her family, society and the State that are necessary, depending on the status of the child, under national and international law.” R. C. title II, chapter one, art. 28.

³⁷ RWANDAN CONST. title II, ch. two, art. 5.

³⁸ RWANDAN CONST. title I, preamble, § 10.

³⁹ RWANDAN CONST. title II, ch. one, art. 34.

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Rwandan Constitution seeks to fill the gaps in traditional Rwandan life to re-create a sense of communal mutuality and aid not tied to ethnic status. Recognizing the loss of social structures that previously would have protected women, children, the elderly, and the disabled, the Constitution steps in to announce the intention that there be protection.

This may raise doubts or complaints among some critics that “Western” constructs of marriage and property law based on concepts of the “individual” are trampling traditional indigenous concepts of “the community.”⁴⁰ However, this very framing of the “community” assumes that social structures have remained viable and desired by the indigenous population. Culture and community – even “tradition” itself – are dynamic, ever growing, ever changing. The artificially clear distinctions between what is or should be “Western” legal values and “indigenous” communal values are not fixed. They evolve and they adapt as needed. For lawyers or anthropologists to block this cyclical, interdependent flow denies indigenous people their roles in modern life with all of its complexities.

By combining statutory rights with enforcement through mediation,⁴¹ Rwanda has adapted Western jurisprudence to address the realities of day-to-day life in a nation without a legal infrastructure; where fundamental concepts of social duties and benefits must be reconstructed on a case-by-case basis.

⁴⁰ LAURA NADER, *THE LIFE OF THE LAW: ANTHROPOLOGICAL CONCEPTS*, Berkley, 220-222 (Univ. of Calif. Press 2002).

⁴¹ Rwanda is not alone in this attempt to change social values on a national scale through a combination of statutory rights for the less powerful coupled with enforcement through mediation. The U.S. has taken this approach with regard to workplace discrimination and discrimination in public education. Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., 2000e et seq., changed the face of the American workplace. The Individuals with Disabilities Act, 20 U.S.C. 1400 et seq. changed the face of American public schools. All of these changes in societal values began with legislation enforced through a federal administrative agency capable of pursuing enforcement actions against defendants without financial cost to the plaintiff. Now, however, most of these cases are handled not through litigation nor through agency enforcement actions, but through private mediation. However, Rwanda is compelled to begin this change in or revival of societal values without the benefit of decades of legal precedent derived from decades of government-backed enforcement efforts. The public statutes exist, but enforcement has shifted almost immediately to the private party – *de facto*, although not *de jure*.

III. THE MEDIATION COMMITTEE ACT – GATEKEEPER TO JUSTICE

That Rwanda has statutes promoting mediation and arbitration, in and of itself, comes as no surprise. ADR provisions are standard in contemporary African legislation in order to facilitate the speedy, binding resolution of international business disputes. If English is the *lingua franca* of commerce, then arbitration is the procedure *franca*. However, Rwanda stands out in its legislative efforts to use ADR to revive and promote shared cultural values in traditional disputes arising outside the civil-commercial arena. There is a creative tension in Rwanda's legal system balancing formalized Western indicia of justice with traditional community-based bargaining. In many ways, it interweaves a linear approach to the law with one that is organic and flexible.

A. The Mediation Committee Act – Structure and Scope

The title of the statute – “The Mediation Committee Act” – as proclaimed in the Constitution, hints at the philosophical disconnect between Rwandan and American court-connected mediation. American mediation routinely occurs in private, with a minimal number of persons involved and specifically eschews formalities of procedure and even substantive law. By contrast, the Rwandan mediation statute reads on its face like a civil-commercial arbitration or a mini-trial to be held in public, except for a provision that permits the mediators to close the session,⁴² and another provision that encourages the mediators to “seek first to reconcile the two parties.”⁴³

The statute closely follows the language of Constitution. Each sector of the nation is required to have a “Mediation Committee” which is responsible for “mediating between parties” in a dispute before a case is filed in court.⁴⁴ Exactly what “mediation” consists of is not defined. Rather, the Constitution essentially assumes that mediation comprises a skills set well known to Rwandans, not re-

⁴² Organic Law No. 17/2004 of 20/6/2004 on Organization, Powers and Functioning of the Mediation Committee, Ch. IV, art. 15.

⁴³ *Id.* at art. 16.

⁴⁴ RWANDAN CONST. title IV, ch. five, art. 159, §4.

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quiring further elaboration.⁴⁵ Alternatively, one could read into this silence an expectation that sector Mediation Committees will adapt their processes to meet the needs of cases as they evolve.

The scope of the Mediation Act is wide. It operates as the gatekeeper to the court house for any civil case relating to land, houses, cattle, non-performance a contract, family cases and inheritance.⁴⁶ This broad reach is limited only by the financial amount at stake: no more than three million Rwandan francs. The Act also limits access to the courts for criminal cases, including those related to property damage, damage to crops or other assets; or the killing or wounding of another's domestic animals. The theft or extortion of money through threats, swindling or simple robbery would also be taken first to the Mediation Committee. Similarly, criminal acts related to family life such as adultery, desertion from the marital home, child neglect or abandonment, or theft of marital property by a spouse or relatives would be taken first to the Mediation Committee.⁴⁷

The expansive scope of the Mediation Committee Act partially explains its structure. Because mediators will serve in lieu of civil and criminal courts for most cases, the adjudicatory function of the Committee has to be carried out with greater procedural protections as guaranteed under the Constitution. Hence, the Mediation Committee Act provides for what most other societies would term arbitration, where the mediators take formal minutes which become a matter of record,⁴⁸ the session expects parties to present arguments,⁴⁹ and witnesses may offer testimony.⁵⁰ The neutrals are selected in the standard civil-commercial manner, where each party selects one person from the Mediation Committee panel in whom they have confidence, and those two select a

⁴⁵ "The Mediation Committee shall comprise twelve residents of the Sector who are persons of integrity and are acknowledged for their mediating skills." *Id.* at title IV, ch. five, art. 59, §4.

⁴⁶ The Mediation Committee Act, ch. III, art. 7, §1.

⁴⁷ *Id.* at § 2 art. 8.

⁴⁸ *Id.* at ch. IV, art. 17. The minutes must contain "the parties' identification; the dispute's summary presentation; claims by the involved parties; the mediators' decision to which all parties in conflict agree; the mediators' decision with which one of the parties does not adhere, if any; the date and the place where the mediation session has taken place; signatures or fingerprints of parties in conflict; the mediators' names as well as their signatures or fingerprints; the rapporteur names as well as his or her signature or fingerprint." Under the Constitution, the minutes must record "the terms of the proposed settlement of the case." RWANDAN CONST. title IV, art. 159, §4.

⁴⁹ Mediation Committee Act, at ch. IV, art. 5.

⁵⁰ *Id.* at art. 15. Indeed, mediators "may have recourse to testimonies by any person who can shed light on the matter."

third neutral to complete the panel.⁵¹ Mediators are to be selected from areas other than the specific village where the dispute takes place.

In formulating a recommended ADR model, this author construed the statute as establishing a combined mediation and arbitration process. The provisions outlining straight-forward arbitration practices were to be followed in the event that more informal, less confrontational mediated dialogue failed. Yet, the organic law remained largely silent concerning processes for mediation or for identifying whether a case properly belonged before the Mediation Committee at all.

Filling this process void was vital, since the gatekeeper function determined whether and how a woman or child with HIV/AIDS could enforce most property or other rights under civil or criminal law. Submitting a case to the Mediation Committee of the Sector was “obligatory.”⁵² Even police enforcement of criminal law could depend upon the Mediation Committee’s action: whether to hear the case, attempt reconciliation, arbitrate, or recommend action by the public prosecutor.⁵³ Therefore, energies in developing the initial mandatory ADR model stressed the development of processes to assure that members of the Mediation Committee held a consistent, clear understanding of their obligations as “a person of integrity” acting as a neutral, attempting to develop consensus around traditional Rwandan values supporting family, women and children.

B. Theory Confronts Practice

i. Problems Informed by Prior Learning in Tribal Peacemaking

This author was asked to apply the theory of ADR as developed elsewhere to the practice of ADR in Rwanda as circumstances dictated. Based upon what ADR specialists in America have learned thus far, implementation of the Mediation Committee Act may prove problematic: neutrality and ethics of the mediators (particularly that they would serve as volunteers without pay); that information received would be kept confidential; that sessions may be structured in a way that does not encourage vulnerable parties

⁵¹ *Id.* at art. 13.

⁵² *Id.* at ch. II, art. 2.

⁵³ *Id.* at art. 13.

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to be forthcoming; and that resolutions may be reached in a manner that is more directive than consensual. The training model itself and training methods would need to be tailored to fit the various levels of formal education – or lack thereof – among the mediation volunteers.

On the other hand, this author's prior experiences with styles of mediation other than the standard facilitative, non-directive, interest-based bargaining suggested that these concerns could be addressed. As Director of the Oklahoma Supreme Court's all-volunteer mediation program in the central portion of the state, this author developed with others a model of tribal peacemaking that did not depend upon acceptance of any one tribe's traditional practices for acceptance. This was important in Oklahoma, because its large Native American population is diffuse, largely integrated into the general population, but still conscious of traditional values, especially when child custody issues are at stake. Rather than relying upon the traditions or practices of any one tribe or clan, the Oklahoma approach to tribal peacemaking relies upon the parties' acceptance of commonly held core values about family, honor, compassion and respect. This approach to community peacemaking grew to embrace non-Native American disputes involving churches, neighborhoods and other communities.⁵⁴

Standard ADR practices considered essential to the very definition of mediation were challenged and modified. Neutrality of the mediators was no longer defined as having no prior knowledge of the parties whatsoever. Often, parties needed to sense that the mediators had some type of emotional or spiritual connection to their situation in order to trust in the process itself. Thus, neutrality was redefined as having no pre-conceived idea about the resolution; but that the mediators did care about all the parties involved. Confidentiality also was subject to adjustment based upon the circumstances. Typically, persons absolutely critical to the resolution might not be present at the session. To assure that no one felt pressured, and all voices were heard – directly or indirectly – parties could speak with others intimately involved in reaching a decision, although the mediators would be bound to keep private all that was said.

This approach was embraced by female attorneys and judges in the oil-rich region of Nigeria that still suffers bloodshed over

⁵⁴ See Phyllis E. Bernard, *Tribal Peacemaking: Oklahoma Style*, presented at Annual Mediators' Conference, Oklahoma Supreme Court Administrative Office of the Courts, Oklahoma City, OK (July 2001).

ethnic divisions, nearly 30 years after the Nigerian Civil War (also known as the Biafran War). The International Federation of Women Lawyers (FIDA) in South-Central Nigeria adopted the Oklahoma tribal peacemaking model and adapted it for use with 400 women peacemakers in villages throughout the Niger Delta. The FIDA village peacemaker model used the support of women within a given geographic area to build support for other women, working through largely intact social structures, such as age cohorts, village councils, or women's groups. It did not attempt to overturn the traditional patriarchal order or customary law. Instead, the peacemaker model worked in a complementary manner to assure substantial involvement by women in the decision-making process. Most importantly, the village peacemakers engaged in as much conflict prevention as possible, assuring that persons had a compassionate, full opportunity to vent grievances. The peacemakers did not conduct mediations themselves, but instead prepared parties to participate in a range of resolution processes. The peacemakers also were trained to work with FIDA attorneys to identify cases where the judicial option needed to be exercised, removing the matter from traditional, customary resolution entirely.⁵⁵

Rwandan women – especially in rural areas – did not have intact cultural groups to re-balance power in mediations, but they did have the newly enacted federal statutes concerning land and property rights. Traditional ethnic and clan practices in Rwanda had proven deadly and divisive; hence, the government pushed to “strengthen and promote national unity and reconciliation”⁵⁶ by appealing to a Rwandan sense of family values transcending tribal boundaries. While Nigerian village women could seek guidance through FIDA members and ultimately gain access to the courts, this option, realistically, was closed to most Rwandan women in rural areas. Additionally, the pervasive issue of violence against women combined with the constraints of time and health needs weighed heavily against fairness under the Mediation Committee Act.

ii. Party Self-Determination Meets Community Pressure

If party self-determination was the central theme of court-connected mediation in America, then the theme of Rwandan mandatory ADR would be the revival of community values in a

⁵⁵ See *supra* note 4 for fuller description, Bernard, at 33-46.

⁵⁶ RWANDAN CONST. title I, preamble, § 4.

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context of human rights. Harmonizing the principles of self-determination, community and justice offers a dialectical challenge. For example, how can a party exercise its rights of self-determination when it is threatened physically, psychologically, emotionally or financially? Moreover, if a party is not represented by counsel, how can it exercise its human rights when most, or a very vocal segment, of its community seeks to undo those rights?

Over the past twenty years, American court systems, ADR theorists and practitioners have taken some major steps toward understanding the dynamics of coercion in family cases. Most sectors acknowledge, at least publicly, the arguments pressed by Grillo and Bryan: women who are psychologically or physically intimidated by an opposing party should not be compelled to mediate.⁵⁷ The dynamics of violence undermine the principle of self-determination upon which modern ADR depends, especially when access to ADR essentially replaces access to the court room. Fairness and fear are incompatible.

Some court-connected mediation programs, such as that sponsored by the Oklahoma Supreme Court, have gone to great lengths to develop fairly sophisticated pre-mediation interviewing protocols to identify physical and psychological abuse, neglect and suicide or homicide risk. Such cases are referred to appropriate social service agencies, including women's shelters and legal counsel. Cases deemed unsuitable for direct party-to-party mediation might be considered for settlement negotiations between attorneys. But, more typically, a case found too dangerous for mediation would be considered in need of the power of the judiciary and police to effect a fair and enforceable resolution.⁵⁸

Yet, even American courts confront a harsh reality: the resources necessary to make such referrals a meaningful alternative to mediation may be found only in major metropolitan areas. And those areas too may not be adequate to meet the demand. Hence, by necessity, some jurisdictions – especially in rural areas – have had to reconsider their policies concerning domestic violence and

⁵⁷ In August 2000 the American Bar Association House of Delegates adopted the resolution by the ABA Commission on Domestic Violence recommending that court-mandated family law mediation include an opt-out provision in any case where there has been domestic violence. The recommendation and report wholly endorse the concerns that mediation under such coercion can be “counter-productive” at best, and may “endanger victims” at worst. ABA Commission on Domestic Violence, Multidisciplinary Responses to Domestic Violence, <http://www.abanet.org/domviol/mrdv/home.html> (last visited March 5, 2005).

⁵⁸ A fuller description of this process, with citations, is found in Phyllis E. Bernard, *Teaching Ethical Holistic Client Representation in Family ADR*, 47 *LOYOLA L. REV.* 163 (2001).

mediation. A new generation of theorists has taken the discussion full circle, but has elevated the consideration to an even higher level. They question whether, under a limited set of circumstances, a woman can give fully informed consent to mediate even where there is a history of domestic violence?

Generally, formal resources do not exist in the Niger Delta nor in Rwanda. In the Niger Delta, FIDA village peacemakers constituted a significant human resource to conduct pre-mediation interviews to assess the dynamics of threat and violence, and potential options for safety and support. In Rwanda, the mediation model adopted a version of this approach. Though many women found themselves unable to confront their tormentors,⁵⁹ others fiercely believed that they had nothing left to lose. They did not fear dialogue, nor the decisions of outsiders. They chiefly desired an opportunity to be heard, irrespective of the consequences.⁶⁰

Such consequences could be profound. The same dynamics that make reconciliation through the *gacaca* trials open to question are at work in the mediation-arbitration sessions of mandatory ADR. Thefts of land and property along with threats of violence and actual violence were committed between persons who are neighbors and family members, still living in close proximity. Everyone's story is known to everyone else; or at least, that story which circulates most widely. The privacy and protection that are assumed in American court-connected ADR are absent. Thus, a woman or her children who pursue their property rights in this public process could receive physical retribution unless the Mediation Committee can lead the community to provide voluntary security. That is to say, the resolution reached through mediation, arbitration or a combination of methods, would use community pressure to assure defendants' conduct conforms to overarching moral norms. Finally, the educational process of the Mediation Committee could allay some of the disheartening "confusion" all

⁵⁹ See, e.g., *supra* note 14, the testimony of Adèle and Assumpta.

⁶⁰ Contrast this with the sentiment of Frida who has identified the men who killed her husband and continues to pursue them in the courts. She proclaimed: "Even if I have to die, I would be proud that I'd done my duty and the other inhabitants would know that I was a victim of the truth." She acknowledged that "[w]e are hated wherever we go. The families of the genocidaires say that we do nothing but cry and unjustly imprison their people." Frida persists, determined "not to give up hope." Nevertheless, she feels that "[a]ll the justice system has done is to sow seeds of confusion among the people. There is no justice for the victims." African Rights, *RWANDA: BROKEN BODIES*, *id.* at 73.

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participants suffer in confronting a justice system under reconstruction.⁶¹

This proposition assumes that the mediators themselves recognize the need for women and children to be provided for, and that the community will act in accord. The Rwandan training model takes the approach that mediators, more likely than not, will not understand the nuances of either formal or customary law. Further, the system should not attempt to make mediation training a “cram course” in creating a substitute for a law-trained judge.⁶² Instead, mediators should focus on the people problems that underlay the legal problems, seeking creative, workable resolutions that provide physical, financial and emotional security over the long term.

The Rwandan training model cannot, however, directly address the community’s role. The Committee only has jurisdiction over the parties, although, the Committee is empowered to consider the needs of all interested persons. If, however, “any party” obstructs the implementation of a Committee settlement, the “interested party” may compel “forced execution” of the mediators’ decision.⁶³

Only time can tell whether this statutory power will suffice to redirect community pressure, when that community has assigned the female plaintiff the role of scapegoat, or “sin-eater.”⁶⁴ The psychological dynamics are replayed in innumerable testimonies of victims of the genocide rapes: a family’s passionate resistance to the needs of a wife, widow or sister with HIV/AIDS or who otherwise is a victim of genocide rape represents the family’s need to perceive the female as sinful and with her sins perceived as an absolution for their own wrong-doing.⁶⁵ The public shunning and

⁶¹ See *supra* note 60, remarks of Frida.

⁶² This has been a consistent complaint about the role of the gacaca judges: that they are not law trained, yet the training offered focuses too much on the technicalities of law. See African Rights, *Gacaca Justice: A Shared Responsibility* (Kigali: January 2003) at 9-12.

⁶³ Organic Law, Mediation Committee Act, at art. 19.

⁶⁴ The sin-eater was a fixture of rural communities in the British Isles until at least the first quarter of the 19th century. This person “took upon himself the moral trespasses of his client – and whatever the consequences might be in the after life – in return for a miserable fee and a scanty meal.” The sin-eater literally ate a loaf of bread and a bowl of beer fixed atop the corpse, representing the sins of the deceased. *Funeral Customs: Chapter IV: Wakes, Mutes, Wailers, Sin-Eating, Totemism, Death-Taxes*, <http://www.sacred-texts.com/etc/fcod/fcod07.htm> (last visited Jan. 29, 2006).

⁶⁵ Wing summarizes these injuries to the spirit, capturing the nature of defilement aggravated by silence, which reinforces shame, making survival a reminder of failure, an occasion for guilt, not celebration. *Id.* at 289-293.

shaming of such women fulfills a deep-seated need for others to place blame elsewhere.

To redirect this community pressure presents a formidable challenge. The med-arb model and training recommended for use under the Rwandan Mediation Committee Act sought to meet this challenge by tapping into the powerful iconography of traditional culture. These images offered mediators a bridge to combine statutory justice with personal justice, encouraging resolutions in accord with Rwandan traditional values as refined in the 2003 Constitution.

IV. THE “*UMWUNZI*” - “BONE HEALER” - METAPHOR FOR THE RWANDA MEDIATION COMMITTEE ACT

As identified above, the Mediation Committee Act, as enacted, essentially took a Western civil commercial model of arbitration and applied it to African family and village disputes. The challenge was to maintain the integrity of the underlying statutory and constitutional objectives while implementing the Mediation Committee Act in a way that invoked the traditional values shared in common by most Rwandans, irrespective of tribal or clan identification. As in Nigeria, this was accomplished first by identifying the process issues most vital to a successful ADR system, as identified thus far in other settings. These issues, and a method for working through them, were literally translated into icons: images and stories embedded with instructive cultural subtext.

The training protocols searched diligently to identify traditional Rwandan cultural activities and values that had not been subverted through genocidal propaganda. Next, these images were converted into line drawings with simple text to facilitate the training of mediators who had limited formal education. Finally, the protocols were taught in a hands-on method: (1) presenting the explanatory theory step-by-step with examples keyed to everyday life; (2) following with a demonstration of the method; (3) reinforcing the method through role plays where mediator trainees applied the method in scenarios drawn from likely cases; (4) closing each step in the process with de-briefing and discussion of points learned.

This section highlights some of the key icons as used in the model and in training volunteers, as recommended by the author in development with ABA Rwanda. Both the model and the training

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have continued to evolve. The model encourages growth and adaptation by teaching core principles of active listening, confidentiality, and problem-solving through stories linked to positive shared experiences in cultures of the volunteer trainees.

A. *The Umwunzi: A Neutral Third-Party Known for Integrity and Healing Broken Relationships Without Pay*

Due to the extensive, powerful role of hate speech and imagery during the genocide, it proved difficult to find the healing, neutral images of integrity and community mutual support that had been available in Nigeria. Poignantly, the very image that has marked the deepest sorrows of the genocide – the bones of the dead, maintained in genocide shrines throughout the nation – has also given rise to the teaching metaphor that rests at the heart of the Rwandan med-arb process. The mediator is not referred to as “Mediator” nor as “Committee Member.” Instead, the mediator is called the “*umwunzi*” with all that this icon invokes.

The *umwunzi* is the highly respected healer of fractures, whose God-given gift of healing through touch sets broken bones and speeds the healing process. This icon of selfless, modest integrity at the service of the community permeates virtually all Rwandan cultures, irrespective of ethnicity, region or religion. As explained to this author: “It’s within you to have and within you to give”; *i.e.*, what is given freely by the Creator must be given freely to the people.⁶⁶

Because mediators serve as volunteers, and because they facilitate and decide cases where powerful parties might attempt to purchase a favorable outcome, there had been some apprehension in a society rife with quiet corruption. Specifically, how could the training adequately convey the importance of neutrality and refusing payments to influence decisions? The cultural subtext of the *umwunzi* was so extensive and ingrained in Rwanda that the invocation of this single word overrode most of those apprehensions. Trainees automatically understood the ethical framework for the mediators’ service.

At a deeper level, trainees embraced the healing metaphor of the *umwunzi* who, under the Mediation Committee Act, healed

⁶⁶ Interviews with ABA Rwanda staff, Kigali, Rwanda, (Sept. 28, 2004). Notes on file with author.

broken relationships as the village *umwunzi* healed broken bones. This teaching metaphor carried with it lessons about patience and limitations on the achievable. The village *umwunzi* did not promise immediate cures; but created opportunities for the body to heal itself, if the patient cooperated. The recuperative process would take time and entail pain; but strength would eventually return as the bones adjusted to their new position. Similarly, the mediators did not have in themselves the capacity to create justice and reconciliation. The parties had to engage in the process, which would take time and involve substantial discomfort. Genuine reconciliation would not come quickly, but the settlement set the stage for eventual healing.

B. “*Agahozo*”: The Comforter Entrusted with Secrets

People from small towns in America (or anywhere) probably scoff at the idea of confidentiality in dispute resolution. Most disputes, it seems, play out in public, or at least in public gossip long before parties file a case in court. The role of confidentiality, then, in rural areas (or urban neighborhoods) may change depending upon what mediators realistically can promise and what parties need.⁶⁷

The Rwandan Mediation Committee Act generally assumes transparency. Sessions are held in public, open to other Mediation Committee members even if they are not part of the proceeding.⁶⁸ Such openness may play an important function in assuring some measure of accountability. One might even consider the format of the statute and the invitation for expanded participation by the community to establish the mediators as the functional equivalent of the jury “as fact finder and community presence.”⁶⁹ This transparency may work to the benefit of many parties, even those who confront far more powerful adversaries. The mediators as community presence – and conscience – could re-balance power.⁷⁰

⁶⁷ This can become a major issue in cases involving victims and offenders, including domestic violence matters. See Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2004 J. DISP. RES. (UNIV. OF MISSOURI-COLUMBIA) 401 (2004).

⁶⁸ Mediation Committee Act, art. 15.

⁶⁹ Roscoe Pound Institute, *The Jury as Fact-Finder and Community Presence* (2000).

⁷⁰ If, in fact, domestic violence is considered a public policy issue, and if parties in confidential proceedings are especially vulnerable to abuse of power, some observers suggest that transparency is exactly what fairness requires. See Andre R. Imbrogno, *Using ADR to Address Issues*

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On the other hand, early experience with the International Criminal Courts for Rwanda suggests that women who have been victims of genocide rape, or who are otherwise marginalized in their communities might not share this view. From their perspective, the sight of three persons sitting in judgment, interrogating them in public, subjects them to yet more humiliation and harm. Sad accounts have been reported where ICTR judges responded to victims' stories with derision and laughter. Even where the response has not been quite as damning, the mere fact that victims had to repeat in public injuries that occurred in private, compounded their pain and suffering.⁷¹

The model sought to reduce re-victimization. As already described previously in this paper, one can virtually assume that most cases where a woman pursues property rights for herself or her children will involve some amount of domestic violence or sexual abuse. Plaintiffs with HIV/AIDS deserve special consideration so that their already difficult position in the community is not further eroded due to the manner in which the mediation sessions are conducted. Hence, the med-arb model recommended an initial step in the process, equivalent to the pre-mediation interview and counseling session conducted by FIDA village peacemakers and by volunteers in the Oklahoma Supreme Court's family mediation program.

This pre-mediation conference is a private, woman-to-woman discussion held somewhere apart from relatives and neighbors. The mediator/interviewer uses active listening techniques to solicit as much information from the plaintiff as the plaintiff is willing to share. She also discusses options, including the risks and potential benefits of proceeding with her claim. To encourage both persons to understand their roles, we sought another icon of traditional Rwandan life: the "*agahozo*."

The *agahozo* could be male or female, but typically is an older woman to whom people turn for comfort and guidance. The *agahozo* is the quintessence of trust, and the soul of discretion concerning the secrets shared with her. The role of the *agahozo* becomes especially important under Article 8 of the Mediation Committee Act, in that plaintiffs considering filing criminal charges

of Public Concern: Can ADR Become an Instrument for Social Oppression?, 14 OHIO ST. J. DISP. RES. 855 (1999).

⁷¹ Press Release, African Rights, RWANDA: BROKEN BODIES, at 77-81 (April 15, 2004)(describing numerous instances in the ICTR where "the institution that has increased international recognition of the heinous nature of rape, has also been the forum for the humiliation of rape victims."). *Id.* at 77.

for: assault and battery, threats, adultery, desertion, child neglect or abandonment, or property crimes less than three million Rwandan francs must go to the Mediation Committee before the case can go to the public prosecutor. Police are instructed in Article 9 of the Act to refer a female complainant to the Mediation Committee first before taking action. Thus, the *agahozo* may constitute a woman's first meaningful contact with the justice system as she seeks redress for crimes against her person. Gratefully, the cultural function of the *agahozo* carries a subtext of respect and responsibility that quickly connected with mediation trainees.

C. "Muganda": Working Together to Foster Harmony and Goodwill

The propaganda of genocide brutally warped the language of community values and service. Most of the images one would typically use to encourage joint action for the betterment of the community had been subverted to serve as cue words to rationalize or to signal the start of massacres. Even the image of communal farming failed. Many of the most volatile cases concerned estrangement within a family, arising because family members had killed, raped, stolen from, or failed to assist other family members during the genocide.

One of the few icons to emerge untainted was the "*muganda*," an occasion when ten to twenty people would join their energies to erect a building, followed by a celebration. The *muganda* was a practice widely recognized throughout Rwanda and, like the *umwunzi* and the *agahozo*, was not limited by boundaries of tribe or clan. The *muganda* summoned the combined energy of the community and celebrated generosity.

Similarly, the Committee – whether serving as mediators or arbitrators – would work with parties to solve their problem in ways that fostered harmony and goodwill, as did the traditional *muganda*. As described earlier in this paper, many such traditions had fallen into disuse during the civil war. The influx of new residents – especially those forced to move in the villagization process – undercut the limited efforts at reviving community traditions. Without sufficient points of cultural contact, community-building gained little traction. The *muganda*, however, remained as an overarching icon of pre-civil war cooperation and mutual aid; and was readily embraced in mediation training.

V. CONCLUSION

This paper has attempted to look unblinkingly at the profound difficulties that confront Rwanda as it begins to mandate ADR for most civil and family matters and for some crimes. This paper has also sought to respect choices made and implemented by the Rwandan people. One could see in this blend of statutory rights and mandatory mediation a process that makes the victim beg for justice; or, one could envision a daring adaptation of jurisprudence that uses limited resources to effect a different kind of justice. That justice is a blend of statutory rights, personal needs and traditional values blended in a flexible, inclusive way, that fills many gaps in Rwandan law and society. At its best, this will be a justice that rebuilds a nation brick by brick, case by case.

Does this blended process require women to trade statutory rights for negotiated protection? This is possible. On the other hand, the statutes give women something to bargain with, which they have not had before. Thoughtful, compassionate use of the *muganda* concept in the hands of mediators serving as *umwunzi* has the capacity to assure that resolutions will conform to general principles of fairness, tolerance and protection towards women and children. Sensitive use of the *agahozo* role can avoid employing mediation when the mediation cases are unsuitable, but require instead action by the public authorities. The *agahozo* function can preserve a plaintiff's dignity while helping her make informed choices about participation in mediation or arbitration.

The resolutions may or may not match what outsiders expect. There will, undoubtedly, be significant strains on the system as it begins, develops and matures. If economic and military stability can be secured, Rwanda may eventually have much to teach other societies in search of a flexible jurisprudence built around norms that transcend ethnic boundaries. It may be ultimately an adaptation offering both statutory and personal justice within a framework of commonly held values. This type of adaptative jurisprudence may be essential for success not only in Rwanda, but wherever cultural pressures threaten to divide rather than to unite a nation.