



## **Alternative Dispute Resolution (ADR) and Mediation: The Experience of French-Speaking Countries**

53 states around the globe are members of the *Francophonie* and are sharing French as their official language. About half of them are located in Africa. ADR is recognized in different forms within the legal systems of these countries. Some of them have a longstanding practice of mediation in their social history, others introduced it only recently. The purpose of this presentation will be to focus on these different experiences and understandings.

The way ADR is implemented in francophone countries could be a source of inspiration for the work of the EACC, mediators and legal practitioners in Ethiopia. And this for various reasons. As Ethiopia did, most francophone countries that introduced ADR in their legal framework originally based it on the Anglo-Saxon model. Their legal systems however are considerably different from the Anglo-Saxon Common Law, and therefore many adaptations have been necessary. This experience shows that mediation can be transferred into another cultural, educational and institutional environment, but that it also has to be changed to fit with the specific social realities. In addition, as most French-speaking countries are located in Africa (almost half the African countries are francophone), their experience of ADR is geographically much closer to Ethiopia than the American one. Therefore, the second part of the presentation will deal specifically with the situation in Africa.

But first, let us turn to the francophone countries of the northern hemisphere.

### **1) ADR and mediation in francophone Europe**

#### *The development of ADR in North America and Europe*

The concept of ADR as an extrajudicial way to resolve disputes was originally developed in North America. In the USA, it was first experienced in commercial matters. Its main impetus was the high cost of American litigation and the desire of the litigants to retain business relationships rather than destroy them after a court sentence. Later, ADR started to be used in the form of “community mediation” in neighborhood disputes and in family conflicts. In neighboring Canada, ADR initially began to be used in family law. In the mid 1980s, the use of mediation began to spread into civil non-family cases – most vigorously



in personal injury cases. Some federal states, like Québec, today require mediation in any family law case before an issue of custody or access can go to the courts.

In most parts of Europe, particularly in the UK, mediation was introduced from the USA. The major francophone countries, France, Belgium and Switzerland, however took it over from Québec. This is probably the reason why it was first experienced in family law. An early, very influential advocate for family mediation was sociologist Annie Babu who attended a course in mediation in Québec. She lobbied strongly for family mediation among welfare associations and in April 1988 persuaded family law professionals in a number of European countries to form an organization to promote mediation: the “Association for the Promotion of Family Mediation” (APMF). In the following years, several family mediation services were created, which, in 1991, established an umbrella organisation: the “National Committee of Associations and Services of Family Mediation” (FENAMEF). The APMF and the FENAMEF today still exist and have contributed considerably to the fast development of ADR in francophone Europe.

From the very first, mediation associations and mediators had two main aims for their new profession: professionalization and legalization. With regard to professionalization, they lobbied for the creation of a recognized state diploma for arbitrators. They also worked out a code of conduct.

Legal recognition of mediation in francophone Europe started in the early 1990s. A huge increase in the number of divorces in the 1980s and the concern of public authorities of the cost of these procedures was one important factor for a rapid introduction of mediation into civil law procedures.

### *Mediation in French law*

In France, mediation was formally recognized by the Loi No 95-125 of 18 February 1995 which added articles 131-1 to 131-15 to the New Code of Civil Procedure [reproduced in French in the joint documents]. Under this law, a judge hearing a matter can appoint a third person for up to three months with the consent of the parties. If the mediator requests it, another three months may be granted. The mediation may apply to part or the whole of a matter and the judge can stop the mediation at any time if the mediator or either party requests it. Mediation is always optional.

The mediator’s remuneration is set by the judge and is the responsibility of the parties who must make a provisional payment at the start of the procedure. Impecunious parties are eligible for legal aid.



When mediation takes place **out of court**, there are no general regulations governing it.

### *Judicial conciliation in French law*

Beside mediation, conciliation has existed long time before as another alternative way to resolve disputes in France. It is organized in sections 831 to 835 of the New Code of Civil Procedure. Since the introduction of mediation by the Loi No 95-125, the methodological distinction between mediation and conciliation remains quite unclear in French law. The difference is mainly procedural.

Unlike mediation, conciliation is a free service. Conciliators are no professionals. They are voluntary legal assistants registered on a list drawn up by the First President of the Court of Appeal following a proposal by the Court of first instance.

There are two mechanisms:

- **The preliminary attempt at conciliation before the court of first instance and the local court:** the applicant applies orally or in writing to the clerk of the court's office. The clerk of the court calls the parties together by means of an ordinary letter. If the conciliation is successful, the report, signed by the parties, the judge and the clerk of the court, is legally binding. In the absence of conciliation, the case may either be heard immediately if the parties agree, or there may be a summary or a declaration to the court office, depending on the seriousness of the claim and the nature of the dispute. In practice conciliation hearings are held before a judge in most courts of first instance.
- **Conciliation ordered during the legal proceeding with the consent of the parties:** the court of first instance or local court may, with the consent of the parties, appoint a conciliator to attempt a conciliation. He sets the duration of this mission, which may not exceed one month but which may be renewed once only. The conciliator receives the parties in complete confidentiality. In the event of a memorandum of agreement being produced, it must be submitted for the judge's approval. In the event of failure, the proceedings resume their course once more.

The law on guidance and planning for legal proceedings allows the court of first instance and the local court to order the parties to meet a conciliator to inform them about the aims and procedures of the conciliation process.



### *Out of court conciliation and French law*

Out of court, the parties may resort to conciliation before a legal conciliator if their dispute concerns rights that they are free to exercise. The conciliators receive the parties, who may have assistance. They act in complete confidentiality; that is to say the reports and declarations that they obtain may not be produced or cited later in subsequent proceedings without the consent of the parties. The memorandum of agreement may become legally enforceable if the parties ask the presiding judge of a court of first instance to order this (section 1441-4 of the New Code of Civil Procedure). These agreements therefore have the same legal force as a judgment. In other cases, the agreement will have the same value as a contract between the parties. If the agreement is not enforced, the party so requiring may bring the dispute before the judge.

### *Arbitration in French law*

Arbitration in civil and commercial affairs is mainly organized in sections 1442 to 1491 of the New Code of Civil Procedure. Unless the litigants did not convene on it, arbitrators are relatively free to fix the arbitration procedure. They have important rights to exercise their instruction and are assimilated in many regards to regular magistrates. The arbitration sentence is legally enforceable. Appeals are possible before the ordinary courts of appeal.

### *Particular cases of ADR mechanisms in French law*

Beside the general provisions on conciliation, mediation and arbitration, various compulsory or optional extrajudicial conflict settlement mechanisms exist in French law for particular types of disputes.

- **Conflicts between employers and employees** have to be submitted to a conciliation bureau before being dealt with by the Industrial Tribunal, the *Conseil de Prud'Hommes*. The procedure is regulated by sections L 511-1 and R 516 onwards of the Employment Code. If the parties reach an agreement, it is written up in an official report. If they fail to agree, the procedure continues before the tribunal.
- **Conflicts between landlords and tenants** can be submitted to a conciliation commission dealing with matters relating to leases on dwellings. It is compulsory to refer a matter to this commission before taking it before a court when the dispute relates to rental prices. There is no charge for this procedure. Any dispute regarding the condition of the premises, guarantee deposits, charges and repairs may also be



referred to this commission. The workings of this commission are regulated by Decree No 2001-653 of 19 July 2001. Where commercial leases are concerned, there are similar commissions, referral to which is always optional.

- **For conflicts between consumer and business**, there is a structure for extrajudicial dispute settlement, put in place by the French authorities: the *Direction générale de la Concurrence, de la Consommation et de la Répression des Fraudes* (Office of Competition, Consumer Affairs and Fraud Prevention). This is a one-stop shop providing information and guidance to consumers and helping to settle consumer-related disputes. It brings together on a département level consumers' associations, professional organizations and the administration. This mechanism is free of charge.
- **Where insurance is concerned**, groups of insurance companies have drawn up mediation charters through which an independent mediator gives an opinion on a dispute between insured and insurer. A matter may be referred by letter to this mediator who is bound by the adversarial system. If mediation fails, the case may be referred to the courts within a period of two years starting from the act that was the original cause of the dispute.
- **In matters involving banks**, section L 312-1-3 of the Monetary and Financial Code aims to institutionalize and extend the practice of the bank mediator. The procedure is free of charge and the mediator must give a ruling within two months of the matter being referred to him; limitation periods are suspended during this time.

### *ADR in European Community Law*

In addition to these national legal dispositions, a proposal for a directive on mediation is currently discussed in the European Union. The proposal seeks to further the use of mediation by making certain legal rules available within the legal systems of all member states. These rules cover the areas of confidentiality of the mediation process and of mediators as witnesses, enforcement of agreements for settling disputes as a result of a mediation, the suspension of the running of periods of prescription and limitation of actions while a mediation is in process. It encourages the training of mediators and the adoption of norms of conduct to secure the quality of mediation on a consistent basis throughout the Union.

A European code of conduct has already been elaborated in co-operation with a large number of organisations and practitioners of mediation. The code was adopted by a meeting involving these experts in July 2004 and shall serve as a model for all member states.



### *ADR in francophone Europe: final remarks*

Within 10 to 15 years, ADR has become an important element of the European legal systems. In comparison to long and cost-intensive procedures before court, its advantages are generally perceived as follows:

- preservation of existing relationships;
- arrangements may be made quickly; process usually takes one day or less;
- simple and easy process;
- confidentiality;
- process non-binding; the outcome is within the control of the parties;
- high level of satisfaction.

## **2) ADR and mediation in francophone Africa**

Let's now turn to Africa. About 25 countries, that's half of all African nations, share the French legal system as their official legal system. The social context in these countries however is considerably different from the European or the American one. Like in Ethiopia, the official legal system there is part of a very complex system of social regulation. Beside state law, which has only been introduced under colonial occupation about 100 years ago, there is a great variety of traditional legal mechanisms that still coexist with the official law.

The concept of "ADR", understood as "alternative dispute resolution", has been developed as an "alternative" to law in nations which only know one single legal system. It has necessarily to be revisited to be operational in countries where such an "alternative" already existed from the beginning on.

Some introductory anthropological considerations will be helpful to understand the meaning and the importance of ADR in the African context.

### *ADR in Africa: An anthropological approach*

With regard to state law, the specificity of ADR is to achieve conflict resolution through a negotiated solution that, in the end, is acceptable for all conflicting parties. In the USA, its development was very much encouraged by legal anthropologists who based their recommendations on observations made in societies that already knew such regulation mechanisms. Many of these observations were made in Africa.





To understand and implement institutionalized ADR in a non-Western context, it is important to re-contextualize these research findings from an African – or at least a cross-cultural – perspective. For this purpose, some interesting works of French legal anthropologists are worth mentioning. Trying to classify the different conceptions of law that exist in the world, they distinguish three main ways to conceive social and legal order:

- **Imposed order** (“ordre imposé”): social regulation is based on general and impersonal rules. This abstract way to define law is a traditional characteristic of monotheistic societies and the foundation of those legal systems that today are generally considered as “modern”. “Law” in these legal systems is understood as a set of rules.
- **Negotiated order** (“ordre négocié”): conflict resolution is achieved through common negotiation of a solution, within the family or the group in which the dispute arose. There are only few nonnegotiable and abstractly fixed rules; each dispute can be a moment of redefinition of what is “good” and “just”. To ensure a social continuity, experienced elders and persons who are considered as a notables have an important role. This conception is privileged in most African customs.
- **Accepted order** (“ordre accepté”): life in society is based on the ideal to avoid conflicts. What is considered as “good” and as “order” is a general consensus on social behavior. If nevertheless a dispute arises and is taken to a public place, the situation is socially perceived as a defeat for both parties involved. This conception can mainly be found in Confucian Asia.

Following this classification, ADR has to be situated somewhere between “accepted” and “negotiated” order. It is only an “alternative” to the “imposed” order of state law, but cannot properly be considered as such in societies where similar dispute resolution mechanisms already exist. For this reason, the denomination “*appropriated* dispute resolution” will be favored for the rest of this presentation. The question in Africa is not so much how to define an “alternative” to state law, but how to integrate state law with socially more “appropriate” systems that already exist.

### *“Appropriated dispute resolution” and state law in francophone Africa*

From this perspective, the recognition of ADR appears to have been a steady concern for legal scholars and practitioners in francophone Africa over the past 100 years. Since the introduction of French and Belgian state law under colonial occupation, the integration of customary conceptions has always been perceived as an important mean to reconcile the



official law with social realities. The progressive creation of “customary courts” and the codification of “customary law” were two major priorities of colonial policies. However, this process also intended to get better control over traditional authorities and was, to a large extent, politically motivated. Furthermore, what had to be understood as “customary law” was generally defined by anthropologists, missionaries or lawyers from France and Belgium. Their misunderstanding of local hierarchies and legal mechanisms led to a gap between the recognized “customary law” and the actual local legal practice.

After independence, almost all francophone countries abolished their “customary courts”. This policy however was not only due to the fact that these courts did not really reflect “customary” conceptions of law. It was mainly motivated by the aim to promote the civil law system as the single one. Implicitly, customary legal conceptions were thought to vanish over the time. Half a century later however, the importance of non-state law remains very important all over the African continent.

The official recognition of ADR has thus become a priority again for many legal reform projects. Some of these initiatives (that frequently do not use the term “ADR”) have been presented in a recent report of the French Embassy in Addis Ababa (Dominik Kohlhagen, “State Law and Local Law in sub-Saharan Africa”, 2005). In conclusion to this report, I have identified six different ways to give recognition to ADR in sub-Saharan Africa (*excerpt from pp. 21-22*):

- **Codification** of local conceptions of law has been favored by many francophone countries and some common law countries like Tanzania. This procedure has the advantage to provide accessible and reliable documents that can be used in a written law procedure. Its problem is that it does not take into account the dynamics and flexibility of most local legal systems which prefer negotiation to the strict application of a set of rules.
- **Integration of local law** into the state legal system in a non-written form as practiced in Ghana or in some francophone countries limits the risk of inappropriate determination of fixed rules. It requires the nomination of assessors in court and is a quite easy and practicable way to adjust the law to local customs and practices. However, as the experience of the countries mentioned shows, its impact is limited because it does not render the structure of the judiciary more accessible for people who are not familiar with it.
- **Incorporation of local institutions** into the state legal systems without codification of procedures and the law they use has been practiced under the British “indirect rule”. This way presumes not only that adequate institutions actually exist but also that their logics of functioning are compatible with state law. It requires an important knowledge of the real





*impact well specified institutions have in well specified regions and represents a risk for minorities and socially marginalized groups.*

- **Tolerated self-regulation** is probably the *de facto* situation in most African countries where extra-legal mechanisms of social regulation are known and tolerated by the state's institutions.
- **Cooperation** in a more explicit manner is practiced with the *Bashingantahe* in Burundi and in Mozambique, where the Community Courts are now recognized as conciliation boards without being part of the state judiciary. The risks of this procedure are the same as those of incorporation, but it provides a greater flexibility. The exercise of partial competences can be recognized as being assumed by certain extra-legal forums without being subject to control by the state. Outside Africa, this option is presently experienced quite successfully in the Nunavut region of Canada or in Greenland.
- **Innovation**, like the rehabilitation of traditional dispute settlement mechanisms in Rwanda or the creation of new institutions integrating locally recognized authorities in post-independence Mozambique and in Uganda, is another possible way. At the moment, this possibility has only been chosen on the background of very specific historical or ideological experiences.

As this summary shows, the recognition of “appropriate dispute resolution” by the official legal system is dealt with in many different ways in francophone Africa.

### ***Institutional mediation, conciliation and arbitration in the judiciary of francophone Africa***

The institutionalization of (customary) mediation, conciliation and arbitration is a common characteristic of all legal experiences mentioned. However, there are only few countries where ADR has been integrated into the procedures of the formal judiciary. For the moment, institutionalized, professional and non-customary mediation, as it is currently put in place in Ethiopia, remains quite exceptional in francophone Africa.

One exception is Benin in West Africa. Throughout the country, specialized conciliation tribunals (“tribunaux de conciliation”) are competent to hear almost all matters of dispute related to civil law. Their records are transmitted to the court of first instance which either confirms the successful conciliation or assumes jurisdiction if the conciliation fails. If the decision is confirmed, the conciliation record acquires the force of a final judgment and can only be contested to questions of law through an appeal to the Supreme Court.

Similar tribunals also exist in the Republic of Congo in Central Africa.



Beside these national ADR institutions, most West and Central African countries are presently working on a regional ADR system for commercial disputes. The project is mainly due to the initiative of the U.S. Department of Commerce and its Commercial Law Development Program (CLDP). It shall lead to the creation of a “Center for Arbitration and Mediation in Africa” (CAMA).

Simultaneously, under the aegis of the OHADA, the Organization for the Harmonization of Commercial Law in Africa, the francophone countries have developed a common legal framework based on French Civil Law. Arbitration is considered as the primary way to settle disputes under the OHADA law. All conflicts must be submitted to the Common Court of Justice and Arbitration (CCJA) based in Abidjan (Ivory Coast). The arbitration agreements of the court’s arbitrators are legally enforceable in all member states. Unlike the continent-wide CAMA-project, the CCJA is limited to the francophone countries adhering to the OHADA law. It is today unclear how both institutions will be coexisting.

### *Final remarks and recommendations*

ADR, understood as “alternative dispute resolution”, is a concept developed in the USA and other countries with a legal tradition that differs considerably from the social realities in sub-Saharan Africa. It has to be adapted locally to fully benefit countries like Ethiopia which have a pluralistic legal culture. In pluralistic countries, the problem of dispute resolution must not be put in terms of “alternatives” but in terms of “recognition” of existing mechanisms. In America and Europe, customary conceptions of dispute resolution had to be imported by the means of “ADR”, in Africa they are already there.

In some legal fields, like disputes related to international business, there is obviously a need for mechanisms that do not differ too much from one continent to the other. In matters like divorce, child custody or land tenure however, institutionalized ADR will have to take into account local realities. Wherever possible, it will be important to understand ADR as a way to integrate customary conceptions of dispute resolution, to seek advise with traditional authorities during a mediation process or to refer cases to local courts in order to achieve arbitration.

Initiatives like the EACC should be encouraged everywhere on the African continent. As they do in the Americas and in Europe, they help to unclog the courts from long-pending cases, to save money and to find a solution in an amicable non-adversarial way. In addition, they open the way to more adequate dispute resolution processes in culturally rich countries like Ethiopia where the art of mediation and conciliation has already been practiced for centuries.