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ALTERNATIVE DISPUTE RESOLUTION, AFRICA AND THE STRUCTURE OF LAW AND POWER: THE HORN IN CONTEXT

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INTRODUCTION

Data collected by comparative legal scholars show that legal transplants usually take place from more complex societies to less complex ones.[1] By contrast, the alternative dispute resolution (ADR) movement that has recently developed in modern societies has been described as a return to a simple model of dispute settlement used in the past and in modern non-Western societies. Does this mean that we are experiencing a new kind of legal transplant, a transplant from less complex to more complex societies? In this article I will argue that this is not the case. Far from being a transplant from the southern to the northern hemisphere, ADR seems indeed to be a modern legal institution born from the retreat of the state from some of its traditional functions.[2] A different question thus needs exploring: is ADR, at least, an institution that can easily be transplanted to Africa where the original transplant of the Western state has failed? In other words, is conciliatory ADR more similar to the African way of dealing with conflicts and consequently to be recommended as the dispute resolution mechanism for modern African states? The question appears to be appropriate in situations such as the one in the Horn of Africa—particularly Eritrea—where the new political leadership is confronting the difficult task of building a new legal system.

THE FAILURE OF THE ORIGINAL TRANSPLANT OF THE WESTERN STATE IN THE HORN: A FAILURE TO ELIMINATE GROUP-BASED DECISION-MAKING

As noted by many observers, the political complexity resulting from the strategic position of the Horn has meant that the effort of every political elite to defeat the preceding one has been very strong. In particular, modern and post-modern state elites attempted, unsuccessfully, to eliminate one of the most crucial characteristics of the dispute resolution process: its collective nature.

The history of the Horn shows that every attempt to find an easy and ready device to solve the tragic problems of the area (or even to keep political control over it) has only created more unmanageable complexity with tragic and sometimes paradoxical political outcomes:[3] witness the problems of Ethiopia[4] and Somalia. The only happy exception, modern Eritrea, is facing enormous

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[1] Cf. A. Watson, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, 1993.

[2] On this see S. Strange, *The Retreat of the State—The Diffusion of Power in the World Economy*, Cambridge, 1996.

[3] On the history of the Horn of Africa see I. M. Lewis, *A Modern History of Somalia: Nation and State in the Horn of Africa*, Boulder, 1988.

[4] On the new Ethiopian constitution see Mattei, "The new Ethiopian Constitution: first thoughts on ethnical federalism and the reception of Western institutions" and P. Brietzke, "Ethiopia's 'Leap in the Dark': 'private' federalism and self-determination in the new Constitution", both in E. Grande (ed.), *Transplants, Innovations and Legal Tradition in the Horn of Africa*, 1996.

problems with neighbouring Sudan and is struggling with international bureaucracy to obtain the help it deserves after 30 years of neglect.[5]

What seems to be lacking is the capacity to understand a complex and different structure; a structure at odds with the logic and the power structure of the state. The traditional African system of dispute resolution has always been a collective enterprise with the involvement, in various ways, of the whole community.[6] Of course, the last word belongs to the chief and the most authoritative points of view are those of the elderly. Yet, consent of the parties involved in the conflict and of the community in general still remains the main source of legitimization of the decision.[7] Ultimately, the legal process is designed to re-establish social peace in order to prevent feuds.[8] The consequence of this approach is the high level of flexibility typical of customary law. What may appear to be a violation of a rule may sometimes be the establishment of a new one, accepted and promoted by the community because of its enhanced sensibility to present needs.

The dispute resolution process is therefore only incidentally individual. What matters is the group, and what is important is either peace within the group or between one group and its neighbours. Particularly revealing are the rules by which the harm is made good: usually the group of the offender is involved in the restitution payment, which the group of the victim receives.

This traditional legal process has never been accepted by the political elites of Western states—all of which, concerned as they were with the centralization of power, felt threatened by a decentralized social organization based on groups. The idea of the state is Western, of course, foreign to the African tradition and rather arbitrary in the form imported by the colonial powers. In the Horn, although a centralized tradition is not absent and colonization—experienced in Somalia, Djibuti and Eritrea—was very marginal in Ethiopia, fierce political battles among Western powers have created a complex problem of incompatibility between modern political frontiers and the ethnic membership of the population.[9] Suffice it to say that ethnic Somalis are important minorities in Ethiopia, Kenya and Djibouti. Yet, surrender to the imported constitutional structure seems everywhere total. The failure of the modern conception of the state in Africa is dramatically evident particularly in the Horn, but the lesson has not been learned. The centralizing logic of the state and the illusion that it grants unlimited power to the leading elite has had devastating effects on the social equilibrium of a society based on kinship. According to the simplifying logic of the state shared by colonial and post-colonial leading elites in the Horn, the illusion is that enactments are the law, and that an enactment backed by the power of the state is enough to solve problems and develop the legal system in a consciously planned way.

The relationship between the state and the law, however, is not infrequently itself in conflict and the state, even when established and well developed as in

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[5] On Eritrea's struggle for independence see R. Iyob, *The Eritrean Struggle for Independence: Domination, Resistance, Nationalism*, Cambridge, 1995.

[6] There is no one single tradition in Africa. I am therefore speaking in general terms to give a very basic picture of what is a common African phenomenon.

[7] Compare, among others, Gulliver, "Disputes settlements without courts: the Ndendeuli of southern Tanzania", in L. Nader (ed.), *Law in Culture and Society*, Chicago, 1969; E. Colson, *The Social Organisation of the Gwembe Tonga*, Manchester, 1960.

[8] On the principle of unanimity as opposed to the one of majority in African society see R. Sacco, "Conclusions", in E. Grande, op. cit., n. 4.

[9] On this, see Iyob, op. cit., n. 5, 39.

the West, sometimes seems to relinquish its claim to control the legal system. The ADR movement in modern societies is often considered an example of this phenomenon.[10]

The Rhetoric of Modern Western ADR

The difficulties faced by the modern state in Western societies in fulfilling one of its traditional tasks—jurisdiction—has led to the contemporary explosion of the alternative dispute resolution movement.[11] ADR, particularly as regards mediation as a means of settling disputes, has often been depicted as a return to an idyllic past in which people, instead of fighting in front of a court for their rights, achieve the consensual resolution of their opposing interests peacefully and privately.[12] In traditional societies without centralized power, courts and lawyers, so the argument goes, people settle their disputes through arbitration, mediation or negotiation, where the issues involved in deciding the outcome are broad and the settlement of interests is a win-win solution. In adopting ADR, it is often argued, Western societies have (re)-discovered from the past a way of handling disputes outside the win-lose adversary adjudicative model.

Can we say, then, that the contemporary explosion of ADR techniques in Europe, USA, Canada and Australia, is in fact a legal transplant from traditional to modern societies? Sometimes transplants are purely nominal. That is, far from being real institutional borrowings from one legal system to another,[13] they may be reduced to a rhetoric that depicts a given institutional arrangement as deriving from elsewhere, even though the rhetoric does not reflect reality. This seems clearly the case of the ADR movement. Nothing in fact is more misleading than a claimed return to a "primitive" way of solving conflicts, where disputes are given back to the people[14] who harmoniously settle them. A legal transplant of this kind from traditional societies to the modern one is merely a rhetorical construction. Its underlying assumptions are wrong in two ways: firstly, there is no traditional harmonious model to be transplanted, and, secondly, dispute resolution in traditional societies is closely determined by the still predominantly group-centred structure of the legal system. Since this structure is lacking in the West, the traditional dispute settlement process—even if we were prepared to accept its harmonious nature—would completely change its institutional role and function once transferred to a predominantly individual-based legal system.

The Fundamental Legal Structure and Its Impact on Dispute Resolution

Techniques for resolving disputes other than by adjudication have never been harmonious, except when harmony was a coerced product (usually, but not

[10] The very idea of communitarian justice, neighbourhood justice centres, etc., implies the retreat of state law in favour of an "informal" legal system; see, for example, J. S. Auerbach, *Justice Without Law?* New York, 1983.

[11] On the explosion of ADR techniques, particularly as regards mediation, see J. Macfarlane, *Rethinking Disputes: The Mediation Alternative*, 1997.

[12] Expressing a widely-held opinion on solutions reached through mediation—as a means to solve disputes opposed to adjudication—Macfarlane states: "As such they reflect consensus and reconciliation rather than a game with winners and losers." Ibid., 4.

[13] See Watson, op. cit., n. 1.

[14] In the sense indicated by Nils Christie's seminal article: "Conflict as property", (1977) *British Journal of Criminology* 1.

exclusively, of Western colonization).[15] In traditional legal systems individuals can find the protection they need in the group: the more powerful the group, the more protection they receive. Through mediation and negotiation, the power of the group is tested: the self-help that results if the settlement is not achieved is the strongest incentive to the settling of disputes.[16] Mediation and negotiation in traditional societies cannot be understood without introducing the societal structure, relationships among groups and particularly the relationship between the individual and the group.[17] In the structure of the traditional legal process the individual does not exist outside the group context: rights and duties are only ascribed to the group.[18] Modern legal systems, by contrast, focus on the individual and ascribe rights and duties to him/her.

Defeating the social organization based on groups and their legal systems was one of the first concerns of the modern state, as it sought to monopolize both coercive force and jurisdiction. Centralization of power meant centralization not only of the production of legal rules but also, for the same reason, of dispute resolution. Modern states gave people the illusion that there was only one legal system, that provided by the state. All alternative legal systems, all alternative centres producing rules of social conduct—even when tolerated—were considered outside the notion of law and jurisdiction. They were made "illegal" in the broad sense that they were considered extraneous to the very idea of law. This is why, for example, the Western lawyer of today does not consider such social rules of behaviour to be law. It is universally known that "folk rules" (i.e. rules that people actually employ in their daily behaviour)[19] apply in contemporary Western societies; yet, if different from state's rules they are not perceived as the domain of the lawyer. As extraneous to what is officially recognized as law (illegal not in the sense of against the law but in the even more disruptive sense of being outside the very conception of the law), many rules may be of interest to the sociologist or the anthropologist but not to the lawyer. The codification movement of the 19th century in Europe, with its underlying idea that all legal rules governing people could be systematically and rationally expressed in a code, was the most arrogant expression of this never-abandoned attitude.

Attempts to neutralize competing legal systems based on the group by rendering them alien to the very idea of law have been undertaken in Western legal systems by offering individuals a very attractive social device: individual rights conceived as a set of freedoms over which the state has the monopoly of enforcement within and outside the group. The peak of the enhancement of individual rights has been reached in contemporary USA, both on legal and political grounds.

Adjudication in this sense is the means whereby every individual, even the most powerless, is able to see his/her rights enforced even against a more powerful litigant. The outcome in terms of right or wrong, the narrow boundaries of the issue at stake (where "the judgment should be based on the application

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[15] L. Nader, "Civilization and its negotiations", in P. Caplan (ed.), *Understanding Disputes, The Politics of Argument*, Oxford, 1995, 39.

[16] Cf. E. E. Evans-Pritchard, *The Nuer*, Oxford, 1940.

[17] Reference to the extended case method pioneered by Elizabeth Colson is obligatory here.

[18] See M. Guadagni, *Il modello pluralista*, 1996.

[19] . . . "the term folk law has been coined, as a more neutral term to indicate that whatever the law is under which people live, whether traditional, customary or newly made, it is the law of the people and should be taken seriously as such" states Benda-Beckmann, in "Why bother about legal pluralism? Analytical and policy questions: an introductory address", 1997, 14 *Commission on Folk Law and Legal Pluralism, Newsletter* XXXIX.

of the rules to the facts relevant to the legal issue which separates the parties"),[20] should indeed protect him/her against a bargain that otherwise would bring into the dispute elements of power that would inevitably undermine his/her chances of seeing rights enforced.

In modern legal systems, then, individuals obtain their protection from adjudication, i.e. from the confrontational nature of the state-run judicial process. In traditional societies they obtain protection from the group, which will negotiate or mediate for them and will be legally accountable for their activity. Mediation, negotiation, arbitration and adjudication consequently all assume different meanings depending on the predominantly individual-centred or predominantly group-centred organization of the legal system.

In the Horn, the subsequent imposition of different legal layers accompanied by the weakness of the modern state, due to its arbitrary borders, has not been able to change the nature of the legal system. The state, both colonial and post-colonial, has been unable to make group-centred rulemaking illegal (in the broad sense discussed above), so that the law in action, although profoundly changed and structurally modified by relentless competition with modernity, remains predominantly group-centred.

The different socio-economical context in which each dispute resolution technique is deemed to operate has a tremendous impact on the nature of the technique itself and on the function that it performs. The substitution, however partial, of one dispute resolution technique (centred on the individual) with another (centred on the group), as if the two were perfect substitutes and able to perform the same function independently of the socio-economic context in which they work, is simply inconceivable and may produce disruptive consequences. The failure to acknowledge this deep structural difference has been the main reason for the failure of attempts to "modernize" the law in Africa and may forestall an understanding of the true nature of alternative dispute resolution in modern societies.

The Rise and Fall of the Adjudicating State

In Western societies the state (at least at the formal level) has won the competition with the group and has successfully asserted its monopoly in dispute resolution.[21] Describing the complex process by which this result has been achieved is beyond the scope of this article. The end result can however be described as the triumph of legal formalism, of the abstract equality principle, and of the "illegalization" of legal pluralism.

Under such an approach, the law is equal for everybody and the power relationship among individuals is simply disregarded: concrete issues of power and wealth are left outside the domain of the law. According to the theoretical underpinnings of this model, neither of the formally equal individuals of which the state community is composed gains any benefit from belonging to a group (kin or other network-based) at the moment of litigation. S/he must rely on state

[20] See P. Stein, *Legal Institutions. The Development of Disputes Settlements*, London, 1984, 14: "... a court tends to define the issue between the parties more narrowly than the informal procedures allowed. The identities of the parties, their previous relations with each other are no longer relevant factors to be taken into account."

[21] On legal pluralism in contemporary Western societies cf., most recently, Benda-Beckmann, op. cit., n. 19.

institutions, since only these are politically legitimized to vindicate his/her rights independently from his/her own power.

Therefore, under this arrangement, which we might call the "dispute resolution social contract" of the modern, monopolistic state, the individual surrenders the protection of his/her group and receives in consideration the much more powerful protection of the state, which promises to vindicate his/her rights no matter how powerful the person threatening them may be.

Interestingly enough, individuals in colonial and post-colonial Africa have not accepted such an arrangement. The literature shows that when the colonial powers offered Africans the chance to receive state-protected individual property rights on land simply by registering with ad hoc offices, very few of the indigenous property owners did so.[22] They knew they could rely on immeasurably stronger property rights within the group structure than they could outside it.[23] They trusted the traditional property system (group-centred) rather than the modern individual-centred one. This is recognized today as one of the most important reasons why land reform has failed in most of sub-Saharan Africa.

By contrast, in Western societies today people have accepted the protection of the state, and even when group-protection still exists it is outside the domain of the law, made "illegal" by the modern legal order. This of course changes from society to society in a continuum that follows the atomization of the family and kinship structure and appears with particular clarity among industrial powers in the modern United States. Here the social structure can be described in the main as a remarkably atomistic polity of individuals relying heavily on courts and confrontation for the solution of problems originating from social interactions.

In the jurisdictional confrontation between the state and the group all modern Western industrial societies have reached a point of no return. The group is officially considered irrelevant from the jursidictional and law-making point of view. Economic development has dispersed the population, the family is nuclear, political parties recognize the same state-dictated rules of the game, the secularization of the law and the separation between churches and the state is almost complete everywhere, and even where there exists such a thing as an official church, its competition for jurisdiction is insignificant.

In our "dispute resolution social contract" the citizen of a modern industrialized democracy has certainly fulfilled his/her part of the deal. The state on the other hand finds it increasingly difficult to keep its part of the bargain. The litigation explosion is unbearable everywhere in the West and obtaining justice is increasingly difficult, expensive and time-consuming. This phenomenon on one side reveals the hypocrisy of the formalistic assumption, since the weaker party is the one who suffers most from the disservices of the state legal system. The stronger party can purchase justice in the arbitration market exactly as it can buy good private healthcare when the quality (or the quantity) of the public supply is unacceptable. It becomes tempting for the state to avoid fulfilment of its part of the social contract related to dispute resolution. Its stronger constituency, the multinational corporation, is largely unaffected since it mostly carries on its

[22] See Mattei, "Socialist and non socialist approaches to land law: continuity and change in Somalia and other African states", (1990) 16 *Rev. Socialist L.* 17.

[23] The protection afforded by the group to women in the traditional Ashanti land tenure system has been recently compared with the individual and disadvantaged position of women in modern Ghana: see Seth Opuni Asiama, "Crossing the barrier of time. The Asante woman in urban land development", (1997) 2 *Africa* 212.

transactions outside the state's jurisdiction. Thus substitution of the confrontational model with the non-adversarial techniques (i.e. mediation or negotiation) of a legal system centred on the individual and on his/her individual rights becomes in practice a complete loss of protection for the poor litigant: s/he cannot rely on the market to buy protection (like a wealthy litigant can) and has relinquished forever the protection of a group, which is considered simply irrelevant as far as law and jurisdiction are concerned.

Formalistic misconceptions of ADR

Given this scenario, one doubts whether groups can be recreated by a modern institutional apparatus developed by the state. It is unlikely that devices such as "neighbourhood justice centres" can build ties among individuals that simply no longer exist. The disparity of power between litigants becomes relevant once again, and weak individuals find themselves not only without the effective protection of a clan but also without the protection of individual rights, this being the consideration that in theory they have received for giving up the group.

Clearly, before an ADR scheme can be enthusiastically endorsed, careful study is required of the social conditions in which it may operate, particularly given the attractive rhetoric responsible for much of its success in Europe, where legal culture, more formalistic than in the United States, is ill-equipped to deconstruct it.

The rhetoric of harmony (the idea that in a conciliatory model people do not fight but harmoniously agree on a common solution), and the alleged existence of this model in a primitive and idyllic society should nevertheless be understood in terms of the real dynamics of power at play behind them. And this is true in traditional societies as well as in modern ones.

Why is this understanding lacking in both the African and the Euro-American contexts? Dispute resolution and adjudication are considered the natural domain of lawyers. The legacy of legal formalism and of the separation between law and politics in Western societies has meant that legal discourse is rarely intermingled with a power relationships discourse. These relationships are the domain of the sociologist or the political scientist. Consequently when Western observers examine dispute resolution in African societies, it is natural for them to forget about power relationships. But this oversight is unfortunate since the divorce of law and power is, if possible, even more of a fiction in legal systems outside the Western legal tradition.

In the attempt to understand dispute resolution, epistemological models are required which are able to capture the complex and multilayered structure of law, power and tradition (true or re-invented)[24] characteristic of social conflict. In contexts where its collective nature has not been hidden by a centuries-old tradition of formalistic legal reasoning and emphasis on the individual, this should be at the same time easier and unavoidable. The dispute resolution process is still wholly intermingled with political conflict; it has not developed autonomy (no matter how hypocritical or fictional) and certainly cannot be

[24] E. Hobsbawm and T. Ranger, *The Invention of Tradition*, Cambridge, 1992.

understood by assuming the existence of such autonomy.[25] On the other hand, the impact of such autonomy and the individual-centred perspective behind it cannot be forgotten when dealing with Western societies, particularly when one attempts introductions of collective based dispute resolution devices.

Hence the lesson is that institutions are complex devices and can be understood only in context. No useful knowledge can be obtained by insulating them; even less by mystifying their operation.[26]

Conclusions

Legal transplants are sometimes an easy way to explain a legal phenomenon. Occasionally, they are used to promote the idea of progress and to foster the sense of belonging to the advanced nations. This was certainly true during Haile Selassie's modernization efforts which brought an important layer of modern law to the Horn.

Sometimes the rhetoric of legal transplants is an attempt to regain a long-lost past, a golden age that never was but which is attractive to the modern Western legal system now everywhere undergoing a dramatic growth crisis.

Comparative legal scholars and lawyers are equipped to distinguish the rhetoric of the law from its structure, and they should relentlessly engage in this critical exercise in order to explain and understand the phenomena they observe, including legal transplants.

The chances are that the assonance between the Western ADR conciliatory method to solve conflicts and the African way of disputes settlement provokes yet another transplant from the North to the South. If this is to be the case lawyers and policy-makers should be aware of the implications discussed in this article.

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[25] See Mattei, "Three patterns of law: taxonomy and change in the world's legal system", (1997) 45 *American Journal of Comparative Law* 5.

[26] Recently in the context of legal transplants see E. Legrand, "The impossibility of legal transplants", in (1997) 4 *Maastricht Journal of European and Comparative Law* 111.