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**Impact of Cultural Diversity on the Practice of Dispute
Resolution and Mediation in the Kenyan Legal Sector and a
Quest for Professional and Ethical Stability**



Master of Applied Philosophy and Ethics

2016

**Impact of Cultural Diversity on the Practice of Dispute Resolution and Mediation
in the Kenyan Legal Sector and a Quest for Professional and Ethical Stability**

Gross Anthony

**A Dissertation submitted in Partial Fulfilment of the Requirements for the Award
of the Degree of Master of Applied Philosophy and Ethics (MAPE)**

School of Humanities and Social Sciences

Strathmore University

June 2016



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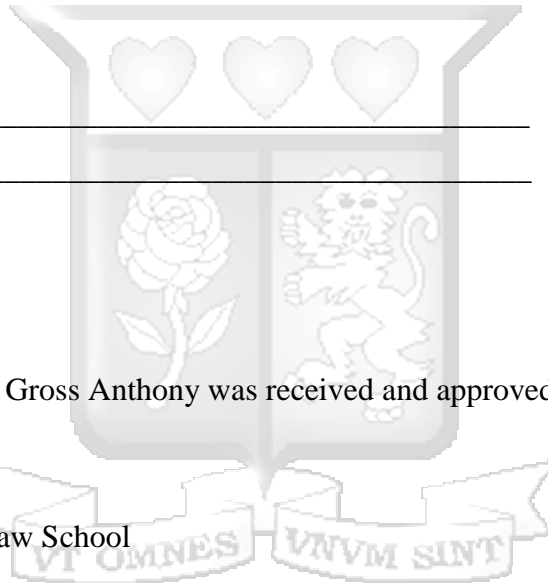


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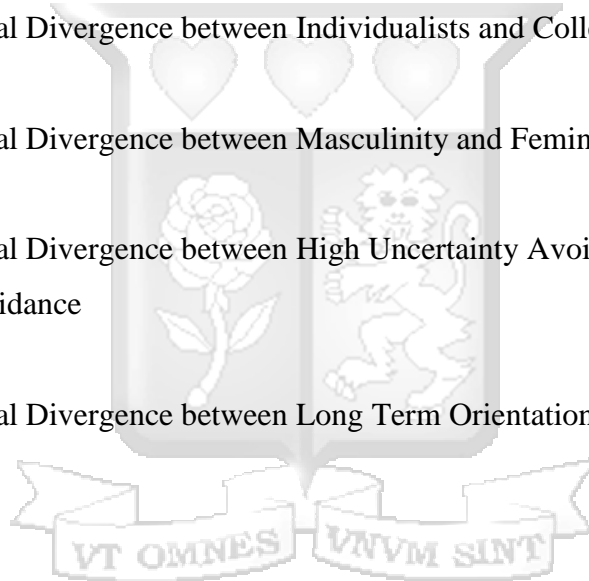
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ABSTRACT

In general terms, it may be said that dispute resolution among legal practitioners in Kenya relies heavily on cross cultural communication and negotiation practices and techniques. This cultural diversity poses unique challenges that may affect dispute resolution as well as jeopardise the attainment of justice. It seems essential to grasp a deeper understanding of the impact of this cultural diversity between African and European cultures commonly referred to as African and Western cultures of both genders in the daily practice of law whether within litigious or acrimonious disputes as well as in the alternative dispute resolution mechanism of mediation. Misunderstandings whether deliberate or by virtue of vocal or expressive communication or whether by tone of facial manifestation, occur as a result of a subjective perception by individuals of one culture of what is the truth and therefore the reality of any given circumstance, which often is not shared by a practitioner from another culture. Such subjectivism appears to be a by-product of the English legal system which propounds an adversarial system of legal practice aiming at a win-lose paradigm, and whose priority would seem to be win at all costs. However, it seems of paramount importance to understand and accept other people's points of view in the interest of peace and so as to avoid conflict. This approach may appear to be more acceptable inter-cultural way of behaving, practicing law and resolving disputes. It is in the pursuit of this objective that this study has analysed, differentiated and compared cross cultural trends and tested the perception of legal scholars on the premise that the cultural diversity impacts on the dispute resolution practice. The study arrives at the conclusion that it seems logical and acceptable to search for and espouse a tested moral standpoint of virtue ethics which is of universal acceptance and has cross cultural application and thus contribute to the search for justice in our society.

CHAPTER ONE

INTRODUCTION

1.1. Background to the Study

Kenya is a country of diverse ethnicity, race, culture and nationality. Its multi-ethnic nature is constituted by more than 40 ethnic communities, some being large and others small. The ethnicity is manifested in various ways, for example, biological heritage, religious divergence and language. Language stands out as the most pronounced way in which the diversity is expressed with the effect that *'the use of different languages naturally separates people into different groups, each not being able to understand others.'* (Yieke, 2010, p. 10). It is also rich in nationality with people of Arabian, Indian and European descent making over 13 % of its population.

In the field of law, Kenya is a rainbow nation of African, Eastern and European legal practitioners who are, in the age of 'the global village,' more appropriately bracketed as African and Western educated. Each of these unique groups espouses a distinctive way of life whether by nature, inherent foundation, vitality, family upbringing, education, customs, culture, beliefs, religious persuasion or personal inquisitiveness and behaviour. The drafters of the Constitution of Kenya, 2010 appreciated this aspect and catered for it. The third paragraph of the Preamble to the Constitution states that *'We the people of Kenya...PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation'*. The Constitution goes ahead, at Article 11, to recognise *'culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people and nation.'* It further mandates the state to *'promote all forms of national and cultural expression through...communication, information....and other cultural heritage'*. Language and culture also feature in the Bill of Rights with the result that every person is entitled to use language and to participate in the cultural life of their choosing.

The Kenya Vision 2030, the country's development blueprint, also takes cognisance of the centrality of diversity in development. In seeking to make Kenya a globally

competitive and prosperous country, the Vision has one its aim being to ‘a cohesive, equitable and just society based on democratic principles and issue based politics grounded on our rich and diverse cultures and traditions.’ (Kenya Vision 2030, foreword). It also goes ahead to state that,

‘Vision 2030 envisions a country with a democratic system reflecting the aspirations and expectations of its people. Kenya will be a state in which equality is entrenched, irrespective of one’s race, ethnicity, religion, gender or socio-economic status; a nation that not only respects but also harnesses the diversity of its peoples’ values, traditions and aspirations for the benefit of all. The Vision aims to move all Kenyans to the future as one nation.’ (Kenya Vision 2030, p. 158).

The recognition of diversity in these important developmental and aspirational steps of the country, therefore, serve to indicate the importance of diversity in the lives of the people of Kenya. In the period of globalization, Kenya cannot afford to isolate itself. It has to join the community of nations in forging a common future that has a place for everyone and respecting their cultural, ethnic, racial and national identity.

Diversity *‘is about creating a culture and practices that recognize, respect and value difference.’* (Wambui, Wangombe, Muthura, Kamau & Jackson, 2013, p. 200). It requires that the differences among people with respect to age, class, ethnicity, gender, physical and mental ability, race and spiritual orientation be acknowledged, understood, accepted, valued and celebrated (Esty, Griffin and Schorr-Hirsh, 1995). Not to perceive, acknowledge and understand such diversity may degenerate into a sort of stereotyping (of the sort that we may see in the way one reacts to individuals from different cultures, ethnic backgrounds or race) which may in turn lead to opposition, defensiveness and animosity instead of a more empathetic and objective perception that would allow all involved parties to deal with the issue at hand.

One of the negative effects of failing to address diversity is ethnocentrism. This *‘is a widespread tendency for people to favour their own group over another group on the belief that one’s own ethnic group or one’s own culture is superior to other groups and cultures.’* (Njoroge & Kirori, 2014, p. 357). It occurs due to cultural narrowness where

one rigidly accepts those who belong to their group while rejecting those of other groups (Ogretir & Ozcelik, 2008). The negative effect is that *'it prevents understanding and incites conflict when actions and words are seen as threats rather than different ways of experiencing life.'* (Njoroge & Kirori, 2014, p. 357). The social-cultural background of an individual governs their behaviour (Jhingan, 2009). Dispute resolution becomes even more difficult since,

"Lack of understanding can inhibit constructive resolutions when conflicts emerge between social groups. People are not aware that they can develop more valid understandings about how they experience life." (Njoroge & Kirori, 2014, p. 359).

The need to address diversity is even more pressing with the increasing globalisation. Today, the world is increasingly becoming a 'global village', leading to

"...more interaction among people from diverse cultures, beliefs and backgrounds than ever before. The society no longer works nor lives in an island; people are now part of the worldwide economy with competition coming from all over the continents." (Wambui, Wangombe, Muthura, Kamau & Jackson, 2013, p. 200).

The twenty-first century and its prominent features, for example globalisation, have continued, from the previous century, the aspects that accelerated conflict, for example, industrialization, urbanization and technicalization. These aspects *'encourage contact among people, competition between interests, increased visibility of inequalities and injustices, and inertia in social institutions.'* (Augsburger, 1992, p. 21).

The practice of dispute resolution and mediation is bound to be affected since, *'When there is diversity, conflict inevitably occurs...'* (Wambui, Wangombe, Muthura, Kamau & Jackson, 2013, p. 200). Conflict emerges where the goals, values and expectations of individuals or groups are incompatible and the incompatibility can be real or perceived (Cupach & Canary, 1997),

...the phenomenon of conflict, in its rich and varied forms, is an inevitable and universal feature of human groups. Wherever there are scarce resources, divided functions in society, different levels of power, competition for a limited supply of

goods, status, valued roles, or power as an end in itself, there conflict will occur. All human populations exhibit social conflicts. (Augsburger, 1992, p. 20)

Conflict is inevitable in the day to day human interaction (Martin & Nakayama, 2010, p. 426): *“Conflict is universal yet distinct in every culture; it is common to all persons yet experienced uniquely by every individual.”* (Augsburger, 1992, p. 18). An intercultural environment is, therefore, bound to give rise to intercultural conflict which must be addressed as,

Intercultural conflict may be characterized by ambiguity, which causes us to resort quickly to our default style - the style we learned growing up - in handling it. If your preferred way of handling conflict is to deal with it immediately, and you are in a conflict situation with someone who prefers to avoid it, the conflict may become exacerbated as you both retreat to your preferred style. As the confronting person becomes increasingly confrontational, the avoider simply retreats further. (Martin & Nakayama, 2010, p. 429)

However, acknowledging the differences often leads to finding similarities especially where the parties have common goals. This is because appreciating the differences between parties *‘reduces the likelihood of conflict or facilitates an easier road to conflict resolution.’* (Wambui, Wangombe, Muthura, Kamau & Jackson, 2013, p. 208). Mediation can provide an appropriate solution where the mediator is culturally sensitive as they will be able to transform the conflict by assisting the disputing individuals or groups to arrive at new ways of handling the conflict (Augsburger, 1992). The culturally sensitive mediator can, for example, *‘transform attitudes by redirecting negative perceptions.’* (Martin & Nakayama, 2010, p. 459). It is important that cultural differences are considered in the process of resolving a conflict since they influence the thoughts and actions of individuals (Elmer, 1993). Individuals behave according to the traditions and practices of their cultures and this is manifested even in conflict situations. The prudent mediator must, therefore, be able to apply principles that cut across cultures. It is the *raison d’etre* of this study to come up with a standpoint of virtue ethics that will guide a mediator in such a situation.

1.2. Statement of Problem

Kenya is a country with a rich and varied cultural diversity. However, this has led to misunderstandings and perceptions of unprofessional practice or unethical behaviour among lawyers and mediators. Cultural values are given more premium over professional and ethical standards. This is the reason why this study undertakes the search for a moral standpoint that has cross cultural application in order to ensure that cultural diversity does not of itself impede conflict resolution.

1.3. Objectives of the Study

The objectives of this study are:

1. To determine cultural manners and unprofessional practice, and the connection between the two;
2. To distinguish ethical from cultural practices; and
3. To suggest ways in which the mediation process can be improved by understanding different cultures.

1.4. Research Questions

The study seeks to answer the following questions in pursuing its objectives:

1. What does a person consider unprofessional behaviour according to his or her own cultural background?
2. What are ethical and cultural practices and how do they differ?
3. How does a mediator deal with parties from different cultures?

1.5. Thesis (Hypothesis) of the Study

It appears that people tend to give more importance and value to cultural traditions than professional standards and codes of practice. Consequently, legal practitioners who import cultural considerations into professional conduct without proper contextualization rather than aspiring to follow a universal practice compound a dispute instead of resolving it.

1.6. Significance and Justification of the Study

In every multicultural society there are blurred, confusing, disappointing and sometimes inexplicable disagreements, contrary to the wishes and intentions of the parties. This is because people from different cultural, racial, national and ethnic backgrounds find themselves seeking to utilize the scarce resources. They are therefore bound to differ in the manner they seek what they need and even in the manifestation of their opinions and ways of life. Studying and confronting such disagreements and deepening our understanding of the impact of cultural tenets on commercial relationships will be beneficial primarily to the legal sector and dispute resolution stakeholders, as well as to the efforts being made to expand our understanding of the dynamics of relationships in a cross-cultural society. A mediator who approaches a dispute having in mind the cultural diversity in question will be able to better guide the parties, for example, by diverting the negative tension due to the cultural differences.

1.7. Scope and Limitations of the Study

This study was conducted within Nairobi, Kenya's capital city, which is the epicentre and heterogeneous melting pot of a sufficiently representative sample of the different cultures of lawyers and mediators in Kenya. This study aimed at identifying the different perspectives, cultures and traditions as they relate and as they cause an impact on mediation as a selected dispute resolution mechanism.

The study was limited by time constraints. It was undertaken as part of the requirements for the award of the degree of master of philosophy and, therefore, had to be conducted within stipulated timelines. The availability of the interviewees was also another factor that constrained the study as it incorporated a quantitative approach. There was also a failure to achieve 100% response from the interviewees who were sent the questionnaires.

1.8. Theoretical Framework

Whilst such observations assist practitioners in terms of their relations, the search for acculturation or universality of a society's ethical concept requires a differentiation between the Deontological perspective espoused by Kant, whereby there is in each of us

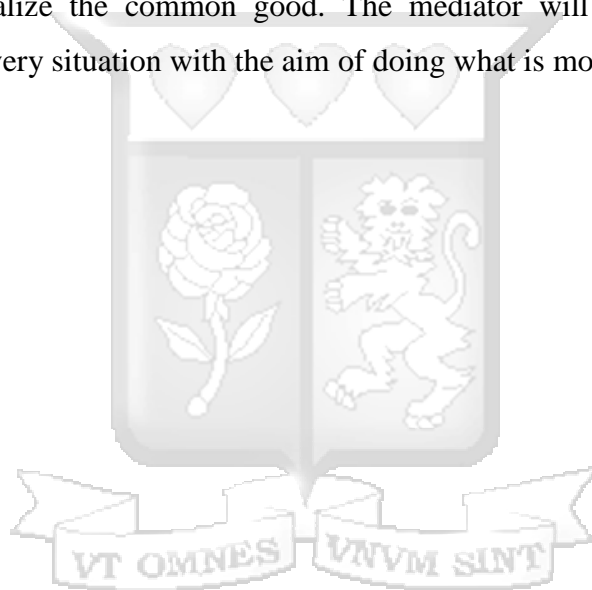
a priori or a 'categorical imperative' of how we come to know how to behave; the Utilitarian Theory espoused by John Stuart Mill and the modern philosophers, in which there is an egoistical and hedonistic pursuit of pleasure and what makes us and others feel good; or the classical philosophy of the Virtue Ethic theory, based on the assimilation of integrity. In this, the search or end is for the same happiness but acting morally is how to achieve this for oneself and for others. Cultural diversity and the decentuation of perception of moral relativism in society will find a unifying acculturation in the pursuit of a common ethical concept. Virtue Ethics is such a pursuit.

Utilitarian ethics cannot be able to appropriately guide a mediator who is confronted with a situation where there are conflicting cultural aspects. A utilitarian mediator may have to choose one over the other depending on what will lead to the derivation of more good in the situation. The end which the mediator seeks to achieve will be the main guide of the means employed in resolving the conflict. This is not likely to lead to an amicable solution as one party may feel unsatisfied or even disgruntled where their cultural perspectives are not given premium as the other. In most instances it might be the minority party that will loose out. Taking the utilitarian approach is not likely to lead to substantive recognition of diversity as the concern of the utilitarian is to obtain the most good for the greatest number. This may imply giving prominence to only one culture that can result in the greatest good. This will, therefore, not have departed from placing more significance on the cultural values over professional and ethical standards.

The deontological approach also is not likely to achieve a breakthrough. It takes an approach where an individual is bound to perform their duties as stipulated in professional codes and regulations. They have to perform the outlined duty regardless of the situation. This is likely to cause more problems than it can solve in a multi-cultural environment. The individuals from different cultural backgrounds are likely to feel duty bound to perform what their cultures dictate. This will lead to more conflict as the parties may be engaging in cross-purposes. A mediator taking such an approach cannot be able to bring the parties together. The manifestations of each culture will take course, for example, a confrontational person will continue to be more confrontational while the avoider

continues to avoid even more. This can only aggravate the conflict instead of addressing the underlying issues.

Virtue ethics can guide the individual to a better end even in a multi-cultural environment. It is concerned with the character of the individual rather than the acts and the rules. A mediator taking this approach can be able to apply virtues, for example, integrity, impartiality, loyalty, competence and diligence, respect and confidentiality in guiding the parties to an amicable end. These virtues are not subjective to culture but take a cross application. They form the basis of a moral standpoint that can be used to enhance interaction among parties from different cultural backgrounds. The aim of applying these virtues is to realize the common good. The mediator will also be required to act responsibly in every situation with the aim of doing what is morally good.



CHAPTER TWO

LITERATURE REVIEW

2.1. Introduction

The study examines existing literature on the subject in a thematic manner. It does this with the aim of countering the notion prevailing in existing literature that cultural traditions are more important and valuable than professional standards and codes of practice in the mediation process. The themes covered are: cultural diversity/sensitivity; the legal profession and mediation; and professional and ethical considerations.

2.2. Cultural Diversity/Sensitivity

Janet and Bennett (2001) define and differentiate between Objective Culture being the institutional aspects of culture such as political and economic systems and its products e.g. art, music and cuisine, which is internalised through socialization; and Subjective Culture, being the experience of the social reality formed by a society's institutions (worldview of a society's people) and externalised through social behaviour.

They also define diversity as being the cultural differences in values, beliefs and behaviours learned and shared by groups of interacting people defined by nationality, ethnicity, gender, age, physical characteristics, sexual orientation, etc.

Further, they opine that people don't behave the way they do due to race but due to cultural factors. This points out how professional ethical standards have had little impact while culture has taken the centre stage, for example, in the mediation process.

Hall (1993) analyzes the kind of behaviour found in high and low context cultures by dividing it into five categories, namely; how people relate to each other (association), communicate with each other (interaction), treat space (territoriality), learn (learning) and treat time (temporality). The distinctions are conveniently extrapolated in table 1.1 in Appendix I.

Jandt, (2012) considers the seminal work of Geert Hofstede from 1980 to 2001, which included the ranking of 50 countries from low to high context cultures.

For him, cultures can be compared by measuring their dimensions. These are not physical measures, but measures of the values and attitudes of different cultures. There are 5 dimensions of culture according to Hofstede:

Individualism describes culture from loosely structured to tightly integrated—from the United States ranked 1st to Guatemala ranked 50th. East Africa ranked 33rd /35. Masculinity describes how a culture's dominant values are assertive or nurturing - from Japan ranked 1st to Sweden ranked 53rd. East African was ranked 39th. Power Distance describes distribution of influence within a culture—from Malaysia ranked 1st to Australia ranked 53rd. East Africa ranked 21st in this regard. There is also Uncertainty Avoidance, which describes a culture's tolerance of ambiguity and acceptance of risk—from Greece ranked 1st to Singapore ranked 53rd. In the same, East Africa ranked 36th. Finally, Confucian Dynamism describes cultures that range from short term values with respect for traditions and reciprocity in social relations, to long term values with persistence and ordering of relationships by status.

Hofstede (2010) looks at putting the East African States of Ethiopia, Kenya, Tanzania, Zambia into perspective and grades East Africa somewhere between high and low context parameters by considering his own 5 categories:

Power Distance (PDI)

Score (64) - High. Here, centralization is popular and hierarchy in an organization is seen as reflecting inherent inequalities. Subordinates expect to be told what to do and ideal boss is a benevolent autocrat.

Individualism (IDV)

Score (27) - Low. This has to do with whether people's self-images are defined in terms of 'me' or 'us.' According to it, East Africa is considered as a collectivist society.

Masculinity/Femininity (MAS)

Score (44). This is considered to be a relatively feminine society. In feminine countries, the focus is on "working in order to live". People value equality, solidarity and quality in their working lives and conflicts are resolved by compromise and negotiation.

Uncertainty Avoidance (UAI)

Score (52). Has a high preference for avoiding uncertainty. Uncertainty avoidance has to do with the way a society deals with the fact that the future can never be known. Characteristics of an uncertainty avoidance high society include the existence of an emotional need for rules, 'time is money', innovation may be resisted, there is the maintenance of rigid codes of belief and behaviour and there exists an intolerance of unorthodox behaviour and ideas.

Long Term Orientation (LTO)

Score (25). In this one, there can be seen short term oriented culture. Long term, on the other hand, is the extent to which a society shows a pragmatic future-oriented perspective, rather than a conventional historical short term point of view. Characteristics of a short-term oriented culture include a great respect for traditions, a small propensity to save, social pressure to keep up with "Joneses", impatience for achieving quick results and a strong concern for establishing the truth.

Berry (2005, p. 697-712) on the other hand seeks to combine rather than differentiate; Acculturation is a culture change that is initiated by the conjunction of two or more autonomous cultural systems. Ways of solving cultural conflicts in the different acculturative strategies are by: Assimilation, in which the acculturating person yields to the behavioural norms of the dominant group; Separation, in which individuals withdraw from the acculturating arena in order to avoid continuing cultural conflict; Integration, which occurs when the two groups in contact agree that mutual accommodation is the appropriate course to follow; and Marginalisation, in which little involvement is sought in either culture.

In conclusion, he posits that an approach of integration within acculturation should be emphasized. Cultural diversity and the resultant acculturation are here to stay. Finding a way to accommodate each other poses a challenge and an opportunity to social and cross-cultural pathologists everywhere. Further, diversity is a fact of contemporary life, the "spice of life" or the main "irritant", so to say.

Diversity is emphasized as being very clearly (Tannen, 1983) observed cultural differences in communication, categorized and illustrated into 8 types as: (1) when to talk (2) what to say (3) pacing and pausing (4) the art of listening (5) intonation (6) what is conventional and what is not in a language (7) degree of indirectness and (8) cohesion and coherence and summarized:-

Cross cultural communication can falter. When to talk, what to say, pacing and pausing, showing listenership, intonation, formality, indirectness and cohesion and coherence all impact on the different ways of communicating and consequently the understanding between cultures. Communication is, by its very nature, culturally relative. Cross-cultural communication is like trying to follow a route on which someone has turned the signposts around. All the familiar signposts are there but they do not lead you in the right direction. Communication is exuberant and deficient. It is deficient because what we say never communicates exactly that we have in mind in all its ramifications and associations.

It is, however, the very heart of being human. If things are misunderstood, then your intentions are misperceived and you start to think that you are crazy. Communication is the very sense of being in the world.

The correlation of Cultural Divergence becomes more pertinently ponderable with the introduction of African Philosophy.

Ratcliffe (1999) propagates the concept of rhetorical listening as a tool for cross cultural interaction. Rhetorical listening put simply is effective listening. It encompasses listening to understand, which Ratcliffe defines as follows:

“Understanding means more than just listening for the speaker/writer’s intent. It also means more than simply listening for our own self-interested intent... Listening with the intent to receive and not master discourses.... Listening with an appreciation for the cultural logic behind the words.”

Rhetorical listening may not mean that we will be automatically swayed to accept the other person’s standpoint but it does mean that we will see that standpoint in a more holistic and comprehensive way.

She delves further into the aspect of cultural logic and says that when we listen beyond the claim and appreciate the cultural logic behind the claim we are able to understand each other better. She further posits that by appreciating cultural logic “we are able to recognize that our standpoints are not autonomous points of static stases but rather complex webs of dynamically intermingled cultural structures and subjective agency.” We learn from each other because we not only listen to each other’s claims but also to the cultural logics they expose.

Rhetorical listening, when employed as a ‘code for cross-cultural conduct’, has the potential to generate more productive discourses about and across both commonalities and differences, whether these discourses be narratives or arguments and whether they be in academic journals or over the dinner table.

As a code of cross-cultural conduct, rhetorical listening may further our understanding of intersections between different cultures and in turn promote dialogue between persons from these different cultures.

The ability to listen across cultures is critical for inter-cultural interaction. The devaluation of listening over speaking has, however, made listening across difference nascent. In conflict resolution and reconciliation people listen to understand each other better and increase the possibility of resolving the conflict (Glenn & Ratcliffe, 2011).

In conflict resolution parties must listen across difference in order for there to be any chance of reaching consensus. Parties are encouraged to try and see beyond the conflict and try and understand the other’s viewpoint. This means to try and see the ‘humanity rather than the political differences’ of the other party. This model of listening is known as ‘compassionate listening’ (Arbor, 2011).

Compassionate listening involves, empathetic listening, reflecting back what one admires about what the other party has said, and strategic questioning geared towards encouraging the speaker to move from oppositional advocacy to engagement and emotional introspection.

Compassionate listening allows the listener to see the speaker as a person and not just a representative of a particular ideology. It makes the listener appreciate the cultural and

political reasons for the speaker's particular standpoint. Compassionate listening also creates a 'safe space' for the speaker to comfortably express his views without the fear of being judged or the need to put up a front.

"Listening across difference is not a passive process."

One must adopt an open mind. Even where the speaker's views vary with our own beliefs, listening across difference then requires you to embark on the difficult task of questioning your own beliefs. This will involve engaging both the intellectual and emotional reasoning behind your own thinking. Thus, recognizing resistance and triggers in one's self that inhibit the ability to continue listening, and then taking these and transforming them into moments of learning about ourselves.

"Listening across difference is not just an idea but enacted in conscious practices during every listening session." (Glenn & Ratcliffe, 2011, p. 226)

One way of encouraging listening across difference to the more resistant person is to listen intently to them, this may then motivate them to listen to others and this could have a significant impact on engagement across difference.

"Listening is the basis of what may become sustained dialogue. Successful dialogue can only take place when people are ready to listen to each other and themselves. Dialogue becomes the basis for problem solving and, ultimately, for advocacy." (Hwoschinsky, 2011, p. 3)

Heidegger observes "The West inherited "logos" as the Greek noun, understood as a system of reasoning and forming logic, but lost its verb form, "legein", which means not only to speak but also "to lay down, to lay before" – that is, to listen." (Corradi, 1990, p. 3)

Stenberg (2011) is of the opinion that "Logos" creates the notion that the only way one can express any rational thought is by speaking about it forcefully. It perpetuates competition and not dialogue. Listening is considered to be inferior to speech.

Expounding on the meaning of understanding as developed by Krista Ratcliffe in her article on Rhetorical Listening, Stenberg states that understanding another person's views requires the listener to embrace unfamiliar voice or thoughts instead of keeping at a distance what does not come naturally to their understanding. It requires an individual to truly open up and accept the possibility that they can benefit from considering another person's ideas.

Ratcliffe (1999) notes that rhetorical listening "involves a choice to locate exiled excess and contemplate its relation to our culture and ourselves". Exiled excess refers to the action of completely rejecting an idea simply because rejecting it is the traditional response i.e the norm. Therefore, rhetorical listening would require one to bring the exiled excess to the forefront.

Rhetorical listening encompasses three functional positions. The first is recognition; this involves trying to understand the context that influences the speaker. Second is critique which is evaluation that goes beyond common sense or the sense that the dominant culture holds to be common. Last is accountability, which requires the listener to evaluate how their lives intersect with that of the speaker and also the external factors influencing the speaker's words (Ratcliffe, 1999).

The cross cultural rhetorical listener must be aware of the cultural logics informing people's claims (Jordan, 2011).

Odhiambo (1995) summarises the positions taken by African Philosophers on cultural divergence.

van Hook (1993, p. 36) observes a central point at issue.

"First: is philosophy the product of a universal human reason or is every philosophy in some significant way an expression of the culture which produces it? And, second, a different but closely related question: are logic, rationality, and argumentation intrinsic and even necessary characteristics of anything which claims to be philosophy, or are these just peculiar to Western philosophy and thus not normative for African philosophy?"

As such there reappears the debate of culture, philosophy and Moral or Ethic concept – Universalism or Particularism.

The Universalist observes basic characteristics regardless of where and when it is practiced (Hountondji, Wiredu, Bodunrinian and Odera Oruka).

The Particularist sees philosophy as an expression of problems and solutions on a people within a specific historical and cultural context (van Hook, 1993, p. 37).

Mbiti (1969, p. 17) makes the observation that,

“Time is simply a composition of events which have occurred, those which are taking place now and those which are immediately to occur. What has not taken place or has no likelihood of an immediate occurrence falls in the category of ‘No-time’. What is certain to occur or what falls within the rhythm of natural phenomena, is in the category of inevitable or potential time.”

Kapuscinski (2002) considers “The Difference Between An African’s And European’s View Of Time”. The European feels himself to be time’s slave, he must observe its ironclad, inviolate laws, its inflexible principles, deadlines, dates, days and hours. Africans apprehend time differently. For them it is a much looser concept, more open, elastic and subjective—‘when will the meeting take place?’ makes no sense, it will take place when people come. Therefore the African who boards a bus sits down in a vacant seat, and immediately falls into a state in which he spends a benumbed waiting.

Gyekye (1996, p. 94) explains further:

“It is one thing to have a conception of a future and quite another to feel concerned about it. It is certainly instructive that Jesus taught his followers not to worry about tomorrow, for “sufficient unto the day is the devil thereof” (that is, there is no need to add to the troubles each day brings) (St. Mathew, Cap. 6: 34). Christians who have a conception of the future time are here being told not to be

anxious about what they will (tomorrow, in future) eat, wear etc. Yet the fact that they are to focus on the present does not obliterate their hopes of blessedness in the future.”

Van de Walt (1997) compares a divergence between Afrocentric and Eurocentric in table 1.2 in Appendix I.

This review brings out the point that cultural diversity manifests itself in various ways and often attracts more attention than the professional or ethical standards in question. It is therefore necessary to identify a standpoint from which cross-cultural interaction can take place without faltering. This is essential especially when considered in light of the era of globalization where cross-cultural interaction cannot be avoided. There are always going to be disputes involving parties from different cultural divides and the mediation process must overcome this in order to resolve the actual problem at hand.

2.3. Mediation in the Practice of Law

Etherington & Lee (2007) consider Professional Ethics to involve decisions that will govern conduct in accordance with cultural norms. Professional Ethics are culturally distinct. Nicolson (2005) advocates for ‘Virtue Ethics’, in which the focus is upon motivations and intentions, the development of professional moral character rather than compliance with duties or judging the consequences of action. Thus, appropriate moral behaviour, beliefs and feelings will become part of the individual’s essential character. Threats to legal ethical frameworks under globalization are not only confined to a clash of cultures but also one of values.

Le Baron, (1998) revisits the frameworks that have been given in the conflict resolution literature for their potential to help demystify cultural differences that is Individualist versus Collectivist societies, Traditional versus Modern societies and High versus Low-context societies.

Individualist versus Collectivist Society

In this situation, Individualist values include freedom, honesty, social recognition, achievement, self-reliance, comfort, equity. Collectivist values, on the other hand, include harmony, face saving, filial piety, modesty, moderation, thrift, equality of rewards and

fulfilment of others' needs. Those from Individualistic cultures expect vertical hierarchies and function well within them. Those from Collectivist societies may be more comfortable with wider and more pronounced power differentials and deference to those higher in status.

Barkai (2008) understands that cultural differences are more likely to lead to impasses during negotiation and subsequent mediations, unless mediators understand and adapt to the cross-cultural differences of the parties.

He revisits many of the nuances considered precisely but now starts the debate from a mediator's perspective: Culture is the total accumulation of an identifiable group's beliefs, norms, activities, institutions and communication patterns. It is the collective programming of the mind that distinguishes the members of one group or category of people from others. Cross-Cultural differences can cause a range of responses, from minor annoyances to a high degree of friction and frustration, sufficient to put business deals in jeopardy, make disputes more difficult to solve or create international incidents. Recognizing and overcoming the problems that result from cultural differences are the main tasks of a mediator in a cross-cultural mediation. Negotiating parties from different cultures may have completely different interests based upon their cultural interests and preferences.

In searching for a framework for a Cross-Cultural Mediation Template, he revisits High and Low-Context Communication, a concept pioneered by Edward T. Hall. He summarises it as shown in table 1.3, Appendix I.

He summarises Geert Hofstede's 5 Dimensions of Culture of Power Distance Index (PDI), Individualism (IDV), Masculinity (MAS), Uncertainty Avoidance (UAI) and Long Term Orientation (LTO) by tabulating Hofstede's findings as shown in tables 1.4, 1.5, 1.6, 1.7 and 1.8, Appendix I.

Boulette (2009) opines that all is not well in the legal profession. It finds itself in need of moral defence because good and skilled lawyers have shown a complete ethical failing. It

is high time that lawyers answer for their actions in the courtroom and boardroom. They must answer to the public, not on the basis of their role as lawyers, but as human beings subject to common ethical constraints. Lawyers have hidden behind their Bar membership cards and arguments for client autonomy to represent morally reprehensible cases and clients.

Pepper (1986, p. 614) is says *“Once a lawyer has entered into the professional relationship with a client, the notion is that the conduct by the lawyer in service to the client is judged by a different moral standard than the same conduct by a layperson.”*

Negi (2007) observes that in a low-context culture, people tend to say exactly what they mean rather than to suggest or imply. The spoken word carries most of the meaning. People are not expected to read into what is not said or done to embellish the meaning. Low-context communication is more common in individualistic cultures, where there is less reliance on shared experiences as a basis for understanding. As there is less shared experience and history, the speaker must convey background information and spell things out in detail. The United States is a very low-context culture.

In a high-context culture, much of the meaning of a communication is already “programmed” into the receiver of the message as a result of the shared experience, connection and history of the sender and the receiver. People are more likely to infer, suggest and imply than say things directly. Often no words are necessary to carry the message - a gesture or even silence is sufficient to communicate meaning. A critical component of most communication is to preserve the relationship and in this regard, face-saving is important as it leads to a tendency to be indirect and avoid confrontation.

The mediator may analyze the problem in terms of 5 cultural issues: language, assumptions, expectations, biases and values. The mediator may keep a checklist for avoiding cross cultural miscommunication. The mediator may use the internet to seek information on history, culture, current events and practices of a foreign country.

The mediator may also find the assistance of co-mediators who are culturally similar to the parties.

Law (2008) pinpoints several considerations: Culture is particularly relevant to mediation practice because it shapes the way people view conflict and how they deal with disputes within the justice system. In the context of mediation, culture is a set of values and beliefs acquired from learning, experiences and social upbringing, which creates implicit social rules or a code of ethics and behaviour within a specific group. Conflict often involves the perceived or actual incompatibility of norms, values or processes in regards to goal issues, content, identity, relationships and conflict procedure. Culture consists of unwritten rules and patterned ways of thinking, feeling and reacting that are acquired and transferred mainly by languages or symbols.

Ladehoff (2015) explains the unseen idiosyncrasies of different cultures: Just as nine tenths of an iceberg is out of sight, so is nine tenths of culture out of conscious awareness.

a) Primarily in Awareness – dress, fine arts, literature, classical music, popular music, folk dancing, games, cooking, drama.

b) Primarily out of Awareness – patterns of superior/subordinate relations, definition of sin, conception of justice, notions of leadership, tempo of work, approaches to problem-solving, eye behaviour roles in relation to status by age, sex, class, occupation, kinship and so forth, conception of past and future, ordering of time, preference for competition or cooperation, body language notions about logic and validity, patterns of handling emotions, facial expressions, arrangement of physical space.

Every interaction between individuals is likely to be multicultural on several levels because an individual may “carry” several cultures e.g. ethnic, religious and occupational cultures. We should appreciate differences as differences, non-judgmentally.

Waincymer (2014, p. 513-551) observes that common norms of truthfulness, fairness, independence, loyalty and confidentiality integrity and honesty are sometimes perceived and/or interpreted differently.

In the Preamble to the IBA Guidelines on Party Representation in International Arbitration (2013), we read:

“The guidelines are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.”

Mc Fadden (2014) is instructive as he compares the Asian and Western influence of cross-cultural differences on mediation and offers some practical guidance on overcoming common problems. Cultural diversity can sometimes result in miscommunication. Parties do not attend mediation in a vacuum; they will bring with them their individual communication, conflict management preferences, negotiation styles and cultural values. Western negotiation is outcome-focused and reaching an objective is paramount. Asian negotiation has a more ambiguous approach that encompasses human relationships and a more holistic picture. Understanding values and attitudes is crucial to successful negotiations.

The mediator may therefore have to manage a process where one party may be relaxed about hierarchy and prefer informality, whilst the other may insist on formality and that respect be shown for rank.

Mediations in the future will be conducted between parties from hugely different, if not diametrically opposed, cultural backgrounds. Mediators will increasingly have to deal with parties from cultures who don't want to get down to business straightaway but who want to discuss family or other social questions first, those from cultures who nod and say yes, but really mean no, or 'I don't have enough authority to agree that.' There will be cultures for which a contract is not the end product of negotiation but the starting point and there will be cultures which view entering into a contract as the prerequisite to developing a relationship and those who require the development of a relationship before contemplating entering into a contract (2014 Arbitration Issue I – CI Arb. Fit for Purpose P.33).

Rosen (2006) states that in Western cultures, Truth is commonly imagined as “straight” rather than “crooked”, where for the Barotse, who fully expect that people will lie, the truth is said to meander back and forth before arriving at its goal, “like cattle moving towards water.”

Justice is defined as follows: Rendering to everyone that which is his due, whatever that due may be—Easton’s 1897 Bible Dictionary (Rising, 2002, p. 2; Easton’s 1897 Bible Dictionary).

Any system of justice is a kind of enforcement of morality, because what is liberty to one may be a violation of another’s actions.

Ethics concerns what is morally right or wrong. Justice concerns what is legally right or wrong. Ideally, justice is ethical, and one assumes that doing what is ethical is legal. Justice can either be restorative (compensatory), requiring the wrongdoer to restore the innocent victim, to the extent possible, to the same (or similar) condition the victim was in before the wrong was committed (such as paying to repair damaged property, paying hospital bills, returning stolen goods, etc). Justice can also be punitive (penal), punishing the criminals, as a matter of social morality, for the wrong committed.

Ethics, on the other hand, is controversial. The boundaries between what is morally right or wrong are not definite. Can it be acceptable that *“once a lawyer has entered into a professional relationship with a client that his conduct is judged from a different standard than the same conduct of a lay person?”* (Rising, 2002).

2.4. Professional and Ethical Considerations

Gichure (2015) succinctly consolidates the position taken by the great Philosophers of time. She notes that to be ethical is to act according to the best reason (logos) and with the right intention (Plato, 427-437 B.C.E.). Ethics is the art of living well. To live well is to live a life in accordance with the true good of man leading to flourishing or ‘eudemonia’. Nobody can possibly desire evil because all men seek happiness. To be evil

is to miss the real good for man (Aristotle, 384-322 B.C.E.). In order to be good one should live an upright life by fighting against one's passion and emotions, by living in conformity with Nature and reason (The Stoics, 2nd B.C.E. – 2nd A.D.). The virtuous person should lessen his/ her desires so as to be happy (The Epicureans, 341-270 B.C.E.).

The mode of thinking known as the psychological egoism, which opens itself to a theory called ethical egoism, also comes into the picture. It was introduced by Hobbes (1588-1679) who stated that in psychological egoism, the natural human approach to life is one of self-preservation. According to this view, humans are naturally self-interested and do everything in pursuit of self-interest. They chose to live in a society and with rules because they are concerned for their own safety. Ethical Egoism as a theory advances egoism as a moral rule. There is also Emotivism, in which Ethics is a matter of feeling and sentiment. It posits that we tend to see strange, unpleasant and gaudy things as bad, and the pleasant ones as good. Reason is simply a slave of our sentiments (David Hume, 1711-1776). Bentham (1748-1832) adds to the discussion by opining that Egoism leads to Hedonism. What is good is what is pleasurable, and what is bad is painful. Hedonism comes from the Greek term Hedon (pleasure seeking), and is the basis for morality. The view of Adam Smith (1723-1790) is that people act for selfish motives most of the time. They want to find pleasure and avoid pain for themselves, even if it appears that they do so for the sake of other people's welfare. Durkeim (1858-1917) concludes that ethics is simply a system of commandments made up of "thou shalts", which emanate from individuals, because God is an ideal solution to these human of the origin of commands.

Modern and Contemporary perspective of Ethics comprises of 3 schools of thought: Deontological Theory, Utilitarian Theory and Virtue Theory.

The Deontological Theory points out the existence of an indubitable fact: "the existence of a moral law in me". Kant (1724-1804) says that every person experiences this fact inside themselves so that from there, they can build a pure ethics, untainted by an external demand (commandments) or from emotions (emotivism) or even for the sake of our happiness (utilitarianism). He further goes on to state that one should act in such a way that they can at the same time will that their action becomes a universal law and always

treat humanity as an end and not a means. The reason for deciding whether an action is right or wrong must have its principle exclusively in one's own reason and will. According to Kant once a person has seen what should be done, they have a duty to obey the 'Categorical Imperative', and that imperative becomes to him the moral law. Not following it constitutes acting unethically.

Mill (1806-1873) advanced the Utilitarian theory. This theory grounds Ethics on the principle of Utility, which states that 'those actions are right and good which produce the greatest happiness for the greatest number of people. According to this, the end of human action is the standard of morality.

Gichure (2015) criticizes Mill who degrades man to a beast level as a pleasure loving being. The pursuit of pleasure is regarded as the rational purpose (telos) of human life. It completely sacrifices affirmative action as the human dignity and rights of minorities. It also propagates concerns for one's own pleasures at all costs, thus fostering selfishness. Further, it is prone to abuses and isn't conducive to social justice in a diversified and multicultural society.

Instead, she suggests we should espouse the Virtue Ethics Theory based on Aristotelian ethics. Virtue Ethos focuses on the rationality of moral thinking while allowing that the application conditions of moral words could vary without the words changing their meaning. The central thesis of the Aristotelian Ethics is that all human beings should seek happiness. To find happiness, man needs morality, for it is through his moral deeds that his human dignity flourishes. The telos of man is eudamonia. It is gained through right actions. These right actions constitute moral virtue. An important aspect of morality is to know how to control one's irrational actions.

Macklin (1998, p. 1-22) neatly summarizes the co-relation between Cultural Variation and Ethical Relativism. Absolutist Ethics: Contains exception less rules; never lie, never break promises, always tell the truth. Universalist Ethics: It holds that fundamental Ethical principles exist, and can be used to justify specific rules. In order to understand the relationship between Cultural Variation and Ethical Relativism, one has to distinguish between cultural relativity that stems from a difference in values, and that which can be traced to an underlying metaphysics or epistemology. Custom, tradition and religion are

not easily uprooted. It is one thing to require that Cultural, Religious and Ethnic groups be treated as equals; that conforms to the principle of justice as equality. It is quite another thing to say that any cultural practice whatever of any group is to be tolerated and respected equally. The latter view is a statement of extreme Ethical Relativism.

Lafollette (1991) expands further. Ethical relativism is the thesis that ethical principles or judgements are relative to the individual or culture. Ethical principles vary legitimately from culture to culture and individual to individual. Ethical principles are situation-sensitive. Although ethical principles are absolute, what they prescribe varies, depending on the relevant features of the case. We should see divergence in moral ends not as unavoidable evil, but as a factor contributing to human advancement and moral exercise. We should not merely tolerate diversity, we should embrace it. Otherwise, we will stagnate and fail to achieve our human potential. According to Kant M. Singer, we can determine if an action is morally acceptable by asking, "What if everyone did it?" This generalization argument shows that it is wrong for me (and you and everybody else). The writer is against universality in respect of morality. According to them, what is right or wrong for one person must not be right or wrong for any person in similar circumstances.

Malik (2014) in his *Anthropology of Philosophy and Ethics* delves further into the nuances of the development/ regression of the moral concepts of our thinkers.

Morality, as the anthropologist Benedict (1956, p. 195) put it, 'is a convenient term for socially approved habits'. And 'immorality', in the words of sociologist Sumner (1906, p. 279) 'never means anything but contrary to the mores of the time and place'.

Liberals and radicals epitomized by John Locke and John Stuart Mill both believed in the idea that humans could rationally transform society through the agency of their own efforts and that there were particular values, practices and institutions under which all humans best flourished.

Pragmatists like Dewey looked upon ethics as they looked upon knowledge. Questions of right and wrong, like questions of true and false, could be resolved only empirically in terms of what worked within a particular social setting.

Instead of a single fixed end or ideal activity, we must, Dewey (1957, p. 162-3) argued, make room for ‘a plurality of changing, moving, individualized ends’. Ends and goods vary from place to place, time to time and problem to problem.

Pragmatists claimed that there could be no *a priori* answers to ethical questions. Context was everything.

Mackie (1977, p. 293) contrarily argues that for values to exist there must be a valuator—an agent—to impose a standard on what is otherwise an indifferent universe.

Moral changes do not happen on a whim; they are not arbitrary or random. Changes in notions of right and wrong do not merely follow their own course but are related to broader social, economic, political and intellectual shifts.

Macintyre (2007) observed that the impact of monotheistic religion was to transform morality into a set of laws that had to be obeyed. Laws require a legislator and a police force. God was that legislator, the judge and the enforcer. Modernity dethroned God and enfeebled the institutions of faith. New forms of morality, such as Kantianism and Consequentialism, still viewed morality in terms of rules or laws, but no longer had any figure that could play the role of legislator.

MacIntyre argues that Enlightenment rejected, indeed destroyed, the Aristotelian notion of a virtuous life that had shaped Western thought for nearly two millennia. It rejected, in particular, the notion of the *telos*—the insistence, not just in Aristotle but among all ancient thinkers and in the monotheistic religion, that human beings, like all objects in the cosmos exist for a purpose, and that to be good was to act in a way that enabled them to fulfil that purpose.

Harris (2011, p. 317) as for many of the New Atheists, conceives that the desire to root morality in science derives from an aspiration to demonstrate the redundancy of religion to ethical thinking. The irony is that the classic argument against looking to God as the source of moral values—the Euthyphro dilemma—is equally applicable to the claim that science is, or should be, the arbiter of good and evil. In Plato’s *Euthyphro*, Socrates asks the question: do the gods? If the good is good simply because gods choose it, then the notion of the good becomes arbitrary. If, on the other hand, the gods choose the good because it is good then the good is independent of the gods.

The Euthyphro dilemma can no more be evaded by scientists claiming to have objective answers to questions of right and wrong than it can by theologians (Harris, 2011, p. 318).

The Chinese Thinker Qing (2012, p. 33) expounds interestingly on democracy: “It is flawed as an ideal. Placing too much importance on the will of the people has, in the west, led to extreme secularization, contractualism, utilitarianism, selfishness, commercialism, capitalization, vulgarization, hedonism and lack morality. The political problem of today’s world”, Jiang insists, “is not a lack of democracy but that democracy itself presents a serious problem”

Ethics, as MacIntyre, (1984, p. 52) has observed, can have meaning only if we are able to draw a distinction between “man-as-he-happens-to-be” and “man-as-he-could-be”. Morality is like a map guiding us from the former condition to the latter.

All three monotheistic faiths developed during times of great social dislocation, each fashioned in such circumstances a distinct kind of moral anchor. There was a new reason to be moral: because God, all seeing, all-knowing, loving yet wrathful, requires it of you. The emergence of the modern world, from about the sixteenth century onwards, brought major changes that transformed the language of morality. The idea that morality should be invested in God becomes less plausible as traditional communities disintegrate.

Christian philosopher Lewis (1943, p. 342 - 344] excoriates modernity for imagining that humans can create their own values. *“There never has been, and never will be,”* Lewis insisted, *“a radically new judgement of value in the history of the world”*. The human mind has no more power of inventing a new value than imagining a new primary colour, or, indeed, of creating a new sun and a new sky for it to move into.

The result is a polarization of the moral debate between those who insist that morality is nothing more than individual preference and those who desperately search for some external agent or realm in which to fix the objectivity of values, whether that be God or science, nature or the transcendent. The real problem with contemporary morality, the reason it appears fractious and fractured, is paradoxically, not moral but social.

The human condition is, however, that of possessing no moral safety net. No God, no scientific law, nor yet any amount of ethical concrete, can protect us from the dangers of falling off the moral tightrope that we are condemned to walk as human beings. It can be a highly disconcerting prospect. Or it can be highly exhilarating one. The choice is ours.

Kaveny (2012) observes that making a good law is not reducible to legally enforcing sound morality, particularly in a society that disagrees about what counts as sound morality. What, then, are the criteria of good law? I have found no better compact summary of those criteria than the description proposed in the seventh century by Isidore of Seville and endorsed in the thirteenth century by Thomas Aquinas: “Law shall be virtuous, just, possible to nature, according to the custom of the country, suitable to place and time, necessary, useful; clearly expressed, lest by its obscurity it lead to misunderstanding; framed for no private benefit, but for the common good. Virtuousness and justice are necessary but not sufficient attributes to good law, according to Isidore, law must also be “possible to nature” and “according to the custom” of the particular country. Moreover, this study takes the view that these latter attributes are not mere pragmatic concessions to human intransigence but instead are integrally related to the Thomistic idea that law should function as a teacher of virtue.

Plato (427 – 347 B.C.) concluded, *“Good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws”*

Freeman (2011) suggests that Ethical principles are normative generalizations that guide actions but are less specific in content than rules or codes and leave room for judgement in specific situations. They are listed as respect for autonomy, non-maleficence, beneficence and justice.

He divides the principle of beneficence into four general obligations: (a) one ought not to inflict evil or harm (b) one ought to prevent evil or harm (c) one ought to remove evil or harm; and (d) one ought to do or promote good.

Borruso (2007) concludes poignantly that each culture produces its distinctive philosophy. A worldview includes the philosophy produced by a particular culture, but it includes far more than a philosophy. There one finds custom, superstition, prejudice, irrational likes and dislikes, flights of fancy, peculiar virtues, vices and the rest. To call all of this “philosophy” is an error of confusion, leading to conclusions that can in no way have universal application. Only truth is universal. Considerations like the time, place and people involved in the quest for truth are peripheral.

However, O’Leary, (2015) argues that:

“We should remind ourselves here that of course the truth is not something already defined and completely possessed by certain individuals. To say something is true does not mean it is “the whole truth”. Every vocation and profession has its own particular culture, theology and spirituality. Truth is notoriously elusive. It is pursued most effectively with care and humility. We don’t so much reveal it as gingerly advance towards it, respectful of its slipperiness and complexity without what might be called a spiritual dimension some deep sensitive and inner authority, the authentic “truth telling” is in danger of being coloured, even controlled by fears and bribes even by threats and coercion. Free enquiry and independent thinking is muzzled and truth suffers.”

Franceschi, (2015) in his paper compares the three main Schools of Ethics and espouses “Virtue Ethics” as the preferred basis for Professional Ethical Codes particularly among lawyers, to avoid relativism and cultural differences.

This study takes the virtue ethics theory as espousing a moral standpoint from which one can proceed without falling into cultural relativism. It uses this theory in its analysis and in making recommendations on how the mediation process can be improved despite the varied cultural backgrounds of the participants.



CHAPTER THREE

RESEARCH METHODOLOGY

3.1. Introduction

This chapter explains the research methodology used in the study. It looks at the research design, the data collection method, the data analysis and the research quality.

3.2. Research Design

The research methodology used focuses on analysing, differentiating and comparing cross-cultural trends and reactions and testing perceptions among legal practitioners on the premise that different cultures and moral concepts can impact on the practice of dispute resolution. It takes a quantitative approach by comparing the High/Low Context as summarized in Chapter 2 and a questionnaire to two cultures of practitioners in Kenya, the African and the Western educated. 75% of the questions come from Claire B. Halverson as a study on “*Cultural Context Inventory*”. Questions considered more typical and particular to the legal fraternity have been added to assess whether a cross-cultural relativity exists.

The questionnaire is premised also on the High/Low Context findings of Edward Hall, John Barkai and Geert Hofstede as set out in tables 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7 and 1.8 in Appendix I.

3.3. Data Collection Method

The data used in the study was collected through questions seeking to establish the behaviour of the target individuals in certain interactive situations, for example, when working in teams, problem solving situations and where differences have occurred and the manner in which they are expressed. The intention was to establish the individual’s behaviour or response in associating with others, identifying oneself, perception on social structure and authority, disagreement, space and time. The questionnaire described a set of situations and required the individual to respond with respect to the frequency with which they opted to do a certain act when in a situation. The frequency was measured in

a scale of 1 to 5, with 1 indicating that the individual hardly ever resorted to the option while 5 indicated the option which was almost always preferred.

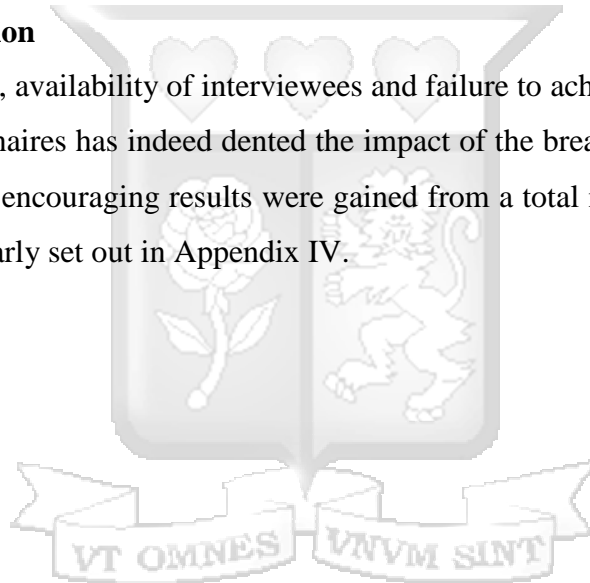
The invitation to the questions is set out in Appendix II. The invitation was sent to 20 African, and 16 Western, legal practitioners. The questionnaire and score sheet are set out in Appendix III.

3.4. Data Analysis

Replies to the questionnaire were received from 15 African and 11 Western invitees. The data analysis is set out in Appendix IV.

3.5. Limitation

Time constraints, availability of interviewees and failure to achieve 100% response from invited questionnaires has indeed dented the impact of the breadth and depth of analysis but nevertheless encouraging results were gained from a total number of 26 participants as more particularly set out in Appendix IV.



CHAPTER FOUR

RESEARCH FINDINGS

4.1. Introduction

This chapter highlights the findings of the study under the following parameters: cultural diversity; in context (low and high); individualism versus collectivism; masculinity versus femininity; power distance; uncertainty avoidance; and long-term versus short-term orientation.

4.2. Cultural Diversity

Let us first differentiate cross-cultural divergence between that which is considered “Primarily in Awareness”. This apparent and expressive grouping is obvious to the primary senses. The way different nationalities, ethnic or tribal groups dress, their manifestation and appreciation of the arts, their literature, classical and popular music, their folk dances, games, way of cooking and different use of food are all visually, orally or auditory definitive of the different cultures from birth, up-bringing and education.

“Primarily out of Awareness”, however is more unseen, inherent and more difficult to identify. Indeed, it is the divergence that this paper seeks to understand, analyse and address.

The various patterns of superior to subordinate relations, the definition of sin, morals, ethics, the concepts of justice, notions of leadership and the qualities presumed or expected thereof, approaches to problem-solving, eye-behaviour roles in relation to status by age, sex, class, occupation, kinship and so forth, conception of past and future, ordering of time, preference for competition or cooperation, body language, and notions about logic and validity, patterns of handling emotions, facial expressions, arrangement of physical space are all examples of those less conscious instances of how different cultures must sensitize themselves to others’ perception of themselves, their effect on others and a reciprocated understanding and appreciation of their own idiosyncrasies as will be expanded upon hereunder (Ladehoff, 2015).

Comparison of the High and Low Context Culture Scores, whilst providing a pretty clear indication of how an individual prefers to interact in work and other social settings, and how and in which situation an individual is likely to feel more comfortable using one or the other contexts, is in no way judgmental or suggestive on one being better than another.

Preferring one style does not mean that one can't interact effectively in many contexts, but just that in having a certain pre-disposition one might have to make some adjustments if, for example, your style is predominantly high context and you find yourself functioning in a largely low context culture, or vice-versa.

It is even more important to understand how one's preferred style might differ from others, and what that means when interacting with those who do not share that preference.

This will become practically appropriate when these dispositions are manifested by different nationalities to the mediation process.

4.3. In Context

If your low context score is larger than your high context Score—it suggests that you have a tendency to be direct, be concerned with facts, and might tend to screen out various elements of a context such as emotional tone.

If your high context is larger than your low context Score—it suggests that you are more likely to be keenly aware of non-verbal communication going around you and tend towards indirectness, avoiding open conflict and consider maintaining relationships at least as important as “getting the job done”.

If your scores for high and low context are relatively close together—it suggests that you have integrated aspects of both approaches and can use one or the other as the situation requires, although this may also indicate that you might not be totally comfortable in either strongly low or high cultural contexts.

4.4. Edward Hall, 1993

Usefully compartmentalizes the spectrum of high to low context to 5 areas of behaviour, namely Association, Interaction, Territoriality, Learning and Temporality. These are tabulated more specifically in Appendix I Table 2.1.

High context culture finds its roots in collective groups and the extended family. Relationships are based on trust and assumed to be dependable by virtue of a belonging to the tribe, group and family. Instructions and authority is centralized and once established, rarely questioned.

Verbal messages of communication are implicit and indirect. Inflection of sound, facial expression, gestures and inclinations and movement of the head are all part of the package entirely relevant and fully understood by that particular group. Disagreement is personalized and can immediately cause animosity leading to a breakdown in communication. Space is casual and communal. Personal space is not abused by tactility or close bodily nexus. A seat for 5 can be made to accommodate ten. In Kenya, matatus can carry twice the number of passengers allowed by law. Boda bodas likewise. Time is a process and belongs to nature, learning comes from observing.

Meanwhile low context culture is centred more on oneself. One's own accomplishments and spontaneous ideas and opinions without relating to other relationships are in the short term temporary and transient. The social structure is decentralized. Verbal message is explicit and direct. I try and say what I mean and mean what I say, and if I disagree, it is not personalized but my right to disagree and to state my position—even at the risk of causing surprise and even offence. Time is kept fanatically and should not be lost or squandered. Learning follows explicit instruction and direction, problem solving is satisfying and speed is valued.

4.5. Geert Hofstede

The greatest proponent of such observations is Geert Hofstede. In 1980, he analysed the East Africa cultural tendencies and compartmentalized the nuances of High and Low Culture into:

1. Individualism
2. Masculinity/Femininity
3. Power Distance
4. Uncertainty Avoidance

5. Low term Orientation

His Individualism-collectivism dimension describes cultures from loosely structured to tightly integrated. The masculinity-femininity dimension describes how a culture's dominant values are assertive or nurturing. Power distance refers to the distribution of influence within a culture and Uncertainty avoidance reflects a culture's tolerance of ambiguity and acceptance of risk (Jandt, 2007).

4.5.1. Individualism versus Collectivism

This dimension refers to how people define themselves and their relationships with others. In an individualist culture, the interest of the individual prevails over the interests of the group. People look after themselves.

Masakazu (1994, p. 127) defines modern individualism as “a view of humanity that justifies inner beliefs and unilateral self-assertion, as well as competition based on these”. In a collectivist culture, the interest of the group prevails over the interest of the individual. Individualist cultures are loosely integrated; collectivist cultures are highly integrated.

1	United States	28	Turkey
2	Australia	29	Uruguay
3	Great Britain	30	Greece
4/5	Canada	31	Philippines
4/5	The Netherlands	32	Mexico
6	New Zealand	33/35	EAST AFRICA
7	Italy	33/35	Yugoslavia
8	Belgium	33/35	Portugal
9	Denmark	36	Malaysia
10/11	Sweden	37	Hong Kong
10/11	France	38	Chile
12	Ireland	39/41	West Africa

13	Norway	39/41	Singapore
14	Switzerland	39/41	Thailand
15	Germany (F.R)	42	El Salvador
16	South Africa	43	South Korea
17	Finland	44	Taiwan
18	Austria	45	Peru
19	Israel	46	Costa Rica
20	Spain	47/48	Pakistan
21	India	47/48	Indonesia
22/23	Japan	49	Colombia
22/23	Argentina	50	Venezuela
24	Iran	51	Panama
25	Jamaica	52	Ecuador
26/27	Brazil	53	Guatemala
26/27	Arab Countries		

[Source: Hofstede, 2001, Exhibit 5.1, p. 215]

Westerners find it hard to appreciate the ethnic and tribal concerns for who is who and who is related to whom as a basis for the understanding of the hierarchal authority to talk, negotiate and relate on behalf of the collectivist. The collectivist will not understand that such relations and influences are secondary to the merit and content of the communication and the accomplishments or social standing of the individual interlocutor.

In the workplace, in individualist cultures, the employer-employee relationship tends to be established by contract, and hiring and promotion decisions are based on skills and rules; in collectivist cultures, the employer-employee relationship is perceived in moral terms, like a family link, and hiring and promotion decisions take the employee's in-group into account.

Knighton (1999) developed this cultural difference into the area of communication: Individualism and collectivism have been associated with direct and indirect styles of

communication – that is, the extent to which speakers reveal intentions through explicit verbal communication. In the direct style, associated with individualism, the wants, needs, and desires of the speaker are embodied in the spoken message. In the indirect style, associated with collectivism, the wants, needs, and goals of the speaker are not obvious in the spoken message.

4.5.2. Masculinity versus Femininity

The second dimension across which cultures vary is masculinity versus femininity. Cultures that place high values on masculine traits stress assertiveness, competition, and material success. Those labelled as feminine cultures are those that permit more overlapping social roles for the sexes. Cultures that place high value on feminine traits stress quality of life, interpersonal relationships, and concern for the weak.

1	Japan	28	Singapore
2	Austria	29	Israel
3	Venezuela	30/31	Indonesia
4/5	Italy	30/31	West Africa
4/5	Switzerland	32/33	Turkey
6	Mexico	32/33	Taiwan
7/8	Ireland	34	Panama
7/8	Jamaica	35/36	Iran
9/10	Great Britain	35/36	France
9/10	Germany	37/38	Spain
11/12	Philippines	37/38	Peru
11/12	Colombia	39	EAST AFRICA
13/14	South Africa	40	El Salvador
13/14	Ecuador	41	South Korea
15	United States	42	Uruguay
16	Australia	43	Guatemala
17	New Zealand	44	Thailand

18/19	Greece	45	Portugal
18/19	Hong Kong	46	Chile
20/21	Argentina	47	Finland
20/21	India	48/49	Yugoslavia
22	Belgium	48/49	Costa Rica
23	Arab Countries	50	Denmark
24	Canada	51	The Netherlands
25/26	Malaysia	52	Norway
25/26	Pakistan	53	Sweden
27	Brazil		

[Source: Hofstede, 2001, Exhibit 6.3, p. 286]

In the workplace, in masculine cultures, managers are expected to be decisive and assertive; in feminine cultures, managers use intuition and strive for consensus.

4.5.3. Power Distance

The third dimension is power distance, or the way the culture deals with inequalities. Hofstede (1991, p. 28) defines power distances as “the extent to which less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally”.

In high power distance cultures, children are expected to be obedient towards parents versus being treated more or less equals. In high power distance cultures, people are expected to display respect for those in higher status. Cultures with high power distance have power and influence concentrated in the hands of a few rather than distributed throughout the population. These countries tend to be more authoritarian.

In the high power distance workplace, superiors and subordinates consider each other existentially unequal. In cultures high in power distance, for example, corporate presidents’ offices are more likely to be luxurious with controlled access. Company bosses are “kings” and employees “loyal subjects” who don’t speak out. In the low power distance workplace, subordinates expect to be consulted, and ideal bosses are democratic.

In more democratic organizations, leaders are physically more accessible and offices may be more “open plan”.

1	Malaysia	27/28	South Korea
2/3	Guatemala	29/30	Iran
2/3	Panama	39/30	Taiwan
4	Philippines	31	Spain
5/6	Mexico	32	Pakistan
5/6	Venezuela	33	Japan
7	Arab Countries	34	Italy
8/9	Ecuador	35/36	Argentina
8/9	Indonesia	35/36	South Africa
10/11	India	37	Jamaica
10/11	West Africa	38	United States
12	Yugoslavia	39	Canada
13	Singapore	40	The Netherlands
14	Brazil	41	Australia
15/16	France	42/44	Costa Rica
15/16	Hong Kong	42/44	Germany (F.R)
17	Colombia	42/44	Great Britain
18/19	El Salvador	45	Switzerland
18/19	Turkey	46	Finland
20	Belgium	47/48	Norway
21/23	EAST AFRICA	47/48	Sweden
21/23	Peru	49	Ireland
21/23	Thailand	50	New Zealand
24/25	Chile	51	Denmark
24/25	Portugal	52	Israel
26	Uruguay	53	Austria

27/28	Greece		
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[Source: Hofstede, 2001, Exhibit 3.1, p.87]

4.5.4. Uncertainty Avoidance

Fourth dimension is uncertainty avoidance, the extent to which people in a culture feel threatened by uncertain or unknown situations. Cultures strong in uncertainty avoidance are active, aggressive, emotional, compulsive, security seeking and intolerant: cultures weak in uncertainty avoidance are contemplative, less aggressive, unemotional, relaxed, accepting of personal risks, and relatively tolerant.

1	Greece	28	Ecuador
2	Portugal	29	Germany (F.R.)
3	Guatemala	30	Thailand
4	Uruguay	31/32	Iran
5/6	Belgium	31/32	Finland
5/6	El Salvador	33	Switzerland
7	Japan	34	West Africa
8	Yugoslavia	35	The Netherlands
9	Peru	36	EAST AFRICA
10/15	France	37	Australia
10/15	Chile	38	Norway
10/15	Spain	39/40	South Africa
10/15	Costa Rica	39/40	New Zealand
10/15	Panama	41/42	Indonesia
10/15	Argentina	41/42	Canada
16/17	Turkey	43	United States
16/17	South Korea	44	Philippines
18	Mexico	45	India
19	Israel	46	Malaysia

20	Colombia	47/48	Great Britain
21/22	Venezuela	47/48	Ireland
21/22	Brazil	49/50	Hong Kong
23	Italy	49/50	Sweden
24/25	Pakistan	51	Denmark
24/25	Austria	52	Jamaica
26	Taiwan	53	Singapore
27	Arab Countries		

[Source: Hofstede, 2001, Exhibit 4.1, p. 151]

In high uncertainty avoidance cultures and in the workplace, there is an inner need to work hard, and there is a need for rules, precision, and punctuality. In low uncertainty avoidance, in the workplace, employees work hard only when needed, there are no more rules than necessary, and precision and punctuality have to be learned (Hofstede, 1980).

4.5.5. Long-term versus Short-term Orientation

In 1987, a new dimension labelled long term versus short term orientation was suggested and added to Hofstede's work. This dimension includes such values as thrift, persistence, having a sense of shame, and ordering relationships. Long-term orientation encourages thrift, savings, perseverance toward results, and a willingness to subordinate oneself for a purpose. Short-term orientation is consistent with spending to keep up with social pressure, less savings, preference for quick results, and a concern with face. See table 5 below but similar tables incorporating East Africa in this further dimension are not available, although by comparison with the other tables of dimensions, one could well conclude again that East Africa would score middle of the road (Michael Bond, 1987).

1	China
2	Hong Kong
3	Taiwan
4	Japan

5	South Korea
6	Brazil
7	India
8	Thailand
9	Singapore
10	The Netherlands
11	Bangladesh
12	Sweden
13	Poland
14	Germany
15	Australia
16	New Zealand
17	United States
18	Great Britain
19	Zimbabwe
20	Canada
21	Philippines
22	Nigeria
23	Pakistan

[Source: Hofstede, 2001, Exhibit 71, p. 356]

From the foregoing, we can conclude, East Africa scored very much in the middle of the road leading marginally towards high context. In each of these categories the high/low context parameters were found to be Japan/Switzerland, Malaysia/Australia and Greece/Singapore. The East African culture is invariably classified as high context. It is very comfortable with spiritual powers and supernatural causes. Divinity is paramount and all embracing. Magic and Emotions form the basis of intuition founded on the past and traditions and protected and somewhat closed societal groupings.

Western tendencies are invariably considered low context, are more materialistic and technological, seeking verification and they question reality from a perspective of

intellectualization. The Westerner is more analytical and reflective, future oriented, critical and open to change and influence.

4.6. Conclusion: The Findings of Appendix IV

The analysis of the findings of this study's questionnaire is surprisingly close to the East African statistical observations. It is very much mid-way and both cultural groupings would seem to be well balanced in finding 'The Middle Way'.

The majority of both Africans and Western Educated participants displayed a Low Context Score. It was expected that the study would be able to point out a bigger divergence between the African and Western trained lawyers but instead arrived at a mid-way.

Out of a sample of 15 Africans, 12 were predominantly low context. Out of a total sample of 11 Western educated persons, however, 10 were low context. Therefore the Western educated displayed a higher number of low context persons out of the total sample of western educated persons tested.

The general average difference between the low context score and high context score was much higher for the Africans than the Western educated. This would suggest that the Africans who were high context were strongly high context and those that were low context were strongly low context. Whereas the Western educated manifested less volatility within the contexts despite a higher preponderance of lower context attributes.

The sample of participants tested was quite small and testing a larger sample may present a stronger conclusion as to the general context displayed by persons in either culture.

However, the results are encouraging for our Kenyan Society in this era of the Global Village.

Acculturation of differing perspectives whether by assimilation or integration will lead to a cultural diversity whereby all benefit from the combined recipe into a more understanding and accommodative polyglot. 'The spice of life' rather than the alternative

presently experienced in Europe where experiments of acculturation seem to be leading to separation and marginalization where such diversity is more of an 'irritant' (Berry, 2005).

African philosophy in the 21st century has grappled with this same dichotomy:

“First: is philosophy the product of a universal human reason or is every philosophy in some significant way an expression of the culture which produces it? And, second, a different but closely related question: are logic, rationality, and argumentation intrinsic and even necessary characteristics of anything which claims to be philosophy, or are these just peculiar to Western philosophy and thus not normative for African philosophy?” (Van hook, 1993, p. 15)

The two schools of thought are polarized between the Universalists as espoused by Hountondji, Wiredu, Bodunrinian and Odera Oruka who insist that philosophy, culture and moral and ethic concepts are universal and have basic characteristics regardless of when and where practiced and the Particularists led by Temples and Mbiti who see philosophy and ethics within a specific historical and cultural context of the day.

The middle way, as suggested in this study, is to be found in the exploration and a quest for moral and ethical stability not only for the legal profession but for society as a whole, where cultural diversity is celebrated and embodied rather than seen as inexplicable differences to separate on religious ethical, tribal or racial grounds but we shall consider this in more detail later.

CHAPTER FIVE

DISCUSSION

5.1. Introduction

And so one moves to the second leg of the foot stool of this thesis, to examine how such multicultural perspectives and behaviours impact on lawyers and in turn their participation as party representatives or as third party neutral mediators in the practice of law.

Despite its success as an Alternative Dispute Resolution (ADR) mechanism process in the West, mediation is yet to find its feet, or rather, prove itself to be a prime medium in the expeditious dispensation of justice and disposal of cases in Kenya.

This is of course a great paradox in light of traditional methods of dispute resolution at grassroots levels still being practiced by most of the tribes in Africa. Nevertheless, the more structured and dynamic process inherited from the West seeks to provide a template for international, multicultural disputes and to find a place within the respective legal systems.

5.2. Traditional Dispute Resolution

Traditionally African communities had their own methods of dispute resolution. Although not referred to as mediation, reconciliation or negotiation, these traditional dispute resolution mechanisms were anchored on the same concepts. They relied largely on people's ability to negotiate and sought to foster relations among the people.

There were various institutions of conflict management that sat to resolve disputes among the African people.

There was the council of elders which was a common institution among most tribes. It consisted of wise, elderly and respected members of the community. The council would listen to disputes and act as arbiter among its people.

Aside from the council of elders, disputes would also be solved by the family or the clan, depending on whether the dispute involved one family unit or many. There was also the tribe, which ranked highest in the traditional African socio-political organization. The

tribe, as the custodian of community land resources and customary law, acted as mediator on inter-clan disputes.

The traditional mechanisms were applied effectively among the African people until the advent of colonialism, with which came with the western adversarial court system. The colonialists did not understand the African way of resolving disputes and believed them to be inferior to their own western court system.

As a result, settlement of disputes slowly moved away from the traditional ways to the court system which is today the main dispute settlement mechanism in African countries.

5.3. Mediation Pilot Project

Article 159 of the Constitution of Kenya (2010) places the promotion of ADR as one of the principles by which the exercise of judicial authority should be guided.

In furtherance of this the Judiciary of Kenya has come up with the Mediation Pilot Project. The aim of the project is to see that disputes assessed and found to be fit for mediation are referred to mediation before embarking on litigation. In doing this, the judiciary hopes to reduce the backlog of cases it faces.

Mediation also gives parties an opportunity to attempt to settle disputes without having to embark on an arduous court battle.

In readiness for the launch of the project the Mediation (Pilot Project) Rules 2015 were gazetted by Chief Justice Willy Mutunga on the 9th October, 2015. The rules basically provide that all civil actions commenced after enactment of the rules should be screened by the Mediation Registrar and if found suitable should be referred to mediation. Mediation under the rules is to be conducted by a mediator accredited by the Mediation Accreditation Committee which is set up under Section 59A of the Civil Procedure Act CAP 21 Laws of Kenya. The start of the pilot project is eagerly awaited.

5.4. Cross Cultural Nuances in the Field of Law and Mediation

One will find that the demographic profile of mediation panels worldwide is made up predominantly of lawyers. This is possibly not surprising since lawyers will invariably be

at the forefront of either encouraging their clients to, or dissuading them from, participating in mediation as a prelude to other judicial remedies.

Indeed lawyers and ex-judges will seek to search out these skills for themselves as a possible adjunct to their legal practices or retirement possibilities after leaving the bench. This is by no means to say that lawyers make the best mediators. On the contrary. From a career in law or on the bench, lawyers have become dyed-in-the-wool judgmentalists, unable to turn their imbued professional attitudes to the gentler, empathetic and entirely impartial mediation process. Many lawyers, particularly litigators and judges, find it very hard and disconcerting to escape the environment of a hostile and adversarial system of the practice of law as inherited together with the trappings of authority, clothing, wigs and systems of address from the colonial power and by similar handing down to other commonwealth jurisdictions. Though with the advent of a new Constitutional Supreme Court, Chief Justice Willy Mutunga has done away with the use of elaborate wigs and gowns in the Supreme Court.

Interestingly though, advocates are happy and seemingly proud to don the wig at the time of their admission as an advocate of the High Court, based on the unappreciated precedent that in fact the wig in England is strictly reserved to those Barristers of Law who have been admitted to one of the 4 Inns of the Court of England and Wales.

It is within the framework of the legal profession and extrapolation of the research data findings that the study turns to itemize, from the author's own experience, four areas in which the high/low context and individualistic/collectivist dichotomy are often played out.

5.4.1. Time

The perception of time, however simplistic it may seem, very clearly demonstrates the difference and the resulting misunderstandings and frustrations that can occur between the high collectivist and the low individualist cultures and perceptions.

One regularly finds humour in the various colloquial sayings or philosophical tidbits expounded in conversations:-

“Time waits for no man”;

“Procrastination is the thief of time”;

The Maasai proverb “You Europeans have the watches but we Africans have the time” sums up the psychological difference in attitude. The low context individualist European or Caucasian puts great emphasis on time keeping and precision. The Swiss are proud of the reputation that their Railway system ensures trains leave on the dot of the hour and arrive punctually as per schedule.

National airlines espouse similar aims. Efficiency and strict adherence to time lines gives the Europeans the formality and assurance of a cultural norm ingrained by upbringing and education. Punctuality is considered a courteous consideration of others and showing discipline and commitment to a pre-arranged timeline.

The African is bemused by such stringent commitments. They, not wrongly, see such pedantic adherence to rules and regulations as restrictive and stressful.

Practically speaking, however, the consequences cause misunderstanding and frustration to the low context individual. The sense of divine right and self-importance manifested by way of African leaders and politicians is a case in point. It is not only usual but somehow expected that a political meeting or fund raising will start 3 hours late. The African has all day for such occasions. The European seethes with frustration at the lateness and inconvenience and selfish lack of consideration and assumption by the powerful that their time is any more important than their own.

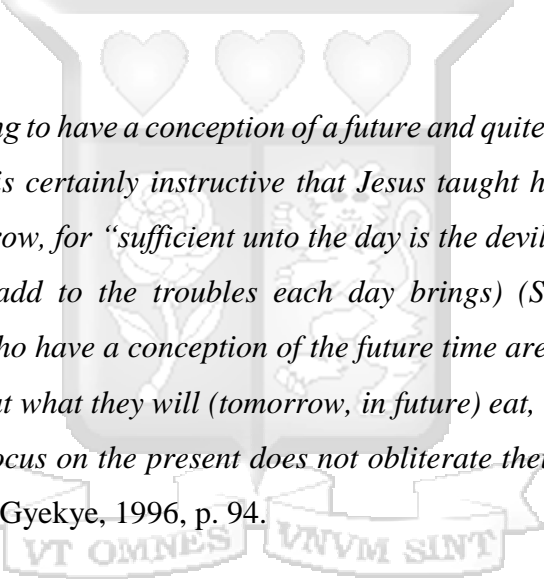
Conversely, an African sense of hospitality involves sharing a meal. Taking a break from routine and sharing one’s bread however meagre is a sign of a charity and concern for others, an opportunity for friendship which the Westerner never seems to have time for and does not appreciate the same importance of occasion.

Philosophers of the African Concept of time have observed:

“Time is simply a composition of events which have occurred, those which are taking place now and those which are immediately to occur. What has not taken place or has no likelihood of an immediate occurrence falls in the category of ‘No-

time'. What is certain to occur or what falls within the rhythm of natural phenomena is in the category of inevitable or potential time." (Mbiti, 1969, p. 17):

“As for the Difference Between An African’s And European’s View Of Time”: The European feels himself to be time’s slave, he must observe its ironclad, inviolate laws, its inflexible principles, deadlines, dates, days and hours. Africans apprehend time differently. For them it is a much looser concept, more open, elastic and subjective—“when will the meeting take place?” makes no sense as to them, it will take place when people come. Therefore the African who boards a bus sits down in a vacant seat, and immediately falls into a state in which he spends a benumbed waiting (Kapusinski, 2002).



“It is one thing to have a conception of a future and quite another to feel concerned about it. It is certainly instructive that Jesus taught his followers not to worry about tomorrow, for “sufficient unto the day is the devil thereof” (that is, there is no need to add to the troubles each day brings) (St. Mathew, Cap. 6: 34). Christians who have a conception of the future time are here being told not to be anxious about what they will (tomorrow, in future) eat, wear etc. Yet the fact that they are to focus on the present does not obliterate their hopes of blessedness in the future.” (Gyekye, 1996, p. 94.

Imported into the legal sector, the difference manifests itself in our courts. Very few courts start systematically at 9 am and close business at 5pm. Advocates can wait an entire morning to be heard on a simple court mention scheduled for 9 am. Slowly the assumption gains credence that one can be late for Judge X but not for Judge Y. Adjournments in Judge X’s court but not in Judge Y’s court lead to uncertainty among advocates. Such time keeping spills over into practitioners not preparing for hearings or applications; assuming invariably correctly, that the matter will be adjourned. Caught unawares and unprepared by a Judge who wishes to proceed, he will desperately seek an adjournment. How else does one explain the preparation of a Cause List of 15 Mentions and 5 Hearings a day? There is an assumption by both administration and practitioners that the majority

of those will be adjourned. A decreasing level of professional standard as to time keeping, unnecessary adjournments and delays, invariably prejudicial to one party, and a general malaise of inefficiency bemoaned by low context individuals but understandable to the high context collectivists ensues.

The same conundrum occurs in the interpretation of civil procedure and rules as to time lines, extensions of time and a presumption of right to adjournments. Strict adherence is sacrificed in favour of a more humanitarian exercise of a discretion to accord one party the understanding of the difficulties and allow them another chance but invariably prejudicial to the other party. The question, “what are rules for”? seems to beg the answer “to be broken of course”.

5.4.2. Professional Conduct

Not dissimilar to the divergent perception of time are the values attached to professional conduct.

Admittedly, the advent of email and mobile telephony has increased the pressure and expectation of timeous and expeditious communication and response time. Indeed the low context individual would delight in such technology whilst the high context collectivist view would feel pressured to respond and not be so emphatic and linear about the mode and urgency of communication.

It is the high context individual who seeks to please his respondent who thinks that if you have nothing to report or nothing positive to say then either don't say it or buy time by offering false hopes and platitudes of positive action in the future. Commitments as to delivery of Witness Statements or Submissions, indeed meetings, are sometimes not honoured.

Low context proponents would expect and be quite resigned to a negative reply so as to be able to move on in the chain of cause and effect and act accordingly. High context ones, on the other hand, do not want to disappoint and put off the moment of reckoning to another day. Professional standards perceived from such divergent backgrounds can

sometimes blur into such relative positions that certain practices border on misconduct. One such misunderstanding occurred where: A low context pragmatic and duty-bound perception of a situation of professional duty to a court or tribunal suggested that after the taking of evidence of a fact left undecided, it was later observed that the fact could easily be identifiable and/ or the evidence corrected by referring to an internet site which, after all, is in public domain. The tribunal interpreted the suggestion as trying to sneak in evidence through the backdoor and had the information struck from the record. Whether this was a high/ low context misunderstanding or the tribunal was not aware of the lawyer's professional duty to it, is still not clear.

The same divergent tendency applies to responses to telephone calls, letters, emails and questions expressed therein.

The need to remind or repeat the request frustrates the low contextualist. The high contextualist sees no point in the courtesy of responding if they have nothing or rather nothing positive to say.

But where is the standard norm and habit/s of ethical behaviour? A lawyer's duty is threefold: to the court; to the client; and to himself. Avoidance and non-compliance with professional undertakings, knowingly making false submissions or false facts to a tribunal or allowing and endorsing false witness statements are all too common-place where the professional duty to the court and yourself are second place to the supposed duty to the client "who pays the piper".

In Preamble to the IBA Guidelines on Party Representation in International Arbitration (2013), we read:

"The guidelines are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expensive, including tactics aimed at obstructing the arbitration proceedings."

Boulette (2009) opines that: All is not well in the legal profession. It finds itself in need of moral defence. Good and skilled lawyers have shown a complete ethical failing. It is high time lawyers answer for their actions in the courtroom and boardroom. They must answer to the public, not on the basis of their role as lawyers, but as human beings subject to common ethical constraints. Lawyers have hidden behind their Bar membership cards and arguments for client autonomy to represent morally reprehensible cases and clients.

Pepper (1986, p. 614) is quoted as saying; “once a lawyer has entered into the professional relationship with a client, the notion is that the conduct by the lawyer in service to a client is judged by a different moral standard than the same conduct by a layperson.”

The boundaries between what is morally right or wrong are not definite. *“Can it be acceptable that once a lawyer has entered into a professional relationship with a client that his conduct is judged from a different standard than the same conduct of a lay person?”* (Rising, 2002).

5.4.3. Money

Professional conduct also dictates that lawyers close ranks against forum shopping or fee discounting clients. A lawyer should not take over a brief on instructions without assuring that the previous lawyer on record has been paid his reasonable fee. Accounting and other professionals demand a written confirmation from their predecessors that all outstanding fees have been paid and therefore they have no objection to the new professional taking over instructions midway. Yet all too often a dog-eat-dog attitude prevails where a lawyer sees no quandary in selfishly following a fee when his colleague has still not been paid. Money seems to predominantly feature in the nature of complaints regularly submitted to the Complaints Commission under the Advocates Act where (a) failure to account (b) withholding of funds (c) issuing of dishonest cheques, account regularly (on a quarterly basis as reported) for far more cases than the remaining (d) failing to keep client informed (e) failure to render professional services (f) delay and (g) withholding of documents. When the artless lawyer sees, No one hope, but of his fees, and his skill runs on the lease, Sweet Spirit, Comfort me! (Anon) specifically observes as much.

Withholding of client's money on spurious grounds or by way of lien against extortionate fees should attract instant disciplinary action and debarring or striking from the register. Yet indulgence after indulgence is accorded by the Law Society of Kenya Disciplinary Tribunal to Practitioners who ask for time and terms to repay the client, never seeing the breach for what it is, namely theft. Wanjiku goes to jail while an advocate continues to practice and use his well learned trade and knowledge of the court system's inadequacies to defeat the imposition of a penalty on himself.

Undercutting by lawyers of the well-documented and legislated Advocate's Remuneration Order in a case adhered to more in the breach than in observance. Once the rule or ethic of professional conduct remains unpunished, the standard slides, everyone "does it", that is single practitioners and large established firm alike, and a level playing field is abused while unfair advantages are taken with impunity.

5.4.4. Communication

The area in which the high low context and individualist versus collectivist debate really plays out is in the field of communication.

Directness by one party is seen as aggressive and rude by another. The lawyer who is seen as prevaricating and procrastinating by his opponent sees his accuser as unnecessarily confrontational and persistent. The persistent and major danger in intercultural communication is saying one thing and meaning another or rather hearing one thing and understanding another.

Cultural diversity must nevertheless search for moral uniformity and never succumb or surrender to the escape route of relativism.

Communication is the connectivity of building a relationship—a form of taking responsibility for what you say and mean. The eyes are the connector to the soul. Low context speakers would expect a dialogue where both parties look at each other in the

eyes. In high context cultures, eye contact is often avoided both between genders and hierarchically between seniors and their juniors.

5.5. Mediation

Communication founds the whole dynamic of the mediation process. Awareness of your own proclivity and those of one's colleagues, opponents and parties in a Mediation is one thing while one's perception of others' manifestation of acting and/ or interacting and communicating with each other is quite another; and one's reaction based on these two premises yet a further dynamic to a meaningfully integrated mediation. Mediators, parties to the process and their representatives understanding the divergences between high and low context cultures will usefully examine themselves and others by questioning themselves in regard to the way they communicate:

1. How might knowing your preferred communication style be useful to you in intercultural situations?
2. What is the dominant communication style of groups you have grown up with or interact most with now? Under what circumstances are you most comfortable?
3. When you feel uncomfortable communicating in certain situations, do you ever consider that the problem might be the way some people are expressing themselves, rather than a personal reaction to individuals?
4. What are some of the advantages and disadvantages of both high and low context communications styles?
5. What differences in communication style are you likely to encounter when resolving disputes in a Mediation context and how are you going to react to them? What can you do to prepare to communicate more effectively with someone who has a different style? (Halverson, 1997).

Mediators must be alive to demystifying cultural differences when they must not only relate and communicate effectively with the cross cultural parties before them but must be ever sensitive to the ways the parties are communicating with each other.

The low context modern individualist culture values freedom and honesty, social recognition, achievement, self-reliance, comfort and equity. The high context traditional collectivist culture values harmony, face saving, filial piety, modesty, moderation, thrift, equality of rewards and fulfilment of others' needs. Those from individualistic cultures expect vertical hierarchies and understand how to function well within them. Those from collectivist societies may be more comfortable with wider and more pronounced power differentials and deference to those higher in status (Le Baron, 1998).

The forcefulness, manifestation and portrayal of authority and authoritativeness needs to understand and respect the humility and recognition of seniority.

Having the authority to settle the terms of a mediation is paramount to providing the opportunity of a successful outcome. High context parties might consider the appearance at a mediation beneath a senior manager who would not want to lose face and so sends an underling who would not have the authority to commit an organization to the terms of a settlement. Meanwhile the low context culture would be looking for the outcome of a deal or settlement from the outset, confident in the authority bequeathed to them for purposes of the process. This diversity can often lead to faltering cross cultural communication whilst mediating but more importantly, the mediator will need to find a medium between the several differences in styles of communication that have been summarised conveniently as:

1. When to talk
2. What to say
3. Pacing and pausing
4. Heart of listening
5. Intonation
6. Formality
7. Degree of Directness

Cohesion and Coherence

“Cross-cultural communication is like trying to follow a route on which someone has turned the sign posts around. All the familiar signposts are there but they don’t lead you in the right direction” (Tannen, 1983, p. 15).

Communication can be exuberant and deficient at the same time. With one’s culture, disputes inevitably occur as a result of perceptions and assumptions arising out of communication. How often does a party to a mediation conclude that misunderstandings have arisen because of the failure to communicate exactly what one has in mind in all its ramifications and associations? Between cultures such problems increase exponentially. If we are misunderstood, then our intentions are misperceived and we start to think that we are crazy. “Communication is the very sense of being in the world (Tannen, 1983).

In a low-context culture, people tend to say exactly what they mean rather than to suggest or imply. The spoken word carries most of the meaning. People are not expected to read into what is not said or done to embellish the meaning. Low-context communication is more common in individualistic cultures, where there is less reliance on shared experiences as a basis for understanding. As there is less shared experience and history, the speaker must convey background information and spell things out in detail.

In a high-context culture, much of the meaning of communication is already “programmed” into the receiver of the message as a result of the shared experience, connection and history of the sender and the receiver. People are more likely to infer, suggest and imply than say things directly. Often no words are necessary to carry the message—a gesture or even silence is sufficient to communicate meaning. A critical component of most communication is to preserve the relationship, and face-saving is important as it leads to a tendency to be indirect and avoid confrontation (Negi, 2007).

Silence and the Art of Rhetorical Listening as communication are highly relevant and well summarized in an Anthology and of Views edited by Cheryl Glenn and Krista Ratcliffe.

As “a code of cross-cultural conduct,” its potential lies in the fact that listening not only signifies respect but also asks listeners to acknowledge, cultivate and negotiate conventions of different discourse communities. As a code of cross-cultural conduct, rhetorical listening may further our understanding of gender and ethnicity intersections in ways that may promote cross-cultural dialogues on any number of topics (Ratcliffe, 1999).

Our arguments and our analyses of arguments too often focus only on claims: “I am right” vs “no, you are not”. If we organize not just the claims but the historically-grounded cultural logics enveloping other people’s claims, we may still disagree with the claims, but we may better understand the personal and cultural assumptions (dare I say, values and beliefs) that guide other people’s logics. And if we, in the same way, recognize how claims and cultural logics are rhetorically constructed, we may better appreciate the reasoning powers of others even when we disagree with them (Ratcliffe, 1999).

We learn by listening to those who do not agree with us, provided the listening occurs in the context of “genuine conversation” (Shawn, 1998).

In sum, rhetorical listening broadens our possibilities for interpretive invention when employed as a “code of cross-cultural” communication.

Rhetorical listening has the potential to generate more productive discourses about and across both commonalities and differences, whether these discourses be narratives or arguments, whether they be in academic journals or over the dinner table (Ratcliffe, 1999).

A compassionate listening session begins with a person speaking. The listeners, on the other hand, learn to hold themselves open to, and make sense of stories very different from their own. Generally, after listening for an hour, we “gave back”, thanking speakers for what they had shared with us. Even if we completely disagreed with their positions, we found ourselves responding to their values or personal qualities, such as bravery, perseverance, or commitment to their ideals (Green, 2009).

Compassionate Listening emphasizes that listeners give “the gift of listening” to the speaker, which is, in itself, an intervention in the conflict. This intervention is made up

of three facets: the speaker feeling heard, the listeners modelling engagement across difference, and the speaker hearing himself or herself in a new way (Glenn and Ratcliffe, 2011).

In Plato's *Phaedrus*, Socrates advises his eager companion to "listen to him in silence" so that *Phaedrus* might learn from his mentor's instruction.

The Japanese teach verbosity is dangerous: "Least said, soonest mended; out of the mouth comes evil".

The West inherited a notion of *logos* that conflates rational thought with forceful speech acts such as probing, scrutinizing, critiquing, examining and exploring (Fiumara, 1990, p. 16). This notion of *logos*, however, represents only one side of a two-sided coin: speech without listening. When listening is considered at all, it is deemed speech's passive subordinate, its unequal partner (Corradi, 1990).

Cultural differences are more likely to lead to impasses during negotiation and subsequent mediations, unless a mediator understands and adapts to the cross-cultural differences of the parties, and more importantly, around the mediation table where sensitivity on so many divergent cultural planes must be handled with dexterity and skill. Mediators whose tendency in a high context process is to fill the gap of silence to better urge the parties along, run the risk of missing the vital signs and truths hidden in the meaning of silence by high context cultures.

Silence—listening to understand not to reply; "Through listening, people can engage more possibilities for inventing arguments that bring differences together, for hearing differences as harmony or even as discordant notes". After all, the difference between listening for intent and listening with intent reflects a rhetor's choice to truly understand a speaker's (or writer's) intent. This "difference" in our understanding of listening shifts the aims of rhetoric from one of simple "mastery" to a rhetoric that promises to move an audience "beyond original beliefs to some new version of the truth". With rhetorical

listening, there is at least the possibility of truly changing one's mind and finding the common ground of American democratic citizenry" (Ratcliffe, 1999, p. 195–224).

Culture is the total accumulation of an identifiable group's beliefs, norms, activities, institutions and communication patterns. It is the collective programming of the mind that distinguishes the members of one group or category of people from others. Cross-cultural differences can cause a range of responses, from minor annoyances to a high degree of friction and frustration, sufficient to put business deals in jeopardy, make disputes more difficult to solve or create international accidents. Recognizing and overcoming the problems that result from cultural differences are the main tasks of a mediator in a cross-cultural mediation. Negotiating parties from different cultures may have completely different interests based upon their cultural interests and preferences (Barkai 2008).

It is the interests and the needs of the parties to a dispute that must be elicited by the Mediator. Bringing these emotions to the table and gently cajoling the expression of such emotion can unlock the impasse and deflate the annoyance, friction and frustration that invariably jeopardizes negotiation and deals and thus force parties away from Mediation and back to the win/lose scenario of litigation and arbitration, in which the nuances are put aside at the expense of party control and the adjudication handed over to a Judge or Arbitrator.

The Mediator would have to be alive to the problem in terms of 5 cultural issues: language, assumptions, expectations, bias and values. Whereas language can be accommodated by appointment of suitable bilingual Mediators, those persons need to prepare themselves well in advance as to available information on history culture, current events and practices of a foreign country. Such circumstances could well dictate, and certainly advise, the use of a co-mediator's conversant or culturally similar to one of the parties.

Conflict often involves the perceived or actual incompatibility of norms, values or processes with regards to goal issues, content, identity, relationships and conflict process.

Culture consists of unwritten rules and patterned ways of thinking, feeling and reacting acquired and transferred mainly by languages or symbols (Law, 2009).

Just as nine tenths of an iceberg is out of sight, so is nine tenths of culture out of conscious awareness.

Western negotiation is outcome focused and reaching an objective is paramount. African negotiation has a more ambiguous approach encompassing human relationship and a more holistic picture.

By way of conclusion, it is noted that Mediations in the future will be conducted between parties from hugely different, if not diametrically opposed, cultural backgrounds. Mediators will increasingly have to deal with parties from cultures who don't want to get down to business straightaway but who want to discuss family or other social questions first, those from cultures who nod and say yes, but really mean no, or "I don't have enough authority to agree that". There will be cultures for which a contract is not the end product of negotiation but the starting point and there will be cultures which view entering into a contract as the prerequisite to developing a relationship and those who require the development of a relationship before contemplating entering into a contract.

We should appreciate differences as differences non-judgmentally. To do so in the context of Mediation provides a dispute resolution mechanism that can transcend all nations, borders, races and religions. Failure to do so could only compound the disputes (In 2014 Arbitration Issue I – CI Arb. Fit for Purpose p. 33).

CHAPTER SIX

CONCLUSION AND RECOMMENDATION

6.1. Introduction

And so to the third foot of the stool: the quest for professional and ethical stability in the practice of law and mediation.

We have looked at the cultural divergence tendencies recognized by many authors based on the seminal works of Geert Hofstede and set out in detail in Appendices 1.4, 1.5, 1.6, 1.7 and 1.8.

We have observed the significant divergence on a universal scale between individuals and societies, nationalities, races, religions and ethnic groupings or tribes who weigh in somewhere between the modern parameters of low context individualist traditional and high context collectivist.

The research questionnaire designed to compare these levels of divergences as between Western and African educated lawyers in Kenya did not elicit any marked extremes as between the two groups. The results beg the question that one is looking to explain the differences by stereotyping. Perhaps so, but there is nevertheless some empirical reality in the findings of the questionnaire and more so in the observations from private practice that the Western educated group was found to be marginally lower context and the African educated group marginally higher context but all of no significance.

The implications of such divergence, though not indicated in the research date, was nevertheless examined and debated in various respects within the legal profession and in turn how diverging cultures can pose challenges among the parties, their representatives but particularly to the independent third party neutral mediator tasked with finding common ground between such parties in the interests of forging a settlement among disputants.

If the divergence that exists is not directly related to cross cultural values and traditions then we must look elsewhere for the stability needed in the practice of law and dispute resolution. 'Elsewhere' must consider the ethical concept of the moral philosophy and concept of the truth in our time and place.

6.2. History of Philosophy

Throughout the history of philosophy the dominant thinkers of those times have always coupled their search for The Truth within its contemporary view of the Moral Concept of the age and its view of ethical behaviour.”

From the Hellenists through the classical middle ages, the enlightenment, and modern contemporary philosophers have dedicated their thinking to the definition of “truth”.

“Only truth is universal” (Borruso, 2007). One would hope and wish as much but the path to such enlightenment is sometimes long and clouded.

A Chinese proverb poses: “There is your truth, my truth and the truth.”

Whilst Wiredu (1980) observes that truth is like cattle moving towards water” and that “There are as many truth as there are points of view”.

There lies the entire conundrum of moral relativism and the liberalism of our present age, and more particularly its impact on the legal profession.

6.3. The Way Forward

What are the ethics, habits and virtues, and codes of conduct and behaviour of our age that society and lawyers must aspire to? There are universally considered 3 philosophical tenets of Ethics:

6.3.1. Utilitarian Ethics

Pain and Pleasure, of Punishment and Reward is a doctrine consolidated around two English philosophers, Bentham (1748-1832) and Stuart. Utilitarianism is commonly

understood as the philosophical thought that considers as morally good the action that produces most good for the greatest number. That is why some describe utilitarianism as consequentialism. Something is morally good only if it maximizes happiness for the greatest number of citizens. Utilitarianism claims to propound a reliable and scientific theory equating good with pleasure or happiness, and evil with pain and unhappiness. This shifts morality to something external and not intrinsic objective rather than subjective. A person who, for instance, maximises profits for the company and shareholders, even satisfying consumers but through corrupt practice, would have provided pleasure and happiness for a number of persons. It is a philosophy and morality of “the end justifies the means”. In its wake, however, there is bred selfishness and subjectivity.

6.3.2. Deontological Ethics

Deontological systems of Ethics are also duty-based systems contrary to Utilitarianism where consequences determine the morality of actions. For Kant, its chief proponent, what is good is the will and the motives of the person who acts, and that is the only factor that qualifies an action as morally right. The reason and will demand “a categorically imperative” but from where do these attributes derive? They derive from “the Good” but once again this attracts room for relativism. This is the system of professional codes and regulations. One is duty bound for the sake of rules. He says that every person experiences this fact inside themselves so that from there, they can build pure ethics, untainted by an external demand (commandments) or from emotions (emotivism) or even for the sake of our happiness (utilitarianism) (Kant, 1724-1804).

6.3.3. Virtue Ethics

This system of Ethics is based upon human habits with their role in shaping the moral character of the person. The emphasis is put on individual character rather than on the acts themselves and the rules (deontology); or on the utility sought and/or on the consequences of such actions (utilitarianism). In order to, however, reach a clear understanding of virtue ethics, it is important to understand the biggest impact of the previous systems of Ethics discussed. They have led, each from a different angle, to separating ethics from morality virtue from NORMS. Practical truth, from Aristotle’s point of view does not cancel discrepancies; it allows to live with them in a virtuous manner. Here is a great justification

of the ethical standards required by a society made up of a great diversity of people and communities. It goes on to show that virtuous approach to life is the way of making room for diversity, but also for contrasting view of what is just and unjust, what is useful and what is harmful. Such virtuous standards are required from individuals and institutions. Virtues (and vices when man does what is wrong) are not produced by nature. Rather, they are produced because human nature has a natural disposition to receive them and improve them through habits and customs. Virtue ethics seeks to motivate the improvement of each human being from within. Virtues such as integrity, impartiality, loyalty, competence and diligence, respect, confidentiality, among others, are not a simple matter of procedure requiring routine compliance, rather it is a matter of moral change from within. Virtue installed by a code of ethics is one which expects accountability, condemns impunity and punishes default. Implementing a culture of integrity, virtue ethics embodies principles and values that appeal to reason and will, as well as to traditional values of solidarity, and fosters common good better than individualism (Franceschi, 2015).

St. Paul described moral law as “written on the hearts of men”.

Constitution of the Dominican Order asserts that we as human have a “propensia ad veritatem”, an inclination to the truth. It may get atrophied and temporarily disappear but it is there like a seed in the desert waiting for rain.

St. Thomas Aquinas in the Summa Theologica teaches that truthfulness is the virtue that inclines us to speak the truth always, and to manifest outwardly what we think inwardly.

Virtue theorists believe that all mature human beings possess a set of intrinsic virtues that are universally common to all. These virtues if nurtured soon become permanent and a part of the character of the individual. Morality therefore comes about as a result of these virtues. Virtue ethics therefore focuses on the character of the person and the intentions behind their actions rather than on the actions themselves. A person’s beliefs on moral issues are as result of asking the question “what would a virtuous person do”?

A shortcoming in the theory of virtue ethics, however, is that it is not conclusive as to what is virtuous. The central thesis of the Aristotelean Ethics is that all human beings should seek happiness. To find happiness, man needs morality, for it is through his moral deeds that his human dignity flourishes. The telos of man is eudemonia. It is gained through right actions. These right actions constitute moral virtue (Gichure, 2015).

For Aristotle it was clear that not all purposes are good. Only good persons achieve good purposes. As to who is good and who is not good, this is something that is not given to each individual person. It is fundamentally a result of the type of habits acquired by the person, his/ her education, and the laws established by his/ her community or polity.

Self-responsibility is necessary for moral acting privately and socially. In fact it is also derived from the fact that decision-making about what is right requires commitment, a practical commitment to doing the right thing, from a perspective of right reason.

Moral duty is then a commitment to achieve what is right.

Virtuousness creates social value that transcends the instrumental desires of the actor (Aristotle, 1998).

It is mutual application to both the server and the served, the very basis and necessity of servant leadership whereby virtuous actions produce advantage to others in addition to, or even exclusive of recognition, benefit or advantage to the person displaying virtuousness (Martin and Johnson, 2000).

6.4. Moral Relativism – Progressive or Regressive

The failure to start ethical thinking from the comprehension of human nature gives not only different objects to Ethics, but also different foundations and then different conclusions, which makes Ethics appear in a fragment manner, and adaptable to opinions rather than truths, i.e. relativity (Franceschi, 2015).

Ethics is controversial. The boundaries between what is morally right or wrong are not definite.

Ethical relativism is the thesis that ethical principles or judgements are relative to the individual or culture. Ethical principles vary legitimately from culture to culture and individual to individual. Ethical principles are situation-sensitive. Although ethical principles are absolute, what they prescribe varies, depending on the relevant features of the case. We should see divergence in moral ends not as unavoidable evil, but as a factor contributing to human advance and moral exercise. We should not merely tolerate diversity, we should embrace it. Otherwise, we will stagnate and fail to achieve our human potential (Lafollette, 1991).

According to Kant M. Singer, we can determine if an action is morally acceptable by asking “What if everyone did it?” This generalization argument shows that it is wrong for me (and you and everybody else).

Moral relativism on the other hand denies that there are moral values that are universally shared by all human beings. It proposes that morality is largely influenced by external factors e.g culture and historical periods which then result in varying ideas of morality from culture to culture.

“We should remind ourselves here that of course the truth is not something already defined and completely possessed by certain individuals. To say something is true does not mean it is “the whole truth”. Every vocation and profession has its own particular culture, theology and spirituality. Truth is notoriously elusive. It is pursued most effectively with care and humility. We don’t so much reveal it as gingerly advance towards it, respectful of its slipperiness and complexity without what might be called a spiritual dimension—some deep sensitive and inner authority—the authentic “truth telling” is in danger of being coloured, even controlled by fears, bribes, threats and coercion. Free enquiry and independent thinking is muzzled and truth suffers.” (O’Leary, 2015).

Liberalism and Aetheism are today's religion of money and capitalism purportedly espousing a cause undefinable other than to knock the establishment and seek change of all and everything for changes sake. It is a cause of "nothingness". It challenges the very fibre of Society. In our Society the gospel of truth is often shrouded by the secular gospel of prosperity. It is a gospel of plunder, greed of wealth, health, power and glamour of the fine things in life now. It is a gospel based on lies, cheating and half-truths that lead to corruption, theft, plunder and destructive faithlessness, soullessness and selfishness.

It was with an almost awe struck admiration that the Daily Nation recently observed of one high flying businessman that "The Moral and Ethical ground of his business might be in doubt but here is a man who revels in the astuteness with which he goes about clinching multimillion shilling contracts" shame on our values.

Changes of religious waves follow the dynamics of culture posed by social, political and economic trends affecting societies. (Professor Stephen Akaranga, Chairman of the Department of Philosophy and Religious Studies at University of Nairobi).

Moral changes do not happen on a whim; they are not arbitrary or random. Changes in notions of right and wrong do not merely follow their own course but are related to broader social, economic, political and intellectual shifts (Mackie, 1977, p. 293).

Ethics, as MacIntyre (1984, p. 52) has observed, can have meaning only if we are able to draw a distinction between "man-as-he-happens-to-be" and "man-as-he-could-be". Morality is like a map guiding us from the former condition to the latter.

All three monotheistic faiths developed during times of great social dislocation, each fashioned in such circumstances a distinct kind of moral anchor. There was a new reason to be moral: because God, all seeing, all-knowing, loving yet wrathful, requires it of you.

Nothing new in point of fact. 2,000 old years ago Jesus Christ replied, *“And you experts in the law, woe to you, because you load people down with burdens they can hardly carry, and you yourselves will not lift one finger to help them.”* (Luke 11:46).

In the West, the Institute of Marriage is being bombarded by gay same sex marriage. Abortion and euthanasia and bio-medico invasions of genetics and cloning are suffering the same attack. The discussion is totally one sided. It is seriously lacking in anthropological and metaphysical not to mention religious considerations. This major alteration to a cultural standpoint will have serious consequences. Unsavoury investigations or positions taken are pushed under the carpet and not discussed. So too the hypocrisy of the Rhodes-Scholar from South Africa calling for the destruction of a statue at Oxford University of the very patron and philanthropist, whatever his faults, of the accusers fortune and scholarship.

We must stand up for what our traditions and culture inherited from the Enlightenment and Christianity and resist the art of being offended in the name of invasion of free speech. Closer to home a senior journalist of the National Media Group wrote in January 2016 the sharply critical editorial of Mr. Uhuru Kenyatta’s performance since taking power in 2013. Press censorship used procedure to trump substance and Mr. Denis Galava was unceremoniously dismissed.

“Words cannot hurt”. The fear of being offensive is killing the freedom to express the right of freedom of thought and communication. Inverted censorship is killing healthy criticism in the name of this animal called political correctness.

Christianity is suffering a great criticism followed hopefully by a catharsis of its religion. Muslim believers and intellectuals alike must also take a critical attitude to the religion in which terrorism and *Jihad* holds powerful sway albeit by minority (Scruton, 2015).

“For all its benefits in offering moral guidance and meaning in life, religion is no longer adequate as a basis for ethics. Many people no longer follow any religion. In addition, in

today's secular and multicultural societies, any religion-based answer to the problem of our neglect of inner values could not be universal, and so would be inadequate. We need an approach to ethics that can be equally acceptable to those with religious faith and those without. We need a secular ethics.”

Is there any prospect that we can achieve such a caring way of life? Many people are skeptical. They believe that human nature is inherently selfish and we should just accept that fact. After all, it is the fittest who survive, and those must be the people who put No 1 first. But this crude form of Darwinism is quite contrary to the modern understanding of human nature and of human evolution, since it is the human instinct to cooperate which has given humans their extraordinary power over most other vertebrate species. The fact is that we have two natures, one selfish and one altruistic, and it is the function of our ethical culture to promote the altruist within us over the egotist (Layard & Sachs, 2016).

Without such universal secular ethos with or without an attendant spirituality or religious belief or faith society descends into the dog eat dog mentality of selfishness and self centered pursuit of goals for oneself with no concern for the wellbeing or interests of fellow man. When transported to the legal sector, such morality is devastating.

6.5. For the Legal Profession

Judges are erstwhile lawyers. Their professional conduct is imbued in their legal education of practice before ascending to the bench. The corrupt practices of practicing lawyers is hardly likely to disappear when such an individual is elevating to judge others but it is trite that the pervasiveness of corruption in the judiciary and the legal profession, whether one-off or endemic, is a major impediment to the rule of law as it bestows the fate of the citizens to men and not the law (Abdi, 2016).

An ethically compromised judiciary means that the legal and institutional mechanism designed to curb corruption, however well-targeted, efficient or honest remains crippled.

In my view, judicial corruption can be viewed as a “corruption of corruptions” because those whose responsibility it is to interpret and enforce the rules of law to counteract corruption are themselves corrupt.

Judicial systems that routinely provided adequate access to justice and timely and impartial delivery of justice and that generally uphold the rule of law typically display the following qualities:

Judicial Integrity

In *Baker v Carr* (1962) the Supreme Court of the United States held that “The Court’s authority is possessed of neither the purse nor the sword but ultimately rests on sustained public confidence in its moral sanction.”

Integrity implies adherence to truth, soundness, uprightness and purity.

It is deemed the heart and soul of the rule of law. To support a judiciary that embodies integrity, it is necessary to establish clear codes of conduct, provide ethics training and education to judicial officers, and create adequate mechanisms for receiving complaints from the public and from other judicial officers.

A clear code of conduct, which provides a model for ethical judicial behaviour, is essential to reform. The most widely used ethics code is the 2002 Bangalore Principles of Judicial Conduct. The Bangalore principles present six values essential to the proper performance of high standards of judicial conduct. These values include (1) independence (2) impartiality (3) integrity (4) propriety (5) equality and (6) competence and diligence, and these are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge. While it is not necessary for the Kenyan judiciary to adhere strict to the Bangalore Principles, implementing and following a similar code of ethics will aid in the protection of judicial integrity and efficacy.

Judicial Accountability

Article 11 of the UN Convention Against Corruption emphasizes the importance of judicial accountability, and it indicates that “each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary”.

Judicial Transparency

Judicial Efficiency

An efficient and effective judicial system minimizes opportunities for delay, abuse and , and provide timely public access to justice.

Although codes of legal professional ethics may be fundamentally the same across cultures, differences will be seen in their application from one culture to another. These differences will be evident at the cross cultural level but may also manifest themselves inter-culturally.

“Some standards can be prescribed by law, but the spirit and the quality of the service rendered by a profession depends far more on its observance of ethical standards”. (Justice Thomas, 1997).

Making a good law is not reducible to legally enforcing sound morality, particularly in a society that disagrees about what counts as sound morality. What, then, are the criteria of good law? A compact summary of those criteria was proposed in the seventh century by Isidore of Seville and endorsed in the thirteenth century by Thomas Aquinas: “Law shall be virtuous, just, possible to nature, according to the custom of the country, suitable to place and time, necessary, useful; clearly expressed, lest by its obscurity it lead to misunderstanding; framed for no private benefit, but for the common good. Virtuousness and justice are necessary but not sufficient attributes to good law, according to Isidore, and law must also be “possible to nature” and “according to the custom” of the particular country. Moreover, in my view, these latter attributes are not mere pragmatic concessions

to human intransigence but instead are integrally related to the Thomistic idea that law should function as a teacher of virtue (Kaveny, 2012, Aquinas 1947).

Mediators may come from various backgrounds and their commitment and understanding of ethical principles will be greatly influenced by their cultural backgrounds. In an increasingly vibrant cultural environment an effective mediator must be aware of these cultural differences.

One of the challenges in court mandated mediation is the lack of code of ethics to guide mediators. Court-sanctioned mediation fails to appreciate that mediators may come from different backgrounds and cultures and carry differing ideals as well as application of those ideals with them.

There is therefore need for a uniform code of ethics that will guide any mediator to whom a case is referred. Practical training should also be employed to illustrate situations bringing about an ethical dilemma and how a mediator is to conduct themselves if faced with a similar scenario.

This will ensure quality in court-mandated mediation and will dissipate any doubts on the part of this mediator as to what is ethically expected of him.

At the heart of this debate is a fundamental question that has exercised the minds of philosophers and kings for ages: How should a society organize itself? The goal has always been to find an effective way to control the passions of people so they can live in harmony among themselves and in peace with their neighbours. The quest is not only for sound political systems but, more importantly, for better social and economic systems. The search for the “golden mean”, a mean founded on the universal Golden Rules in all religious, philosophy and beliefs of doing to others as you would have them do to you.

The greatest happiness principle has a universal appeal. It has the capacity to inspire, by mobilising the benevolent part of every human being. In the language of Jews, Christians

and Muslims, it embodies the commandment to Do as you would be done by, and to Love your neighbour as yourself. In the language of Hinduism and Buddhism, it embodies the principle of compassion—that we should in all our dealings truly wish for the happiness of all of those we can affect, and we should cultivate in ourselves an attitude of unconditional benevolence (Layard & Sachs, 2016).

The good of society must be placed above that of the individual. Given Kenya's mix of races, cultures, tribes and religions, its fragile harmony cannot withstand the “untrammelled individualism” of the West.

Perhaps then an application of virtue ethics would constitute a solution to the differences in moral beliefs that come about due to a difference in culture when moral relativism is applied. Virtue ethics would require that each individual decide what is right or wrong in each unique situation and the only influence on them would be a need to uphold these universal virtues.

Many theories of happiness, including Buddhism, Aristotelian virtue ethics, Stoicism, traditional Christian theology, and Positive Psychology, emphasize the path to happiness through the cultivation of mindfulness, attitudes, values, habits, dispositions, and virtues. The emphasis is placed on character, mindfulness and mental health rather than the objective circumstances facing the individual, whether economic, social, or political (Layard & Sachs, 2016).

Thomist insight asserts that hope or “faith in relation to the future” is a habit like every other virtue or acquired habit of thinking acquired by “practice and self-discipline”.

Aquinas described hope as “a movement of the appetite towards some difficult good”. By virtue ethics, we can train our appetites (Eagleton, 2015) to foster habits and norms for one and all beyond the cross cultural divergence or ethnic behaviour, a habit that becomes the very kernel of legal professional conduct, the very heart of the search for love and peace—which is the basis of empathy, required of all the actors on the stage of the Mediation process.

LIST OF REFERENCE MATERIALS

- Abdi, A. (2016). The Nairobi Law Monthly, 7(3). Retrieved from www.nairobilawmonthly.com
- Aquinas, T. (1947). *Summa Theologica* (Vol. I–II, q.95, Art 3).
- Arbor, J. (2011). “*With Our Ears to the Ground: Compassionate Listening in Israel/Palestine*” In Glen C. and Ratcliffe K. *Silence and Listening as Rhetorical Arts*. South Illinois University Press, 217-230.
- Aristotle. (1998). *Metaphysics XII* (Vol. 7). New York, NY: Penguin Books.
- Augsburger D. (1992). *Conflict mediation across cultures: Pathways and patterns*, Louisville, John Knox Press.
- Barkai, J. (2008). “What’s a Cross-Cultural Mediator To Do? A Low-Context Solution for a High-Context Problem”. *Cardozo Journal of Conflict Resolution*, 10(2008), p.43–89.
- Bennett, J., & Bennett, M. (2001). “Developing Intercultural Sensitivity: An Integrative Approach to Global and Domestic Diversity.” Retrieved from <http://www.diversitycollegium.org/pdf2001/2001Bennettspaper.pdf>
- Berry W., J. (2005). “Acculturation: Living Successfully In Two Cultures.” *International Journal of Intercultural Relations*, 29 (2005) 697–712. Retrieved from https://www.academia.edu/7885562/Acculturation_Living_successfully_in_two_cultures_by_John_Berry
- Boruso, S. (2007). “*A History of Philosophy: Philosophy of Culture*.” Paulines Publications Africa.
- Boulette, M. (2009). “Two Concepts of Role Morality - In Search Of A Normative Language Of Legal Ethics.” *Acta Juridica Olomucensis*, 5(No. 9, 2010). Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1527253
- Cawley III, M. J., Martin, J. E., & Johnson, J. A. (2000). A Virtues Approach To Personality, 997–1013.
- Copeland, S. (1998). “Inclusion is Not Enough: Some Reflections on Interdisciplinary Conversations.” “Conversations on Learning Conference. Marquette U. Milwaukee, WI.
- Corradi, F. (1990). *The Other Side of Language. A Philosophy of Listening*. Routledge; Revised ed. edition. Retrieved from <http://www.amazon.com/The-Other-Side-Language-Philosophy/dp/041504927X>

- Cupach WR & Canary DJ. (1997). *Competence in interpersonal conflict*. New York, McGraw-Hill.
- Elmer, D. (1993). *Cross-cultural conflict: Building relationships for effective ministry*. Downers Grove, IL: Intervarsity.
- Esty, K., Griffin, R. and Schorr-Hirsh, M. (1995). *Workplace diversity. A managers guide to solving problems and turning diversity into a competitive advantage*. Avon, MA: Adams Media Corporation.
- Etherington, L., & Robert, L. (2007). "Ethical codes and Cultural Context: Ensuring Legal Ethics in the Global Law Firm." *Indiana Journal of Global Legal Studies*, 14(1, Article 6). Retrieved from <http://www.repository.law.indiana.edu/ijgls/vol14/iss1/6/>
- Fang Law, S. (2009). Culturally sensitive mediation: The importance of Culture in mediation accreditation. *Australasian Dispute Resolution Journal (ADRJ)*, (20). Retrieved from https://www.academia.edu/243509/Culturally_sensitive_mediation_The_importance_of_Culture_in_mediation_accreditation
- Farmer, F., & Strain, M. M. (2011). "A Repertoire of Discernments: Hearing the Unsaid in Oral History Narratives" In Glen C. and Ratcliffe K., *Silence and Listening as Rhetorical Arts*. South Illinois University Press, 231-249.
- Franceschi. (2015). *Unpublished Report submitted to the Judiciary Ethics Committee, Judiciary Training Institute*. Nairobi.
- Freeman, S. (2011). "Ethical Principles Revisited." *Journal of Professional Counseling, Practice, Theory and Research*. Retrieved from <http://www.highbeam.com/doc/1P3-2446133791.html>
- Geert, H. (2010). "Culture's Consequences: Comparing Values, Behaviours, Institutions and Organizations Across Nation." *Sage Publications*, (2nd Edition).
- Geert, H., Gert Jan, H., & Michael, M. (2015). "Cultures and Organizations: Software of Mind."
- Gichure, C. (n.d.). "Historical Approaches to Ethics: Rediscovering the Foundations of Ethics." Strathmore University.
- Glenn, C., & Ratcliffe, K. (2011). "Introduction: Why Silence and Listening are Important Rhetorical Arts" *Silence and Listening as Rhetorical Arts*. South Illinois University Press, 1-22.

- Green, L. (2009). *A Short History of Compassionate Listening Project*.
- Gyekye, K. (1996). *African Philosophy: A Classical Approach*. Prentice Hall, 1996. Retrieved from
https://books.google.co.uk/books/about/African_Philosophy.html?id=KuIQAQAIAAJ
- Hall, E. (1993). *Context Of Cultures: High And Low*. The 1993 Annual; Developing Human Resources. Pfeiffer and Company. Retrieved from http://www2.pacific.edu/sis/culture/pub/Context_Cultures_High_and_Lo.htm
- Halverson B., C. (2015, May 15). "Cultural-Context Inventory." Retrieved from http://www2.Pacific.edu/sis/culture/pub/Context_Cultures_High_and_Lo.htm
- Harris, S. (2011). *The Moral Landscape: How Science Can Determine Human Values*. Free Press; Reprint edition. Retrieved from <http://www.amazon.com/The-Moral-Landscape-Science-Determine/dp/143917122X>
- Helliwell, J., Layard, R., & Sachs, J. (2016). *World Happiness Report* (No. Vol. 1). Newyork: Sustainable Development Solutions Network. Retrieved from http://worldhappiness.report/wp-content/uploads/sites/2/2016/03/HR-V1_web.pdf
- Hook, J. M. V. (1993). *African philosophy: its quest for identity*. Retrieved from www.worldcat.org/title/african-philosophy-its-quest-for-identity/oclc/769830434
- IBA Guidelines on Party Representation in International Arbitration. (2013). International Bar Association. Retrieved from <http://www.ibanet.org/Document/Default.aspx?DocumentUId=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F>
- Jandt, F. E. (2007). *"An Introduction to Intercultural Communication; Identities in a Global Community"* (8th ed.). SAGE Publications.
- Jhingan ML. (2009). *The economics of development and planning*, 39th Edition, Vrinda Publications, New Dheli.
- Jordan, J. (n.d.). *"Revaluing Silence and Listening with Second-Language English Users"* In Glen C. and Ratcliffe K., *Silence and Listening as Rhetorical Arts*. South Illinois University Press, 278-292.
- Judicial Ethics in Australia*. (1997) (2nd ed.). Sydney: LBC Information Services.
- Kaveny, C. (2010). *"Laws Virtues"* (1st ed.). Washington, D.C: Georgetown University Press.

- Ladehoff, P., JD. (2015, May). “*Cross-Cultural Issues in Mediation.*” Pdf document, University of Missouri - Columbia. Retrieved from <http://cms.missouri.edu/Cross-Cultural%20Issues-USE.pdf>
- Lafollette, H. (n.d.). “The Truth in Ethical Relativism,” 146–54.
- Lewis, C. (1943). *The Abolition of Man*. Retrieved from www.cslewis.org/resources/studyguides/Study%20Guide%20-%20The%20Abolition%20of%20Man.pdf
- Macintyre, A. (2007). *After Virtue: A Study in Moral Theory* (3rd Edition). University of Notre Dame Press.
- Mackie, J. (1990). *Ethics: Inventing Right and Wrong*. Penguin; New Ed edition. Retrieved from <http://www.amazon.co.uk/Ethics-Inventing-Right-J-L-Mackie/dp/0140135588>
- Macklin, R. (1998). Ethical relativism in a multicultural society, *8(1)*, 1–22.
- Malik, K. (2014). *The Quest for a Moral Compass*. Atlantic Books.
- Martin JN & Nakayama TK. (2010). *Intercultural communication in contexts*, 5 Edition, New York, McGraw-Hill.
- Mbiti, J. (1969). *African Religions & Philosophy* (2nd ed.). University of Michigan: Heinemann, 1969. Retrieved from https://books.google.co.ke/books/about/African_religions_philosophy.html?id=XgpPAAAAMAAJ&redir_esc=y
- McFadden, D. (2014). “Culture, Business Negotiation and Mediation. Understanding Cultural Differences, Communication Styles and Finding Mutual Understanding.” *Asian Dispute Review*, 156.
- Michelle, L. (1998). Mediation and Multicultural Reality. Retrieved from <http://www.gmu.edu/programs/icar/pcs/lebaron.htm>
- Nicolson, D. (2005). Making lawyers moral? Ethical codes and moral character, *Volume 25*(Issue 4). Retrieved from <http://onlinelibrary.wiley.com/doi/10.1111/j.1748-121X.2005.tb00686.x/abstract>
- Njoroge MW & Kirori GN. (2014). ‘Ethnocentrism: Significance and effects on Kenyan society’ *African Journal of Political Science and International Relations*, Vol. 8(9), pp. 356-367.
- Odhiambo F., O. (1995). *African Philosophy An Introduction* (5th Revised Edition). Consolata Institute of Philosophy.

- Ogretir AD, Sezai O. (2008). 'The study of ethnocentrism, stereotype and prejudice: Psycho-analytical and psycho-dynamic theories' Journal of Qafqaz University.
- Oleary, D. (2015). Furrows For the Seeds of Truth, (16/05/2015). Retrieved from <http://www.thetablet.co.uk/issue/90>
- Online Cultural Training Resource for Study Abroad. (2015, May 15). Retrieved from <http://www2.pacific.edu/sis/culture/>
- Pepper, S. L. (1986). *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*. University of Denver Sturm College of Law. Retrieved from <http://ssrn.com/abstract=1268871>
- Plato. (2001). *Phaedrus. The Rhetorical Tradition: Readings from Classical Times to the Present* (Patricia Bizzell and Bruce Herzberg, 2nd). Boston: Bedford/St. Martin's.
- Ratcliffe, K. (1999). 'Rhetorical Listening: A Trope for Interpretive Invention and a "Code of Cross-Cultural Conduct."' *Marquette University E-Publications@Marquette*, Vol. 51(No. 2), 195–224.
- Rising, J. (2002). "Justice and Ethics." Retrieved from [www.mit.edu /jrising/ resources /philosophy/ webress/ justice](http://www.mit.edu/~jrising/resources/philosophy/webress/justice)
- Rosen, L. (2008). *Law as Culture: An Invitation*. Princeton University Press.
- Ryszard, K. (2002). *The Shadow of the Sun* (13th ed.). Vintage; Reprint edition.
- Scruton, R. (2015). *Fools, Frauds and Firebrands: Thinkers of the New Left* (1st ed.). Retrieved from <http://www.bloomsbury.com/us/fools-frauds-and-firebrands-9781408187357/>
- Singh Vikrant, N. (2007, October 30). Cultural Challenges in Cross Border Mediation. LLRX.com. Retrieved from <http://www.llrx.com/features/crossbordermediation.htm>
- Stenberg, S. (2011). "Teaching from a Restored Logos" In Glen C. and Ratcliffe K., *Silence and Listening as Rhetorical Arts*. South Illinois University Press, 250-263.
- Tannen, D. (1983). *Cross-Cultural Communication*. [Washington, D.C.]: Retrieved from <http://www.eric.ed.gov/contentdelivery/servlet/ERICServlet?accno=ED253061>
- Velasquez, M., Andre, C., Shanks, T. S. ., & Meyer, M. J. (1992). Ethical Relativism. Retrieved from <http://www.scu.edu/ethics/practicing/decision/ethicalrelativism.html>
- Waincymer, J. (2014). Regulatory Developments in the Control of Counsel In International Arbitration - The IBA Guidelines on Party Representation in International Arbitration and the New LCIA Rules and Annex. *Arbitration International*, 30(3), 513 – 551.

- Walt, B. J. V. der. (1997). *Afrocentric or Eurocentric?: our task in a Multicultural South Africa*. Potchefstroomse Universiteit vir Christelike Hoër Onderwys. Retrieved from www.amazon.it/Afrocentric-Eurocentric-Multicultural-South-Africa/dp/186822256X
- Wambui TW, Wangombe JG, Muthura MW, Kamau AW and Jackson SM. 'Managing Workplace Diversity:A Kenyan Pespective' *International Journal of Business and Social Science* Vol. 4 No. 16; December 2013.
- Wiredu, K. (1980). *Philosophy and an African Culture*. Cambridge University Press. Retrieved from www.alibris.com/Philosophy-and-an-African-Culture-Kwasi-Wiredu/book/10082074
- Wiredu, K. (2004). “*A Companion to African Philosophy*” (1st ed.). Blackwell Publishing Ltd. Retrieved from <http://philpapers.org/archive/manmba.pdf>
- Yieke, F. (2010). “Ethnicity and Development in Kenya: Lessons from the 2007 General Elections” *Kenya Studies Review*: 3, 3, 5-16.



APPENDIX I: HIGH/LOW CONTEXT TABLES

Table 1.1

Cultural Variations Between Low Context and High Context Cultures		
	High Culture	Low Culture
Association Relate	One's identity is rooted in groups (family).	One's identity is rooted in oneself and ones accomplishments.
	Relationships depend on trust and are stable.	Relationships begin and end quickly.
	Social structure and authority is centralized.	Social structure is decentralized.
Interaction Communicate	High use of non-verbal elements.	Low use of non-verbal elements.
	Verbal message is implicit.	Verbal message is explicit.
	Verbal message is indirect.	Verbal message is direct.
	Disagreement is personalized.	Disagreement is depersonalized.
Territoriality Space	Space is communal.	Space is compartmentalized and privately owned.
Temporality Time	Time is not easily scheduled but things get done.	Things are scheduled to be done at a particular time.
	Change is slow.	Change is fast.
	Time is a process; it belongs to others and nature.	Time is a commodity to be spent or saved.

Cultural Variations Between Low Context and High Context Cultures		
	High Culture	Low Culture
Learning Learn	Learning occurs by first observing others as they demonstrate and then practicing.	Learning occurs by following explicit directions & instructions of others.
	Groups are preferred for learning and problem solving. Accuracy is valued.	Individuals preferred for learning & problem solving. Speed is valued.

Source: Edward Hall, 1993

Table 1.2

Divergence between Afrocentric and Eurocentric	
African	West
Spiritual powers important	Material entities important
Quest for supernatural causes	Quest for physical Causes
Divination	Verification
Magical	Technological
Close to concrete reality	Abstract, removed from reality
Emotional	Intellectual
Closely involved with the object of knowledge	Observes object of knowledge at a distance
Less analytical, more synthetic	More analytical, less synthetic
More intuitive	More reflective
Consensus important	Competition important
Past-oriented	Future-oriented
More protective and closed	More critical and open but ethno-philosophy

Source: Van de Walt, 1997

Table 1.3

High Versus Low Context Communication	
Low Context	High Context
People rely on verbal communication	People rely on non-verbal communication
People communicate directly and explicitly	Talk goes around the points in circles
People are more present & future oriented and value change over tradition	People are more past oriented and value traditions over change
People value individualism	People value the group sense
Highly verbal persons are perceived favourably	Highly verbal persons are perceived less favourably
People tend to develop transitory personal relationships	People tend to take time in cultivating and establishing personal relationships
In a mediation process, people are likely to focus on facts	In a mediation process, people are more likely to focus on the intuitive and emotional aspects

Source: Edward Hall, 1993

Table 1.4

High Power Distance versus Low Distance Index	
High Power Distance Index	Low Power Distance Index
Status is an important issue	Equality and opportunity for everyone is stressed. There is a belief that all men were created equal and should be treated that way
The countries are poor	Countries are wealthier
Positive words: Respect, father, master, servant, wisdom, favor, protect, obey, order, pleasing	Positive words: rights, complain, negotiate, fairness, necessity, code, termination, objectives, questions, criticize

Source: Hofstede (2001, Exhibit 3.1, p. 87)

Table 1.5

Individualists versus Collectivists	
Individualists	Collectivists
In mediation, they focus on the task	In mediation, they focus on building and maintaining a relationship over the task.
Task prevails over relationship	Relationship prevails over task
They have a task focus .i.e., want to get down to business quickly	They prefer to spend time in building rapport activities
The interest of the individual prevails over that of the group	The collective interests prevail over individual rights

They are extroverts	They are Introverts.
They are wealthy	They are poor
They value self, sufficiency, personal time, freedom, challenge, extrinsic motivators' e.g. material rewards, honesty, privacy and individual rights.	They value harmony more than honesty and work to maintain face.
Positive words include: Positive connotation, friendship, contract, do your own thing, self interest, self respect, dignity, guilt and privacy.	Positive words; Harmony, face, obligation, sacrifice, family, tradition, decency, honor, duty, loyalty and shame.
They seek for mediators who are neutral and impartial.	They seek mediators who are already insiders.

Source: Hofstede (2001, Exhibit 5.1, p. 215)

Table 1.6

Masculinity versus Femininity	
Masculinity	Femininity
Positive words include: fight, aggressive, assertive, merit, excel, force, action, winner, success, deserve, big and fast.	Positive words include: caring, solidarity, modesty, compromise, help, love, grow, small, soft, slow, tender and touch.

Source: Hofstede (2001, Exhibit 6.3, p.286)

Table 1.7

High Uncertainty Avoidance versus Low Uncertainty Avoidance	
High Uncertainty Avoidance	Low Uncertainty Avoidance
Has a rule oriented society that institutes laws and rules.	Less rule oriented.
Willing to invent options.	Less likely to change their positions.
Positive words include: Structure, duty, truth, law, order, certain, pure, clean, secure, safe, predictable and tight.	Positive words include; creative, conflict, tolerant, experiment, spontaneous, insight, unstructured, loose and flexible.

Source: Hofstede (2001, Exhibit 4.1, p. 151)

Table 1.8

Long Term Orientation versus Short Term Orientation	
Long Term Orientation	Short Term Orientation
Make long term commitments.	Change occurs rapidly.
Positive words include: work, save moderation, endurance, tolerance, duty, goal, future, economy, invest and permanent.	Positive words include: relation, gift, today, truth, quick, spend, receive, grand, show, image and yesterday.

Source: Hofstede (2001, Exhibit 7.1, p. 356)



APPENDIX II: THESIS QUESTIONNAIRE

'By Email'

.....

Dear,

RE: MASTERS THESIS QUESTIONNAIRE

I am presently aspiring to a Masters at Strathmore University's School of Humanities and Social Sciences in Applied Philosophy and Ethics.

I am currently working on my thesis on the **Impact of Cultural Diversity and Moral Relativism on the Practice of Mediation in the Kenyan Legal Sector.**

As part of my thesis I am undertaking a case study analysis on the effects of culture on a person's relations and conduct within a working environment. I have therefore prepared a questionnaire titled 'Cultural Context Inventory Test' to help me evaluate this.

I wonder if I could ask you to take a few minutes (no more than 5-10) to fill out the questionnaire attached hereto and send it back to me.

I will be most grateful.

Yours sincerely,

Encl.

APPENDIX III: CULTURAL CONTEXT INVENTORY

Directions: For each of the following twenty six items, circle 1, 2, 3, 4, or 5 to indicate your tendencies and preference in a work situation.

		Hardly Ever	Sometimes			Almost Always
1	When communicating, I tend to use a lot of facial expressions, hand gestures, and body movements rather than to rely mostly on words	1	2	3	4	5
2	I pay more attention to the context of a conversation – who said what and under what circumstances – that I do to the words	1	2	3	4	5
3	When communicating, I tend to spell things out quickly and directly rather than talk around and add to the point	1	2	3	4	5
4	In an interpersonal disagreement, I tend to be more emotional than logical and rational	1	2	3	4	5
5	I tend to have a small, close circle of friends rather than a large but less close circle of friends	1	2	3	4	5
6	When working with others, I prefer to get the job done first and socialize afterward rather than socialize first and then tackle the job	1	2	3	4	5
7	I would rather work in a group than by myself	1	2	3	4	5


8	I believe rewards should be given for individual accomplishments rather than for group accomplishments	1	2	3	4	5
9	I describe myself in terms of my accomplishments rather than in terms of my family and relationships	1	2	3	4	5
10	I prefer sharing space with others to having my own private space	1	2	3	4	5
11	I would rather work for someone who maintains authority and functions for the good of the group than work for someone who allows a lot of autonomy and individual decision-making	1	2	3	4	5
12	I believe it is more important to be on time than to let other concerns take priority	1	2	3	4	5
13	I prefer working on one thing at a time to working on a variety of things at once	1	2	3	4	5
14	I generally set a time schedule and keep to it rather than leave things unscheduled and go with the flow	1	2	3	4	5
15	I find it easier to work with someone who is fast and wants to see immediate results than to work with someone who is slow and wants to consider all the facts	1	2	3	4	5
16	In order to learn about something, I tend to consult many sources of information rather than go to the one best authority	1	2	3	4	5
17	In figuring out problems, I prefer focusing on the whole situation to	1	2	3	4	5

	focusing on specific parts or taking one-step at a time					
18	When tackling a new task, I would rather figure it out on my own by experimentation than follow someone else's example or demonstration	1	2	3	4	5
19	When making decisions, I consider my likes and dislikes, not just the facts	1	2	3	4	5
20	I prefer having tasks and procedures explicitly defined to having a general idea of what has to be done	1	2	3	4	5
21	When communicating I take time to think about my responses and how the other person will react	1	2	3	4	5
22	If I disagree with someone I will not change my opinion to appease them	1	2	3	4	5
23	I work hard to please other people even at my own expense	1	2	3	4	5
24	I feel I have a right to say no to other people's requests and to negotiate a compromise	1	2	3	4	5
25	When asked to do something I say yes, even when I know I can't do it as not to upset the person asking	1	2	3	4	5
26	I am not afraid to be direct with someone, even if they think I am being rude	1	2	3	4	5

APPENDIX IV: CULTURAL CONTEXT INVENTORY SCORING SHEET

Directions: Transfer the circled numbers to the appropriate blanks provided below. Then add the numbers in each column to obtain your scores for High Context and Low Context.

High Context (HC)	Low Context (LC)
1. _____	3. _____
2. _____	6. _____
4. _____	8. _____
5. _____	9. _____
7. _____	12. _____
10. _____	13. _____
11. _____	14. _____
16. _____	15. _____
17. _____	18. _____
19. _____	20. _____
21. _____	22. _____
23. _____	24. _____
25. _____	26. _____
Total _____	Total _____



Put a check mark in the appropriate blank below to indicate which score is larger:

_____ High Context

_____ Low Context

Subtract your smaller score from your larger score. Record the difference in the blank below:

_____ Difference

References:

Cultural-Context Inventory by Claire B. Halverson