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COMMENT

When Alternative Dispute Resolution Works: Lessons Learned from the *Bashingantahe*

ALEXANDER J. BUSZKA†

I. INTRODUCTION

Societies have many ways to settle disputes and solve legal issues, but not all conflict resolution systems are created equal. Some systems are accused of being inaccessible because they are too expensive to use and confusing to navigate. Others are criticized for bias or unfair outcomes. Participants search for methods of conflict resolution that are the most predictable, accessible, equitable, and effective.[1] Their options are limited, however, in view of various financial limitations, time constraints, and ability or willingness to navigate a threatening or

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1. SANDRA F. JOIREMAN, WHERE THERE IS NO GOVERNMENT: ENFORCING PROPERTY RIGHTS IN COMMON LAW AFRICA 15 (2011).

complicated system.[2]

Litigation in the formal court system does not enjoy "unchallenged pre-eminence" in the field of conflict resolution.[3] Around the world, participants engage in various alternatives to enforce compliance with legal or social norms. Often, these options include self-help, peer pressure, appeals to a community figurehead, or participation in a form of mediation or arbitration.[4]

Some, such as the United States Department of Justice, praise the use of alternative dispute resolution (ADR) in the United States as an efficient, cheap, and effective method of conflict resolution that saves participants months of litigation and millions of dollars.[5] However, the critics of ADR are numerous.[6] They point to the rising number of motions to vacate arbitration awards and the increasing judicial scrutiny of arbitration agreements as a sign of growing dissatisfaction with ADR and how it is conducted in the United States.[7]

In a way, both groups are right. ADR has a great deal of potential to resolve conflict without lengthy proceedings, high costs, or damaging relationships, while providing better access for participants.[8] But the exact practice of ADR varies

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2. *See* Penny Brooker, *The "Juridification" of Alternative Dispute Resolution*, 28 ANGLO-AM. L. REV. 1, 3 (1999); Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DEPAUL L. REV. 569, 582 (2007).

3. SIMON ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY 26–27 (1979).

4. *Id.*; Sternlight, *supra* note 2, at 570. *E.g.*, SUDHIR ALLADI VENKATESH, OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR 253–65 (2006).

5. OFFICE OF DISPUTE RESOLUTION, U.S. DEP'T OF JUSTICE, FISCAL YEAR 2016 ANNUAL REPORT [hereinafter DOJ 2016 REPORT].

6. Sternlight, *supra* note 2, at 570.

7. *See* Will Pryor, *Alternative Dispute Resolution*, 65 SMU L. REV. 247, 247, 252 (2012).

8. *See, e.g.*, Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why it Doesn't Work and Why it Does*¸ HARV. BUS. REV., May-June 1994, at 120, 120–21.

widely in its methods and application. In some ADR programs, the process is unfair, it does not allow a sufficient degree of public accountability, and it may not even prevent participants from litigating in court afterwards.[9] But, with significant variation comes a diverse selection of methods from which designers of ADR programs can learn and improve.

The institution of the *Bashingantahe*[10] in Burundi offers us these lessons.[11] Like ADR in the United States, *Bashingantahe* have faced claims of bias or limited effectiveness, but the traditional functioning of the institution and its progress towards correcting these kinds of issues provide examples of how an ADR system can improve. Where the *Bashingantahe* show effective problem solving with transparent proceedings and public accountability, its methods and principles can offer solutions to the weakness of ADR. They also reaffirm practices that are already making progress towards the goal of efficient and fair conflict resolution in the United States.

I will first categorize the different forms of ADR and summarize the growing prevalence of ADR in the United States. Then I will describe some of the most commonly cited benefits of ADR, before discussing common criticisms that follow from mandatory ADR programs and the informal nature of ADR. After introducing the background of the *Bashingantahe* and how they function today, I will compare how the *Bashingantahe*'s current ADR practices match with their espoused principles of their institution, and how they either improve or maintain their practices to better represent those ideals. Finally, I will draw out how the

9. *Id.* at 120–23.

10. See *infra* Appendix: Glossary of Terms, for an explanation of Kirundi words used in this Comment.

11. *See* Assumpta Naniwe-Kaburahe, *The Institution of Bashingantahe in Burundi*, *in* TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES 149, 154 (Luc Huyse & Mark Salter eds., 2008).

Bashingantahe's efforts to maintain and improve their institution provide examples of how ADR programs in general can increase their accessibility, equitability, fairness, and effectiveness.

II. CATEGORIZING ADR

ADR is an umbrella term for many different forms of dispute resolution that involve a third party to assist discussion, mediate negotiation, or arbitrate disputes.[12] The uniting principle is that these methods are something less than formal litigation.[13] ADR commonly refers to mediation and arbitration, but can also include judicial settlement conferences, fact-finding services, and private adversarial proceedings.[14] Courts also use ADR to triage cases, through methods such as early neutral evaluation or mini-trials.[15]

ADR methods fall into two main categories: voluntary or mandatory.[16] Voluntary ADR is pursued by parties independent of a court's order,[17] and includes contracts to use ADR before, or in place of, formal litigation.[18] Mandatory ADR forms a "'mandatory settlement' or 'non-trial' adjudicatory track," where a court requires parties pursuing

12. *Alternative Dispute Resolution Programs: Hearing Before the Subcomm. on Intell. Prop. & Judicial Admin. of the H. Comm. on the Judiciary*, 102d Cong. 61 (1992) [hereinafter *Congressional Hearing on ADR*] (statement of Stuart M. Gerson, Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice); Brad Spangler, *Alternative Dispute Resolution (ADR)*, BEYOND INTRACTABILITY (June 2003), https:/beyondintractability.org/essay/adr.

13. Iftikhar Hussian Bhat, *Access to Justice: A Critical Analysis of Alternate Dispute Resolution Mechanisms in India*, 2 INT'L J. HUMAN. & SOC. SCI. INVENTION 46, 49 (2013).

14. *Id.*

15. *Id.* ADR frequently covers civil cases including civil rights, environmental and natural resources, and tax law. DOJ 2016 REPORT, *supra* note 5.

16. Diane P. Wood, *Court-Annexed Arbitration: The Wrong Cure*, 1990 U. CHI. LEGAL F. 421, 428.

17. *Id.*

18. Steven A. Weiss, *ADR: A Litigator's Perspective: Viewing the Pluses and Minuses*, Mar.-Apr. 1999 BUS. L. TODAY 30, 30 (1999).

full adjudication to first participate in an ADR program.[19] Mandatory ADR is often called Court-Annexed Arbitration (CAA).[20]

A CAA requirement is usually found in state statutes, regulations, or court rules that establish which types of cases must be arbitrated before continuing to formal court litigation.[21] CAA is often required for suits with money damages below a certain amount or that do not address a federal constitutional claim.[22] CAA varies in its local application and some forms lack many procedural requirements compared to formal litigation.[23]

Binding arbitration is more similar to traditional litigation than non-binding arbitration. Binding arbitration is where an arbitrator decides a case on the merits after presentation of evidence and arguments by parties.[24] CAA is non-binding, so all decisions may be reconsidered by the court that ordered it.[25] Each party may demand a trial *de novo* if it is dissatisfied with the arbitration result, at which point the case goes onto the docket and follows the traditional litigation process.[26]

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19. Wood, *supra* note 16, at 428.

20. Bhat, *supra* note 13, at 49.

21. John P. McIver & Susan Keilitz. *Court-Annexed Arbitration: An Introduction*. 14 JUST. SYS. J. 123, 123 (1991); *see, e.g.*, 28 U.S.C. § 651 (2012); OR. REV. STAT. § 36.400 (2015); 231 PA. CODE § 1301 (2006); *In re* Adoption of Alternative Dispute Resolution Plan (W.D.N.Y. May 11, 2018); Standing Order, *In re* Alternative Dispute Resolution Plan (W.D.N.Y. Jan. 21, 2010).

22. Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2177–78 (1993).

23. *Id.* at 2177–81.

24. Weiss, *supra* note 18, at 30.

25. McIver & Keilitz, *supra* note 21, at 123.

26. *Congressional Hearing on ADR*, *supra* note 12, at 16 (statement of Hon. William W. Schwarzer, Senior J., United States District Court for the Northern District of California & Director, Federal Judicial Center).

Mediation, the other most common form of ADR,[27] usually involves a trained neutral mediator.[28] Mediation can be conducted by one or several mediators, often chosen by the parties. In some situations, a neutral third party, such as the state bar, may also select a mediator.[29] A mediator's role may be strictly limited by the parties' agreed-upon rules or by a court. For example, a mediator may not be allowed to request more information from a party than what is offered.[30] The parties resolve the dispute consensually through negotiation, with the mediator attempting to facilitate discussion or address the underlying issues of the dispute.[31] Parties may submit written statements or documents, make presentations, or meet individually with the mediator to realistically assess their complaints.[32]

Often mediation is confidential, non-binding, and has informal procedural rules.[33] It is also different from formal proceedings because it evaluates each case on its own individualized terms.[34]

III. HISTORICAL DEVELOPMENT OF ADR IN THE UNITED STATES

In the United States, the systems of ADR and litigation

27. Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 2 (2012).

28. *Congressional Hearing on ADR*, *supra* note 12, at 31 (statement of Hon. John Leo Wagner, Mag. J., United States District Court for the Northern District of Oklahoma).

29. *Id.*

30. *See* Bush & Folger, *supra* note 27, at 25–26, 26 n.82.

31. *Congressional Hearing on ADR*, *supra* note 12, at 31 (statement of Hon. John Leo Wagner, Mag. J., United States District Court for the Northern District of Oklahoma).

32. Brooker, *supra* note 2, at 9.

33. *Congressional Hearing on ADR*, *supra* note 12, at 31 (statement of Hon. John Leo Wagner, Mag. J., United States District Court for the Northern District of Oklahoma); Bush & Folger, *supra* note 27, at 7.

34. Bush & Folger, *supra* note 27, at 3.

are intertwined because mediation and arbitration are conducted in view of pending litigation, potential litigation, and a court's enforcement of arbitration results.[35] So while ADR programs stand to gain from the continued operation of the court system, ADR persists in spite of it, due to the attractive promises of a faster, less expensive, and less tedious process.[36]

In the United States, interest in ADR began to grow in the 1970s, stemming in part from concerns of an overworked judicial system.[37] As the number of lawsuits filed in the formal court system increased, so did complaints of longer delays and procedural errors.[38] The ADR movement centered around the effects of prohibitively high costs to use the formal court system.[39] If an individual is unable to afford litigation, according to the argument, he or she is effectively no better off than if the government had actually abolished civil courts.[40]

In the 1990s, commentators began to label the courts' inability to efficiently handle the volume of criminal and civil cases a "state of crisis."[41] In response, parties chose to solve

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35. Sternlight, *supra* note 2, at 581–82 (describing that the formal court system and ADR are not separate systems, but intertwined, because judges often refer cases to arbitration, or ADR is conducted in the "shadow" of potential litigation).

36. *See* Weiss, *supra* note 18, at 30.

37. *See* Bush & Folger, *supra* note 27, at 1; Sternlight, *supra* note 2, at 570.

38. Spangler, *supra* note 12.

39. Besides being costly in time and money, the adversarial system can be inaccessible in the sense that it can be confrontational, confusing, and threatening. Brooker, *supra* note 2, at 3. While an attorney has an ethical obligation to communicate with and listen to a client, the client must still place a heavy reliance on the attorney to manage their case for them, due to specialized language and specific procedural requirements. *See id.* If a person cannot afford an attorney, he or she must proceed without such assistance. The concern over the confusing and costly formal court process does not belong solely to those who cannot afford it. Corporate clients also find litigation a burden, given the time and cost it may take to resolve a case. Weiss, *supra* note 18, at 30.

40. Wood, *supra* note 16, at 425.

41. *Id.* at 421–22.

their disputes outside of the courtroom.[42] They increasingly took advantage of alternatives such as expert mediators, rent-a-judge programs, informal mediation, and grassroots-level dispute resolution.[43] Between 1983 and 1988, the number of providers offering ADR services increased tenfold.[44]

The movement received positive media attention and government support as a solution to delays, expensive proceedings, and overcrowded dockets.[45] President Clinton encouraged ADR growth by calling for federal agencies to develop ADR programs to make the government operate "in a more efficient and effective manner" and to encourage "consensual resolution of disputes."[46]

In response to favorable reviews of ADR, Congress authorized courts to engage in ADR.[47] As its popularity increased, ADR's principles and methods were embedded into the formal court system and private institutions.[48] Amid some dissentions, many states and federal district courts joined the federal government in encouraging or mandating the use of arbitration programs.[49]

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42. *See* Bernstein, *supra* note 22, at 2172.

43. *See id.* at 2172, 2187.

44. *Id.* at 2187.

45. *Id.* at 2172.

46. Memorandum on Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking, 1 PUB. PAPERS 663 (May 1, 1998).

47. 28 U.S.C. §§ 651–58 (2012); *see Congressional Hearing on ADR*, supra note 12, at 6–7 (statement of Hon. Thomas J. Moyer, C.J., Supreme Court of Ohio).

48. Sandra Kaufman et al., *Should They Listen to Us?: Seeking a Negotiation/Conflict Resolution Contribution to Practice in Intractable Conflicts*, 2017 J. DISP. RESOL. 73, 75–76. Kaufman described the process of the adoption of ADR into the courts, government agencies, community organizations, and the workplace as a function of researchers promoting negotiation in dispute resolution practices throughout the twentieth century. The increasing commonality of phrases like "collaborative decision making" and "consensus building" in the workplace, and federal agencies adopting "negotiation-based conflict management practices" like mediation are examples of this. *Id.*

49. Eric K. Yamamoto, *ADR: Where Have The Critics Gone*?, 36 SANTA CLARA

While formal systems, such as litigation, offer greater degrees of certainty and transparency, they can also be slower and costlier, and may not properly consider individualized circumstances.[50] One litigator described some considerations when choosing ADR or the formal court system:

> On the plus side, it usually allows for a faster, less expensive resolution, and therefore a more satisfied client. On the minus side, ADR does not always allow a lawyer to delve deeply enough into the evidence, and in the case of nonbinding arbitration or mediation, can sometimes lead to a more expensive and slower resolution.[51]

IV. ADR

A. *Benefits of ADR*

The proponents of ADR argue it helps to increase access to dispute resolution, preserve relationships among parties, increases efficiency, takes advantage of informality, and preserves consent in the process.

1. Access

Access to a dispute resolution system is critical to its success and legitimacy, and is a driving force behind the growth of ADR as an alternative to formal litigation.[52] Internationally, the United States Agency for International Development (USAID) recognizes ADR as especially useful in countries where the judiciary has become untrustworthy or lost respect in the eyes of the citizens.[53] But descriptions of courts with delays, high costs, and technical proceedings are as applicable domestically as they are abroad, and

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L. REV. 1055, 1055–56 (1996).

50. Weiss, *supra* note 18, at 30.

51. *Id.*

52. *See* JOIREMAN, *supra* note 1, at 17.

53. SCOTT BROWN ET AL., USAID CTR. FOR DEMOCRACY & GOVERNANCE, ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS' GUIDE 7 (1998), https://gsdrc.org/docs/open/ssaj1.pdf.

economic barriers prevent many from accessing justice.[54] In this respect, ADR offers a way to access a method of conflict resolution for those who cannot or will not use the court system.[55]

ADR can decrease the cost for parties to engage in dispute resolution and can be cheaper than a formal court proceeding.[56] ADR is credited with taking less time to resolve a dispute and it may provide an alternative to a court system that some view as corrupt or biased.[57] When ADR is organized and performed at the grassroots level, the shorter distance that parties are required to travel means a lighter demand on time and work.[58] ADR's procedures can be streamlined by agreement, allowing participation for those who cannot otherwise afford the time and expense of "full-blown litigation."[59] Increased access to ADR benefits courts, which save administratively by dealing with fewer disputes, and benefits those who are normally excluded from the justice system.[60]

2. Preserving Relationships

ADR can help preserve or improve business or personal relationships through a conflict.[61] Instead of having a winner and loser, both parties may come away from the negotiation more satisfied.[62] The ability for parties to address each other

54. *See id.*; Wood, *supra* note 16, at 452–53.

55. BROWN ET AL., *supra* note 53, at 7.

56. Bhat, *supra* note 13, at 49; Sternlight, *supra* note 2, at 575–76; *see* Raquel Aldana & Leticia M. Saucedo, *The Illusion of Transformative Conflict Resolution: Mediating Domestic Violence in Nicaragua*, 55 BUFF. L. REV. 1261, 1311 (2008).

57. Aldana & Saucedo, *supra* note 56, at 1309, 1311; Bhat, *supra* note 13, at 49; Sternlight, *supra* note 2, at 575–76, 580.

58. Sternlight, *supra* note 2, at 575–76; *see, e.g.*, Aldana & Saucedo, *supra* note 56, at 1309.

59. Weiss, *supra* note 18, at 30, 33.

60. Bush & Folger, *supra* note 27, at 1.

61. Carver & Vondra, *supra* note 8, at 120–21.

62. BROWN ET AL., *supra* note 53, at 7.

neutrally, engage in fact-finding, negotiate over a solution, and focus on reconciliation gives ADR an advantage over formal litigation.[63] The "win-win" advantage also gives ADR relevance to disputes between businesses or issues that parties would normally address in family court.[64]

3. Efficiency

Another benefit of ADR is its use to avoid delays and docket congestion.[65] This, along with streamlined procedures, enables ADR to resolve disputes faster than formal litigation.[66] With ADR, parties may be able to select someone with specialized knowledge of their specific case or the general subject matter, reducing the time it takes to explain issues to a judge or jury.[67] Because parties can directly participate in outlining the process they wish to use, ADR can avoid lengthy proceedings, technicalities, and discovery abuse.[68]

4. Informality

The informality of ADR is both a benefit and a criticism. Some see informality as a method of achieving confidentiality in situations where a person or corporation would like to protect its reputation, while others criticize it as a secret proceeding.[69] It also allows for an individualized result of the proceeding, according to the parties' own

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63. Aldana & Saucedo, *supra* note 56, at 1311; Sternlight, *supra* note 2, at 580.

64. Kaufman et al., *supra* note 48, at 73; Spangler, *supra* note 12.

65. Bhat, *supra* note 13, at 49; Weiss, *supra* note 18, at 33; *see generally* Carver & Vondra, *supra* note 8.

66. Bhat, *supra* note 13, at 49; Weiss, *supra* note 18, at 33.

67. Bernstein, *supra* note 22, at 2239; Weiss, *supra* note 18, at 32.

68. Spangler, *supra* note 12; Weiss, *supra* note 18, at 33; Wood, *supra* note 16, at 452–53.

69. Bernstein, *supra* note 22, at 2239–40; Brooker, *supra* note 2, at 5; Spangler, *supra* note 12; Sternlight, *supra* note 2, at 570, 587.

relevant social or industry norms.[70]

Informality gives mediators and arbitrators the flexibility to address the uniqueness of each case, which would otherwise defeat useful generalizations in the formal court system.[71] It allows for creating solutions that are tailored to the parties' precise situation and allows the ability to address unique features of a problem.[72] The flexibility of ADR's "individualized justice" is unavailable in the formal legal system and it allows "room for mercy in an otherwise rigid, rule-bound justice system."[73]

5. Consent

Some forms of ADR are voluntary and require the consent of the parties to participate. This is an advantage because it can signal a willingness to cooperate and comprise to the other party.[74] Voluntarily agreeing to participate in mediation or accept an arbitration result can improve compliance with an agreement because each party felt it contributed to developing the rules and procedures that governed the process.[75] Requiring consent to participate also allows groups which are disadvantaged to engage in forum shopping for a less biased mediator or adjudicator and places an incentive on mediators and adjudicators to promote a solution that satisfies both parties.

An effective ADR program is one that promotes access, preservation of relationships, efficiency, informality, and consent, while minimizing the costs associated with its use.

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70. Sternlight, *supra* note 2, at 583–84.

71. Bush & Folger, *supra* note 27, at 4–5; *see* Kaufman, *supra* note 48, at 75.

72. Bush & Folger, *supra* note 27, at 4–5.

73. Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57, 58–59 (2004).

74. Bernstein, *supra* note 22, at 2243.

75. Spangler, *supra* note 12.

B. *Criticism of ADR*

ADR is no panacea, however, and there are plenty of situations where ADR has not produced its touted benefits. In some cases, it decreases efficiency. One example is when two companies let their "litigious habits worm their way into the process."[76] They went to arbitration before litigation due to a clause in their contract, and arbitration that should have taken six to twelve weeks "ballooned into a five-year marathon, with five to six hours of testimony four or five days every single week."[77] The judge also played a role—he started to subpoena evidence against custom. Lawyers began taking depositions, and the arbitration ended in an appeal to the court to overturn the arbitrator's decision.[78]

This example demonstrates one category of complaints lodged against ADR and specifically CAA: it merely adds another layer of litigation to the court system. A second category of complaints against ADR is its private and informal nature, which some argue is hostile to the rule of law and detrimental to achieving justice.

1. Criticism of Mandatory ADR: CAA

Commentators criticize that CAA is not very different in substance from litigation, particularly when parties and arbitrators act as if they were in court.[79] The concern is the more litigious arbitration becomes, the more it reduces efficiency and cost-effectiveness. Despite this criticism, courts often mandate CAA.[80] About 65% of cases facilitated by the American Arbitration Association are CAA.[81]

CAA often effectively adds another layer of litigation to

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76. Carver & Vondra, *supra* note 8, at 121.

77. *Id.* at 122.

78. *Id.* at 122–23.

79. *Id.* at 123.

80. *Id.*

81. *Id.* at 124.

the court system when parties include "excess baggage" to arbitration.[82] Excess baggage can appear in the form of extra motions, briefs, discovery, depositions, and expert witnesses.[83] Lawyers in litigious arbitration make repetitive recitations of facts and legal arguments, cater positive publicity for their case, and act with the hostility of a lawsuit.[84] Arbitrators may make arbitration more litigious by acting like judges or awarding damages that are beyond contractual limits.[85]

Appealing arbitration awards increases costs because the parties might as well have gone directly to court. If parties treated CAA as a platform to litigate, then they must restart just to re-litigate the same arguments on appeal. Arbitration is then merely a pretrial expenditure.[86] CAA also raises the cost of an arbitration appeal by reviewing *de novo* and awarding post-arbitration fees and cost-shifting.[87] This is where, by statute, a party must pay the cost of the arbitrator's fee if the result of the *de novo* trial is not more favorable than the arbitration award.[88] The extra time spent in litigation is all the more futile where a party only lost arbitration due to the admission of evidence which would not be admitted at trail.[89] Given the potential for an appeal and the greater "maximum out-of-pocket loss" a party might bear to request one, CAA discourages risk-adverse or poorer litigants who may otherwise bring a suit.[90]

The non-binding nature of CAA solidifies its reputation as an additional layer to the court system. If a party appeals

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82. *Id.* at 120.

83. *Id.*

84. *Id.* at 123.

85. *Id.*

86. Wood, *supra* note 16, at 449.

87. Bernstein, *supra* note 22, at 2235.

88. 28 U.S.C. § 655 (1988); Wood, *supra* note 16, at 449.

89. Wood, *supra* note 16, at 449–50.

90. Bernstein, *supra* note 22, at 2231, 2235.

an arbitration decision, it can use the information and arguments it heard and made to put itself in a stronger position to pursue litigation after arbitration.[91] Given the increasing procedural formality of ADR, parties may use CAA's procedures to delay the settlement of a dispute, then refuse to accept the arbitration award, as a tool to draw out litigation. This effectively reduces CAA to a tool lawyers may manipulate for negotiation.[92]

CAA's increasing cost, combined with the likelihood of continued litigation, has led to a perception that CAA interferes with parties' right to trial and forces them into receiving "second-class justice."[93] The end result is the cost of ADR and litigation become very similar, which prevents access to dispute resolution.[94] To this effect, several companies see increased damage awards, legal billings, and delays after using CAA.[95]

2. Criticism of Private and Informal ADR

Criticism of the private and informal nature of ADR generally falls into one of three categories: concerns about the inability of mediation to achieve social justice; lack of public accountability; or the quality and ethical control over mediators.

a. Social Justice Concerns

The informal and private nature of ADR raises criticism that it does not effectively achieve social justice, especially when cases are handled individually, each on its own terms,

91. *See id.* at 2227–28.

92. Brooker, *supra* note 2, at 14, 23, 25.

93. *Congressional Hearing on ADR*, *supra* note 12, at 20–21 (statement of Hon. William W. Schwarzer, Senior J., United States District Court for the Northern District of California & Director, Federal Judicial Center); Spangler, *supra* note 12.

94. Brooker, *supra* note 2, at 23; Bernstein, *supra* note 22, at 2253.

95. Carver & Vondra, *supra* note 8, at 120.

in the absence of formal rules, and with less scrutiny.[96] If ADR cannot achieve social justice, then ADR effectively sacrifices social justice to save administrative costs, which one author calls "an invidious policy that should be rejected."[97]

One facet of this issue arises when certain cases are categorically channeled into arbitration or mediation and parties are of significantly different power and status.[98] When a member from a disadvantaged group is forced to negotiate in mediation, the rules applied may not promote equality, and parties' rights may be "nickeled-and-dimed" away without their consent, for the sake of compromise.[99] Mediators could intentionally or unintentionally steer parties into agreements that are unfair to them, given a mediator's potential lack of information on the subject matter or lack of knowledge of a power imbalance between parties.[100]

Even where mediators and arbitrators are striving to be fair, the "real world demand of client expectations" encourages them to pressure settlement to save time and money.[101] Privileging "settlement *per se*" in this way, without sufficient attention to the quality of settlement, may disadvantage a certain party when a power disparity hampers its negotiating ability.[102]

In this respect, the private and individualized nature of ADR presents a risk of failing to protect weaker parties with unequal bargaining power.[103] According to one author, the

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96. Bush & Folger, supra note 27, at 3.

97. *Id.* at 34.

98. *Id.* at 5.

99. *Id.* at 6 (quoting Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1012–15 (1979)).

100. *Id.* at 8, 28.

101. *Id.* at 24–25.

102. *Id.*

103. Yamamoto, *supra* note 49, at 1059 (citing Owen M. Fiss, *Against*

risk of a party, mediator, or arbitrator acting on prejudices is greatest in situations where there is a great power disparity and few rules governing the negotiation.[104] In contrast, parties may be more hesitant to act upon prejudices where the formality of a court proceeding serves to remind them of "the American values of equality and fairness."[105] In these situations, the formality and publicity of litigation, instead of being a target for criticism, offers some protection for vulnerable groups who would otherwise be at risk for biased treatment.[106]

Private ADR raises concerns about "micro-justice." In this conception of social justice, "micro-level" justice is that which is aimed at the individual level.[107] Macro-level justice, on the other hand, means "equality between groups," "justice at the aggregate level," and the cumulative effect of micro-level justice.[108] If injustices are recurrent, systematic, and consistently addressed at the micro-level, then all these individual cases add up to make changes at the macro-level to contribute to social justice.[109]

The brunt of the criticism here is that because a private arbitration or mediation decision is not precedent, it disaggregates claims of collective injustice, which might otherwise succeed under legal doctrines of the formal court system.[110] This claim has a historical basis, as mediation

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Settlement, 93 YALE L.J. 1073, 1075 (1984)).

104. *Id.* (citing Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1388–99).

105. Sternlight, *supra* note 2, at 570–71, 571 n.9 (citing Richard Delgado, *Alternative Dispute Resolution Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391, 1398 (1997)).

106. Yamamoto, *supra* note 49, at 1059.

107. Bush & Folger, *supra* note 27, at 4.

108. *Id.*

109. *Id.*

110. *Id.* at 12; Sternlight, *supra* note 2, at 570, 570 n.4 (citing David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622–23

during the Civil Rights era "led enforcement agencies to overlook patterns and systems of discrimination," poorly serving the larger goal of social justice.[111] Without public records or public hearings, it would be difficult to ensure mediation or arbitration complies with or contributes to the protection of individual rights.[112]

b. Public Accountability Concerns

ADR systems are criticized for their unaccountability to the public. This stems from a lack of an "organic connection" to the communities in which they operate, at least in comparison to courts.[113] ADR's lack of accountability and informal nature has led some to criticize it as hostile to the rule of law.[114]

There is also a concern that mediators and arbitrators are selected by individual parties, and not the general public. To the extent the procedures allow, the privately selected mediator or arbitrator applies rules, statutes, and interprets public values. Some argue that a public official should be interpreting and applying any public law or values.[115] Public participation in the democratic process, after all, gives the public official the legitimacy to make these kinds of moral and legal decisions that a privately selected person does not have. Even where there is very little direct public participation in the selection of a federal judge, at least the

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(1995) (noting that private adjudications fail to produce rules or binding precedents)).

111. Yamamoto, *supra* note 49, at 1059–60 (citing Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 540–46 (1987)).

112. Sternlight, *supra* note 2, at 570.

113. Joseph A. Scimecca, *Conflict Resolution and a Critique of "Alternative Dispute Resolution," in* CRIMINOLOGY AS PEACEMAKING, 263–79 (Harold E. Pepinsky & Richard Quinney eds. 1991).

114. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); *see* Sternlight, *supra* note 2, at 570, 570 n.4. (citing Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 675–82 (1986)).

115. Sternlight, *supra* note 2, at 570 n.4.

public has some opportunity to exert indirect control over the appointment. In the decision of who to hire as a mediator or arbitrator, however, the public has none.

The private records created by ADR, or the lack thereof, are not subjected to public scrutiny like court documents. This removes another opportunity for the public to exert some form of control over the result, or at least future results of similar cases.[116] Perhaps for this reason, many courts bar ADR from handling constitutional claims.[117]

The issue of ADR disaggregating claims of collective injustice again becomes relevant. But here, the consideration is that the lack of public accountability makes information private that should be public.[118] This private information could have been used by the public in similar, small stakes civil suits.[119] Depending on the use of ADR, disaggregating claims can avoid collective litigation which would otherwise serve as a method of group mobilization and political

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116. Spangler, *supra* note 12. Public knowledge of a case result can affect future, similar cases through its precedential value, encouraging legislation, or garnering public support for or against the decision. *Brown v. Board of Education*, 347 U.S. 483 (1954) is referenced as an example of the kinds of public benefits that would be lost through the disaggregation of claims, if such a case was never public and courts were never able to use it as precedent. Bush & Folger, *supra* note 27, at 5; Sternlight, *supra* note 2, at 578. It is noted that civil rights cases are often a category of claims that are excepted from mandatory CAA, to prevent exactly this situation. However, the concern with some authors remains that channeling claims into ADR deprives that claim of having any potential precedential effect, which in these situations would greatly benefit the public at large. *See* Sternlight, *supra* note 2, at 570.

117. *See Congressional Hearing on ADR*, *supra* note 12, at 10 (statement of Hon. Thomas J. Moyer, C.J., Supreme Court of Ohio). In some cases, the public interest may override the desire to go through mediation or arbitration. Sternlight, *supra* note 2, at 572 ("In the United States, even many of ADR's staunchest advocates recognize that there are circumstances in which disputes are better resolved publicly, through litigation, rather than through negotiation, mediation, arbitration, or some other private means."). One example is a dispute in which a constitutional right is implicated. *See* Bernstein, *supra* note 22, at 2177–78. These kinds of claims are likely best left to the formal court system.

118. Sternlight, *supra* note 2, at 570.

119. Wood, *supra* note 16, at 451.

efficacy.[120]

c. Quality and Ethical Concerns

Some point out there are few mechanisms or incentives in place to ensure ADR mediators are good quality.[121] For example, if compensation for mediators is too low, service in dispute resolution will compete with other forms of *pro bono* activity, detracting from the pool of qualitied mediators.[122] Mediation especially relies on the mediator's skill in suggesting alternative solutions, establishing trust, and assessing the interests of each party.[123] If the quality of ADR mediators and arbitrators is poor, the entire mediation effort might fail.[124]

One solution to this problem could be to professionalize the arbitrator or mediator corps, outside of the services offered by judges as part of local court ADR programs. Although requiring ethical standards or competency tests can produce some benefits,[125] the corps should not become so formalized by the state that they lose the flexibility they need to adequately respond to parties' problems.[126] Formalization would mirror the disadvantages flowing from CAA: procedural protections are removed for the sake of efficiency, but the ADR program is not sufficiently informal to confer the benefits of informalism, such as an individualized, tailored decision.[127]

If there is limited oversight of mediators and arbitrators,

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120. *See* Sternlight, *supra* note 2, at 570.

121. Wood, *supra* note 16, at 447–48.

122. *Id.*

123. Weiss, *supra* note 18, at 32.

124. *See id.*

125. Bush & Folger, *supra* note 27, at 14.

126. One of the primary concerns with a professional arbitrator corps is that it would become so regulated or formalized that it would essentially function like a "lower tier" of courts, not unlike CAA. Wood, *supra* note 16, at 447–48.

127. *Id.*

other quality and ethical issues may be at stake. If parties reduce discovery, like limiting a mediator or arbitrator's ability to request more information, a decision may be based on an incomplete view of the facts.[128] A decision based on partial information or the inability to discover that a party is concealing information, may result in a settlement that lacks substantive fairness.[129]

Mediators and arbitrators are susceptible to the same temptations of corruption as judges and a biased mediator could have a significant impact on the ultimate negotiation result.[130] The difference is that many ADR proceedings are conducted in private, whereas the publicity of a judge's decision and proceedings can act as a check on his or her actions.[131] Although parties may accept certain ethical risks as tradeoff for speed and costs, this risk may be justified by a degree of trust or experience with the mediator.[132]

3. Squaring the Benefits of ADR with the Criticisms

In devising a solution to the problems of formal litigation, one cannot just combine the formal and informal dispute resolution systems, because their values can be mutually exclusive.[133] ADR programs begin to lose the benefits of informalism when the procedures begin to become more repetitive, burdensome, and similar to "litigation-in-disguise."[134] The result is that like litigation, the costs of ADR rise, but without procedural protections or public

128. Weiss, *supra* note 18, at 33.

129. Bush & Folger, *supra* note 27, at 26.

130. Sternlight, *supra* note 2, at 587.

131. *Id.*

132. Pryor, *supra* note 7, at 258.

133. The end result of such a combination is a program like CAA. Wood, *supra* note 16, at 455–56.

134. Carver & Vondra, *supra* note 8, at 123. Or what Carver and Vondra, call "let[ting] old litigious habits worm their way into the process." *Id.* at 121.

oversight.[135] These parties will witness the worst of what both ADR and litigation have to offer, without the any of the benefits. They "might as well go back to court."[136]

To maximize the benefits of informalism, while minimizing the costs, the goal should be to design a system of ADR that is democratic and publically accountable. It should be less adversarial and more conciliatory, but not secret. ADR can have formal recognition, but the government should not exercise recognition as a tool to centralize or co-opt control of the mediators or arbitrators.

The institution of the *Bashingantahe* in Burundi shows how to design such a system. The institution can demonstrate a way to maximize access to ADR, preserve relationships, increase efficiency, and take advantage of informality and consent. While the *Bashingantahe* have faced criticism for the practices of their institution, their efforts to improve, show how an ADR program might better contribute to social justice, maintain public accountability, and encourage quality and ethical mediators and arbitrators.

V. BASHINGANTAHE

A. *The Institution of the* Bashingantahe

Bashingantahe are the group of individuals who are invested with the responsibility of settling conflicts at the village level in Burundi.[137] They act as local peacemakers, performing the roles of mediators and arbitrators.[138] The

135. *Id.* at 123.

136. *Id.* at 121.

137. The word *Bashingantahe* comes from the Kirundi word *gushinga*, meaning to plant down, and the word *intahe*, referring to a traditional staff of justice. Naniwe-Kaburahe, *supra* note 11, at 154. Together, it means "the one who bolts down the law," but is figuratively understood to be a person who is qualified to provide advice and administer justice and equity. *Id.*

138. Mutoy Mubiala, *The Contribution of African Human Rights Traditions and Norms to United Nations Human Rights Law*, 4 HUM. RTS. & INT'L LEGAL DISCOURSE 210, 230 (2010).

Bashingantahe have a moral and social responsibility to their communities and have historically been "the guardians of tradition and of good behaviour."[139] The institution's legitimacy derives from a community's investiture of these individuals as *Bashingantahe* and the *Bashingantahe's* moral contract with that community.[140] In 2010, an estimated 134,000 *Bashingantahe* operated in Burundi.[141] The institution functions differently from community to community, but *Bashingantahe* generally settle disputes by convening a council or panel of *Bashingantahe* at their *colline*, hearing a case, and offering a solution.[142]

B. *History of the* Bashingantahe

1. *Bashingantahe* as Traditional Advisors

Traditionally, *Bashingantahe* were men selected by local villagers for the quality of being morally and socially responsible.[143] The bundle of qualities that make up an ideal

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139. NIGEL WATT, BURUNDI: BIOGRAPHY OF A SMALL AFRICAN COUNTRY 25 (2008).

140. Patrick B. Litanga, Indigenous Legal Traditions in Transitional Justice Processes: Examining the Gacaca in Rwanda and the Bashingantahe in Burundi 47 (Oct. 5, 2014) (unpublished M.A. thesis, Ohio University) (on file with OhioLINK Electronic Theses and Dissertations Center).

141. ERIC SCHEYE, NETHERLANDS INST. OF INT'L RELATIONS CLINGENDAEL, LOCAL JUSTICE AND SECURITY DEVELOPMENT IN BURUNDI: WORKPLACE ASSOCIATIONS AS A PATHWAY AHEAD 17 (2011). Although other sources also cite the 134,000 number, a survey taken on by the United Nations Development Program, completed by 2002, identified 30,411 "traditionally" invested *Bashingantahe*. Bert Ingelaere & Dominik Kohlhagen, *Situating Social Imaginaries in Transitional Justice: The* Bashingantahe *in Burundi*, 6 INT'L J. TRANSITIONAL JUST. 40, 45 (2012). The difference may suggest the difference between traditional and the total number of *Bashingantahe*, the growth of the institution between 2002 and 2010, inaccuracies in reporting, or a combination of all three.

142. *Colline* translates literally to "hill," but it is an administrative unit that encompasses several hills, similar to a spread-out village or neighborhood. TRACY DEXTER & PHILIPPE NTAHOMBAYE, HENRY DUNANT CTR. FOR HUMANITARIAN DIALOGUE, THE ROLE OF INFORMAL JUSTICE SYSTEMS IN FOSTERING THE RULE OF LAW IN POST-CONFLICT SITUATIONS: THE CASE OF BURUNDI 6 (2005).

143. Déo Makobero, *L'institution des Bashingantahe Comme Moyen de*

Mushingantahe is called *bushingantahe*. It is a broad concept, but roughly means "integrity" and respect for the common good.[144] They looked over the safety of people, goods, and the environment, resolved conflicts, and had an administrative and educational role[145] They functioned separate from the government and so were "a precursor to modern civil society."[146]

According to legend, the institution of *Bashingantahe* started in the seventeenth century.[147] At that time, they were arbitrators, representatives of their respective *colline*, and advisors to the monarchy.[148] The *Bashingantahe* formed a hierarchy of jurisdiction throughout the country, from resolving family conflicts in villages to settling matters at the king's court.[149] As an independent institution, the *Bashingantahe* acted as a check on government power and abuse.[150] The members of the *Bashingantahe* had a "contract" or "mutual understanding" with their community, which created an obligation to model virtuous behavior, intervene in conflict, and protect the weak.[151]

2. Weakening of the Institution during Colonial and

Reconciliation, 1–2 AU CŒUR DE L'AFRIQUE 31, 31 (2001).

144. *See* Elizabeth A. McClintock & Térence Nahimana, *Managing the Tension between Inclusionary and Exclusionary Processes: Building Peace in Burundi*, 13 INT'L NEGOTIATION 73, 86 (2008).

145. Makobero, *supra* note 143, at 31; McClintock & Nahimana, *supra* note 144, at 86.

146. McClintock & Nahimana, *supra* note 144, at 86.

147. Naniwe-Kaburahe, *supra* note 11, at 154; Litanga, *supra* note 140, at 49.

148. Dolive Gretta Kwizera, *The Role of the Institution of Bashingantahe in Nurturing Good Governance and Socio-Economic Development in Burundi*, 5 INT'L J. INNOVATION EDUC. & RES. 151, 152 (2017); Agnes Nindorera, *Ubushingantahe as a Base for Political Transformation in Burundi* 1 (Consortium on Gender, Sec., & Human Rights, Working Paper No. 102, 2003).

149. Naniwe-Kaburahe, *supra* note 11, at 156.

150. *See id.* at 164.

151. Nindorera, *supra* note 148, at 13.

Post-Colonial Periods

Beginning with the colonization of Burundi by Belgium in the 1920s and continuing through a series of post-colonial military regimes, the *Bashingantahe* were weakened by the state.[152] This was part of a trend where the government shifted the power of social control from the local community to the administrative center of the country.[153] The public was distanced from the investiture process and the selection of *Bashingantahe* increasingly became dependent on government appointment, making the position more politicized.[154] Although the strength and influence of the institution varied throughout Burundi, traditionally invested *Bashingantahe*[155] had continued involvement in dispensing justice and leading reconciliation at the community level.[156]

152. Naniwe-Kaburahe, *supra* note 11, at 158–59.

153. Mubiala, *supra* note 138, at 230. For example, the Belgians began to limit the role of customary law, and colonial authorities invalidated the *Bashingantahe*'s judgments. Ingelaere & Kohlhagen, *supra* note 141, at 43; Kwizera, *supra* note 148, at 153–54.

154. Ingelaere & Kohlhagen, *supra* note 141, at 44; Naniwe-Kaburahe, *supra* note 11, at 159–60.

155. "Traditionally invested" *Bashingantahe* are ones that have gone through the traditional process of investiture by the community, as opposed to political appointees. Burundians commonly distinguish "real" *Bashingantahe* from the "false" ones, drawing a line between those who were selected traditionally and continue to follow the principles of *bushingantahe*, and those who were political appointees. Ingelaere & Kohlhagen, *supra* note 141, at 47. Burundians sometimes qualify the title as *"bashingantahe investi"* for those who were traditionally invested by the community. PETER UVIN, LIFE AFTER VIOLENCE: A PEOPLE'S STORY OF BURUNDI 62 (2009). Burundians also distinguish the "old" *Bashingantahe*, who were invested in the era of the monarchy, from the "new" ones. Ingelaere & Kohlhagen, *supra* note 141, at 47. In some places, the *Bashingantahe* are venerated, and in others they are accused of being corrupt or ethnically and politically biased. *Id.* (describing the National Council of the Bashingantahe as "mainly dominated by urban *Tutsi* elites"). *See* MATHIJS VAN LEEUWEN, PARTNERS IN PEACE: DISCOURSES AND PRACTICES OF CIVIL-SOCIETY PEACEBUILDING 128 (2009).

156. Sarah-Jane Koulen, Book Note, 53 J. AFR. L. 321, 323–24 (2009) (reviewing TRADITIONAL JUSTICE AND RECONCILIATION AFTER VIOLENT CONFLICT: LEARNING FROM AFRICAN EXPERIENCES, *supra* note 11).

3. Genocide and Revitalization

Starting in 1993, Burundi experienced a period of violence and inter-ethnic conflict.[157] During the crisis, traditionally invested *Bashingantahe* showed their continued relevance through their ability to preserve peace and resolve conflict. Facing potential assassination, they protected victims of crime and persecution and organized communities to arrest killers and looters.[158] *Bashingantahe* encouraged those who fled their homes to return, initiated reconciliation between offenders and victims, and returned stolen goods.[159]

Post-crisis, there was a renewed interest in reviving the *Bashingantahe*, and the Arusha peace talks from 1998 to 2000 recognized their historical role in promoting cohesion in the country.[160] Nevertheless, after whittling down the *Bashingantahe*'s prerogatives over time, government reforms in 2005 took away their formal legal standing and removed the force of law from their decisions.[161] Where the institution was previously centralized and incorporated as an auxiliary to the formal court system, now it had no legal authority whatsoever.[162]

Although some of the *Bashingantahe* face allegations of

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157. Nindorera, *supra* note 148, at 3–4. Like in Dexter & Ntahombaye's report, the terms "ethnic" and "ethnic group" are used in this work with the recognition that they "do[] not correspond to the reality of the components of the Burundian population," as there are still debates surrounding the origins of these groups and whether any differences that might have existed were originally ethnic, social, or something else. DEXTER & NTAHOMBAYE, *supra* note 142, at 9 n.7.

158. Naniwe-Kaburahe, *supra* note 11, at 160–61.

159. *See id.*

160. DEXTER & NTAHOMBAYE, *supra* note 142, at 16; *see generally* Arusha Peace and Reconciliation Agreement for Burundi, Aug. 28, 2000. For more information on the ethnic conflict and the Arusha Peace Accords, see McClintock & Nahimana, *supra* note 144, at 76–79.

161. SCHEYE, *supra* note 141, at 12, 17; Kwizera, *supra* note 148, at 151.

162. Kwizera, *supra* note 148, at 154. One explanation for this action is the government perceived the *Bashingantahe* to be a threat to its legitimacy. SCHEYE, *supra* note 141, at 26–27.

corruption and partiality, in part due to vertical integration with the government, many continue to follow traditional practices, especially in rural areas.[163] They remain a useful and strong conflict resolution institution, rendering decisions and retaining their place as a symbol of justice, despite being pushed into the realm of informality.[164] They continue to hear a wide range of cases and serve as an attractive informal option before or instead of using the formal court system.[165] This is in part because Burundians commonly see *Bashingantahe* as more accessible, trustworthy, and legitimate than other government agents and the formal court system. *Bashingantahe* are often more independent than local administrators and have an advantage over them, because they know the local context of the conflicts they mediate.[166]

The *Bashingantahe* continue their role in the court system in an informal capacity. Sometimes local courts refer parties to *Bashingantahe* before hearing a case, or require parties to submit written minutes and decisions of *Bashingantahe*.[167] Others use them as witnesses and experts in cases involving property boundaries.[168] Those *Bashingantahe* who are invested traditionally retain their popular legitimacy in part because of the demand for addressing "past atrocities and injustice at the local level."[169]

163. Kwizera, *supra* note 148, at 154–55.

164. SCHEYE, *supra* note 141, at 17; Naniwe-Kaburahe, *supra* note 11, at 159–60, Litanga, *supra* note 140, at 50–51.

165. MATHIJS VAN LEEUWEN & LINDA HAARTSEN, CED-CARITAS BURUNDI, LAND DISPUTES AND LOCAL CONFLICT RESOLUTION MECHANISMS IN BURUNDI 9 (2005); Litanga, *supra* note 140, at 73.

166. DEXTER & NTAHOMBAYE, *supra* note 142, at 18.

167. SCHEYE, *supra* note 141, at 17.

168. Naniwe-Kaburahe, *supra* note 11, at 166.

169. Litanga, *supra* note 140, at 46.

C. *How* Bashingantahe *Function Today*

Variation in the institution is significant, given the prevalence of local control over *Bashingantahe* selection and the influence of local tradition. However, some general trends are discernable.

1. Investiture and Disinvestment

This excerpt from a transcript of a *Bashingantahe* investiture ceremony introduces the idea of what is expected of a *Mushingantahe* once invested:

> If you pass by a place where there are conflicts, you must resolve them. You will stand for the honor of Burundi; you will not repay in kind to one who insult [sic.] you. . . . You will struggle for the orphans. You will be the rest for the lonely. Be courageous in helping the poor. It is only on this condition that God will assist you. Be aware that you are in the place of God and the King. Combat all laziness in your work. Be insightful during the deliberations; do not search for richness or material interest. You will be the straight path in which the country can trust.[170]

With the exception of *Bashingantahe* who are given the title by government appointment, communities within local *collines* invest the title and responsibilities of *Mushingantahe* at their discretion. A community usually selects individuals as candidates when they reach the age of adolescence or alternatively, one may request to be considered in the selection process.[171]

Communities then carefully observe the candidates for a period of time, usually between three months to three years, but possibly longer.[172] The candidate is judged based on

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170. Nindorera, *supra* note 148, at 22–24.

171. DEXTER & NTAHOMBAYE, *supra* note 142, at 11–12.

172. *Id.*; Makobero, *supra* note 143, at 31–32. While there is emphasis placed on an observation after becoming a "candidate," a person's actions and reputation from before that period are considered. For example, because an individual's community observes and evaluates a child throughout childhood, it is more difficult to be selected if the child "did not obey his parents, did not like to work, preferred quarrels," or "did not help the elderly or handicapped." Nindorera, *supra* note 148, at 19. In some areas, a seat at the *Bashingantahe* council can be

certain performance measures, like the quality of his public speaking, how well he performs certain responsibilities during official ceremonies, and how well he debates and resolves conflict. Although the litany of desired character traits may vary slightly, communities also prefer candidates with wisdom, a high regard for truth, a sense of honor and dignity, a love of work, the ability to provide for the needs of others, sobriety, moderation in speech and action, and a sense of justice, fairness, the common good, and social responsibility.[173]

In some *collines*, a candidate will need a considerable degree of wealth as a prerequisite for selection.[174] In others, wealth is not a requirement or it may simply be preferred that the candidate is financially self-sufficient and independent, to resist outside influence on his decision-making.[175] Traditionally, a *Mushingantahe* would be required to have the means to provide beer for everyone in the community at the final investment ceremony, or else coordinate several people to share in the cost.[176]

A candidate is assigned a *Mushingantahe* as a sponsor or mentor. The sponsor monitors the candidate's behavior and instructs him on the customs and skills of conflict resolution in *Bashingantahe* tradition. The candidate is allowed to observe, but not participate in, deliberations and investigations of the *Bashingantahe*.

The involvement of the community and the oath a *Bashingantahe* takes to follow the principles of the institution has a function of sealing a moral contract between

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inherited, or having a parent that is a *Mushingantahe* can give the candidate preferential treatment. *Id.* at 20.

173. Naniwe-Kaburahe, *supra* note 11, at 155.

174. SCHEYE, *supra* note 141, at 16.

175. Ingelaere & Kohlhagen, *supra* note 141, at 49; Nindorera, *supra* note 148, at 20–24.

176. DEXTER & NTAHOMBAYE, *supra* note 142, at 12.

the community and the new *Mushingantahe*.[177] The oath is a promise to follow and mediate disputes according to the core values of the institution, called *bushingantahe*.[178] *Bushingantahe* encompasses the virtues of righteousness, socialness, wisdom, self-control, responsibility to family and society, honor, discretion, equity, truthfulness, dignity, courage, and moderation.[179] Impartiality, fairness, and respect for human rights and the common good are also key components of this set.[180]

In practice, the application of these principles means calming the nerves of parties while an issue is being investigated or explaining at length the grounds for a decision.[181] The *Bashingantahe* apply *bushingantahe* to their decision-making by emphasizing dialogue between parties, consensus, and collegiality.[182]

It is key to distinguish that Burundian tradition prescribes consultation with the people, not nomination by the authorities.[183] "Investiture is and always has been a

177. Barbara Vi Thien Ho, *Post-Conflict Burundi and the Role of Ubushingantahe Council*, AFR. FAITH & JUST. NETWORK (Jul. 17, 2009), http://afjn.org/post-conflict-burundi-and-the-role-of-ubushingantahe-council/.

178. The term *bushingantahe* is somewhat difficult to define, as it spans moral, cultural, social, and legal dimensions. Ingelaere & Kohlhagen, *supra* note 141, at 49. *Bashingantahe* see themselves as not only mediators following *bushingantahe*, but models of traditional and cultural values with the responsibility to pass them on to following generations. Kwizera, *supra* note 148, at 152.

179. *Id.*

180. Kwizera, *supra* note 148, at 151, 153; Litanga, *supra* note 140, at 49–50. *Bushingantahe* also includes certain skills and characteristics like public speaking, a strong work ethic, and economic independence. *See* Ingelaere & Kohlhagen, supra note 141, at 49; Litanga, supra note 140, at 49–50. "A sense of humor" is even included on one list. Litanga, *supra* note 140, at 49.

181. Ingelaere & Kohlhagen, *supra* note 140, at 141.

182. Kwizera, *supra* note 148, at 153. Interestingly, Burundians use the values of *bushingantahe* to evaluate the quality of formal judges as well. Ingelaere & Kohlhagen, *supra* note 141, at 50–51.

183. According to the traditional investment process, the community is involved in finally confirming a candidate, which functions as a contract with the

public affair" and opposition to one's investment, made by any citizen, "regardless of their age or rank, can contribute to an application for the status of *Bashingantahe* being annulled."[184] Only with the community's consent and after taking the oath, could someone become a *Mushingantahe*.[185]

If a *Mushingantahe* began to act in self-interest, rather than for the common good, or otherwise violated his oath, he could face a temporary ban or be disinvested.[186] The *Mushingantahe*'s oath also acknowledges that practicing corruption, sharing secrets, or committing other misconduct, could result in disinvestment or banishment.[187] If banished, the *Mushingantahe* may be allowed to come back and rejoin the council after a period of time and after a show of repentance.[188] Burundians continue the tradition of investment today and *Bashingantahe* continue to be invested in Burundi and abroad.[189]

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community and a source of legitimacy for the institution. At the final investment ceremony, the sponsor presents the candidate to the community, including the candidate's family and representatives of the chief. Makobero, *supra* note 143, at 31–32. Community members may object to investing the candidate. *Id.* The investiture must be supported unanimously, and even a child's objection is considered. DEXTER & NTAHOMBAYE, *supra* note 142, at 12 n.19. Providing there are no legitimate objections, the individual is formally invested, and the community holds a festival. *See id.* at 12. Several speeches are made, including one by a delegate of the community, who expresses agreement with the investiture. Makobero, *supra* note 143, at 32. The new *Mushingantahe* is given an *intahe*, and takes a public oath to follow the principles of the institution, including discretion, intelligence, respect for others, and a spirit of temperance, courage, and dedication. DEXTER & NTAHOMBAYE, *supra* note 142, at 12; *see* Nindorera, *supra* note 148, at 22–23 (describing an oath-swearing ceremony).

184. Naniwe-Kaburahe, *supra* note 11, at 164.

185. Nindorera, *supra* note 148, at 22.

186. *Id.* at 24.

187. DEXTER & NTAHOMBAYE, *supra* note 142, at 12; *see* Nindorera, *supra* note 148, at 22.

188. Nindorera, *supra* note 148, at 24. In case of a violation of a *Mushingantahe*'s agreement with the community, "the usual sanction was to chase him and his family from the neighborhood." *Id.*

189. Ingelaere & Kohlhagen, *supra* note 141, at 46; *see, e.g.*, Jérôme Bigirimana, *L'Institution burundaise des Bashingantahe s'exporte en Occident*, ARIB NEWS (Aug. 7, 2014), http://www.arib.info/index.php?option=com_

2. Dispute Resolution and other Duties

The three primary missions of the *Bashingantahe* are mediation, reconciliation, and arbitration.[190] The *Bashingantahe* seek to settle disputes by reconciling the parties or rendering a judgment, based on the nature of the conflict. They attempt to reconcile individuals, families, and the *colline*.[191] The *Bashingantahe* also perform duties similar to a notary, by authenticating and recording marriage, sale, and succession of land contracts.[192] They oversee inheritances and allocate land held in trust.[193] Traditionally, they held an advisory role to politicians, acting as kingmakers and a neutral check on the power of local chiefs.[194] Today, the *Bashingantahe* still maintain their position as judicial and moral ombudsmen, separate from and outside the government.[195] Others hold political office or an administrative position in their *colline*, acting as a formal representative.[196] The *Bashingantahe* generally oversee the maintenance of justice, provide security for community members' life and property, and emphasize respect for human rights and the common good.[197]

The traditional process of conflict resolution usually begins with private mediation, followed by a public

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190. Naniwe-Kaburahe, *supra* note 11, at 156–157.

191. VAN LEEUWEN, *supra* note 155, at 127–28; Kwizera, *supra* note 148, at 151; Makobero, *supra* note 143, at 32; Naniwe-Kaburahe, *supra* note 11, at 156.

192. DEXTER & NTAHOMBAYE, *supra* note 142, at 13–14; Nindorera, *supra* note 148, at 12; VAN LEEUWEN, *supra* note 155, at 127–28.

193. Naniwe-Kaburahe, *supra* note 11, at 156; *see* Kwizera, *supra* note 148, at 151.

194. DEXTER & NTAHOMBAYE, *supra* note 142, at 11; McClintock & Nahimana, *supra* note 144, at 86; Litanga, *supra* note 140, at 49.

195. McClintock & Nahimana, *supra* note 144, at 86; Nindorera, *supra*, note 148, at 12.

196. In this respect, the *Bashingantahe* run as non-partisan candidates, and in some areas make up 20% of the local state administrators. SCHEYE, *supra* note 141, at 18–19.

197. *See* Nindorera, *supra* note 148, at 14.

hearing.[198] When parties bring a conflict to the *Bashingantahe*, they first seek a *Mushingantahe* to give advice and attempt to mediate between the parties before there is any hearing or decision-making.[199] If the parties cannot be reconciled, then the *Mushingantahe* will convene the *Bashingantahe* council for arbitration.[200] The *Mushingantahe* who the parties first contacted about the dispute may not sit on the council who will adjudicate the case.[201]

Unlike the first reconciliation phase, the arbitration process is public and accusatory.[202] The *Bashingantahe* convene a meeting of a panel, which is usually outdoors.[203] The panel typically consists of between three and five *Bashingantahe*, some of whom have designated roles such as president and secretary.[204] Here, the council members officially become judges and render a decision. The parties first present their evidence without witnesses and the *Bashingantahe* question them.[205] The parties take turns describing their version of the facts and the *Bashingantahe* repeat back the facts and arguments to show they understand the situation.[206] This is meant to inspire a spirit of reconciliation and encourage parties to have an open mind, by making them listen to each other and hear the facts from a third party.[207]

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198. DEXTER & NTAHOMBAYE, *supra* note 142, at 12; Litanga, *supra* note 140, at 49.

199. Litanga, *supra* note 140, at 50.

200. Ingelaere & Kohlhagen, *supra* note 141, at 46–47; Litanga, *supra* note 140, at 50.

201. SCHEYE, *supra* note 141, at 17 n.52.

202. DEXTER & NTAHOMBAYE, *supra* note 142, at 12.

203. Ingelaere & Kohlhagen, *supra* note 141, at 47.

204. SCHEYE, *supra* note 141, at 17 n.52.

205. DEXTER & NTAHOMBAYE, *supra* note 142, at 13.

206. *Id.* at 12.

207. *Id.*

After *Bashingantahe* summon and interview witnesses, the *Bashingantahe* enter into secret deliberations until they reach a consensus on their decision.[208] The facts of the case and the reasoning employed by the *Bashingantahe* are then explained to the parties and the attending public in "common-sense terms."[209] After the *Bashingantahe* give their decision, the party that first approached the *Bashingantahe* invite the other party and the *Bashingantahe* to have banana or sorghum beer, which is shared with all people present.[210] This is done in the spirit of "celebrating and sealing the newly restored relationship" in front of the general public.[211] Aside from this requirement, there is traditionally no fee to use the services of the *Bashingantahe*.[212]

Compliance with the *Bashingantahe*'s decisions are voluntary, as they are not binding. The *Bashingantahe* do appoint a member of the community to oversee enforcement of the decision, but they do not have any coercive power themselves.[213] They rely primarily on the wisdom and persuasiveness of their reasoning, although community-wide peer pressure and respect for the *Bashingantahe* play a role

208. *Id.* at 13.

209. *Id.* at 12.

210. DEXTER & NTAHOMBAYE, *supra* note 142, at 13; Ingelaere & Kohlhagen, *supra* note 141, at 47.

211. DEXTER & NTAHOMBAYE, *supra* note 142, at 13.

212. *Id.* at 12.

213. *Id.* at 13. The *Bashingantahe* commonly use their influence to compel witnesses to appear before the council, which is an expression of the same social and moral authority they could use to encourage compliance. The use of social influence in this way is a common feature of traditional justice systems. "In order to restore harmony, therefore, there must be general satisfaction among the community at large, as well as the disputants, with the procedure and the outcome of the case. Public consensus is, moreover, necessary to ensure enforcement of the decision through social pressure." *Traditional & Informal Justice Systems: Traditional & Informal Justice & Peacebuilding Processes*, PEACEBUILDING INITIATIVE, http://www.peacebuildinginitiative.org/indexc7b8.html?pageId=1876 (last updated Apr. 6, 2009) (internal citation omitted).

in incentivizing cooperation.[214]

Since the revocation of the *Bashingantahe*'s formal legal authority by the Burundian government, the only approval or enforcement of *Bashingantahe* decisions are from local judges on an *ad hoc* basis. Some judges reference the *Bashingantahe*'s decisions for factual background of a case or hear appeals of them.[215] For those parties who wish for an appeal, they may pursue their case in formal court, despite the perception that courts are slow, expensive and corrupt.[216] Other than through these soft controls and *ad hoc* affirmations by local judges, the arbitration decisions are not binding and *Bashingantahe* do not have the State's coercive power to enforce decisions.[217]

Decisions are reached based on customary law, guided by tradition and custom, which commonly places importance on extended families and values the community over individuals.[218] The *Bashingantahe* usually convey their decisions through proverbs, axioms, or other traditional sayings, which serve as a sort of legal application of customary law.[219] There appears to be no official adoption of precedent.[220] Decisions are not always recorded, as some

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214. DEXTER & NTAHOMBAYE, *supra* note 142, at 13. "On the whole, the verdicts given by the Bashingantahe were accepted because they were recognized as fair and honest." Josephine Ntahobari & Basilissa Ndayiziga, *The Role of Burundian Women in the Peaceful Settlement of Conflicts*, *in* WOMEN AND PEACE IN AFRICA 11, 17 (UNESCO 2003). Social ostracism can be a significant behavioral control in this respect, influencing the actions of potential offenders and aiding the process of reintegrating those who did offend. TONY F. MARSHALL, U.K. HOME OFFICE RESEARCH DEV. & STATISTICS DIRECTORATE, RESTORATIVE JUSTICE: AN OVERVIEW 30 (1999).

215. DEXTER & NTAHOMBAYE, *supra* note 142, at 17–18; SCHEYE, *supra* note 141, at 17.

216. SCHEYE, *supra* note 141, at 17 n.51, 17–18; VAN LEEUWEN, *supra* note 155, at 128.

217. DEXTER & NTAHOMBAYE, *supra* note 142, at 20.

218. *Id.* at 13.

219. *See id.*; Ingelaere & Kohlhagen, *supra* note 141, at 47.

220. SCHEYE, *supra* note 141, at 17–18.

Bashingantahe are illiterate, and a few *Bashingantahe* who do make recordings may require the parties to offer beer before releasing minutes of their meetings.[221]

D. *Deviation from* bushingantahe *and Progress Towards Improvement*

Although the *Bashingantahe* promote the *bushingantahe* principles of fairness, impartiality, and integrity in their decision-making, the local practice of the *Bashingantahe* varies and may not always represent the standards of the institution. For example, although some *Bashingantahe* intervened during the ethnic conflict in Burundi, others did not condemn the violence.[222] Some of the *Bashingantahe* who were not selected by their communities are seen as falling short of the principles of the institution.[223] *Bashingantahe* also have not historically treated all ethnic groups or women equally. Despite these shortcomings, the *Bashingantahe* have maintained and improved their contribution towards society-wide justice and inclusion of ethnic groups and women. The continued prevalence of the *Bashingantahe* serves as evidence of the persistent effort to make these changes and better represent the virtues of *bushingantahe*.

1. *Bashingantahe* and Vulnerable Groups

There is some concern over vulnerable groups' access to

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221. DEXTER & NTAHOMBAYE, *supra* note 142, at 21.

222. *See* VAN LEEUWEN, *supra* note 155, at 128.

223. Many Burundians have the view that the more *Bashingantahe* are chosen by political authorities, instead of the traditional investiture process, the less they are representative of the traditional values of integrity and impartiality, and are more likely they are to be corrupt. Kwizera, *supra* note 148, at 151; *see* VAN LEEUWEN, *supra* note 155, at 128. Those that are political appointees are commonly selected based on membership in the ruling party, a diploma, or payment of a fee. Nindorera, *supra* note 148, at 14; *see* Mubiala, *supra* note 138, at 230. In the past, these appointees were commonly administrators and party bosses, and not invested traditionally. DEXTER & NTAHOMBAYE, *supra* note 142, at 14–15.

the *Bashingantahe*. Primarily, the concern centers around women and *Twa*, an ethnic group in Burundi who traditionally were not part of the *Bashingantahe* system.[224] *Twa* are by far the smallest minority in Burundi, and are socially and economically marginalized due to their hunter-gatherer lifestyle.[225] According to legend, women once sat on *Bashingantahe* councils, but at some point they were banned.[226] Access to an informal option for these vulnerable groups is especially important because they are even less likely to use formal methods of conflict resolution. For many, an informal conflict resolution mechanism may be their only avenue for access to justice.[227]

A lack of women or *Twa* on a *Bashingantahe* council can have a role in determining the treatment of participants that include women or *Twa*.[228] It may also have an effect on the willingness of those groups to come to the *Bashingantahe* with an issue, if they are prevented by fear of retaliation or social norms governing behavior.[229] Some Burundians state *Bashingantahe* do not treat men and women equally, and suggest that it is part of a larger picture of gender inequality in Burundi, which affects all institutions, formal and informal.[230] While the *Bashingantahe* are making efforts to include women and *Twa* in their councils, the issue of inequality remains. One example is that some

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224. *Id.* at 10.

225. USAID, PROPERTY RIGHTS AND RESOURCE GOVERNANCE: BURUNDI 5 (2010). In Burundi, the *Hutu* make up roughly 85% of the population, the *Tutsi* roughly 14%, and the *Twa* roughly 1%. McClintock & Nahimana, *supra* note 144, at 76.

226. Nindorera, *supra* note 148, at 14–15.

227. Kelsey Jones-Casey, *Land is Thicker than Blood or Water in Burundi: Intra-Family Land Disputes in a 'Post-Conflict' State*, U.S. INST. FOR PEACE: INT'L NETWORK FOR ECON. & CONFLICT (Jun. 9, 2013, 4:55 PM) (on file with author).

228. *See, e.g.*, Kwizera, *supra* note 148, at 159–60 (according to their survey of community traditional leaders, community members, local government leaders and national representatives in Burundi, 32.1% said the *Bashingantahe* do not respect women and the youth).

229. *See* Jones-Casey, *supra* note 227.

230. DEXTER & NTAHOMBAYE, *supra* note 142, at 20.

Bashingantahe do not enforce women's right to inherit property, even though it is sanctioned by state law.[231]

Women have increasingly become more involved with the institution.[232] In some areas, wives of *Bashingantahe* were traditionally invested alongside their husbands, in a quasi-*Bashingantahe* status.[233] This was called *bapfasoni*¸ a status that recognized one's character, but without granting the right to deliberate or render judgment with *Bashingantahe*.[234] Women could also participate in a parallel institution to the *Bashingantahe*, albeit limited to the female community. Respected women could be selected and sit on a council called *Inararibonye*.[235] They would, like the *Bashingantahe*, convene a council to hear disputes between women, deliberate, and render a judgment or give advice to the parties.[236]

Aside from the traditional facets of female involvement, the *Bashingantahe* have increasingly been investing women in their own right as full *Bashingantahe* since the 2000s.[237] For example, in some cases during the ethnic conflict, women judged as *Bashingantahe*, while men were absent.[238] As another alternative, some villages began investing women as

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231. *Id.*

232. SCHEYE, supra note 141, at 18.

233. *See* DEXTER & NTAHOMBAYE, *supra* note 142, at 20; SCHEYE, supra note 141, at 18.

234. DEXTER & NTAHOMBAYE, *supra* note 142, at 20. Although their authority was sometimes limited to advising their husbands, women formed a necessary part of investiture. This was because men were not considered worthy to become *Bashingantahe* without being married, and the wife of a *Mushingantahe* was considered as much of a role model for the community as her husband. Nindorera, *supra* note 148, at 24, 26.

235. Meaning "those who have seen many things." Ntahobari & Ndayiziga, *supra* note 214, at 20.

236. *Id.*

237. SCHEYE, *supra* note 141, at 18.

238. DEXTER & NTAHOMBAYE, *supra* note 142, at 16.

Bashingantahe with their husbands.[239] Like their husbands, women are given the same status, take an oath, may receive complaints, and may intervene in conflicts.[240] In some areas, however, this is more limited and the *intahe* is given only to the husband—in this situation a woman's authority as *Bashingantahe* may derive more from being a wife than being invested individually.[241] There are also women who are invested as *Bashingantahe* themselves and act in their own capacity as a widow of a *Mushingantahe*.[242] Burundians say that women now regularly sit on *Bashingantahe* panels, conducting public dispute resolution hearings and deliberating with the *Bashingantahe* council.[243]

Women commonly bring their issues to *Bashingantahe*. Although there is disagreement, a plurality of a group of *Bashingantahe* interviewees stated that more women than men come for adjudication or mediation.[244] Commonly, girls and adult women bring domestic violence cases and issues they may experience as a domestic worker.[245]

Membership in the *Bashingantahe* today is open to any individual regardless of clan or ethnicity, which is notable and beneficial given the history of ethnicity-based conflict in the country's history and the perceived bias towards Hutu or Tutsi in many formal institutions.[246] Although *Twa* were traditionally excluded from investiture, some have become fully invested as *Bashingantahe*, with *Twa Bashingantahe* present in each Burundian province.[247] There is still progress to be made, with the recognition that some *Twa* do not wish

239. SCHEYE, *supra* note 141, at 18.

240. Naniwe-Kaburahe, *supra* note 11, at 167.

241. *Id.*

242. SCHEYE, *supra* note 141, at 18; Naniwe-Kaburahe, *supra* note 11, at 167.

243. SCHEYE, *supra* note 141, at 18.

244. *Id.*

245. *Id.*

246. *See* Nindorera, *supra* note 148, at 18.

247. DEXTER & NTAHOMBAYE, *supra* note 142, at 10, 10 n.14.

to be invested as *Bashingantahe*, potentially due to the strong egalitarian roots of their culture.[248]

2. Continued Prevalence of the Bashingantahe and bushingantahe

Although the *Bashingantahe* have no legal standing, formal courts may recommend that conflicting parties see *Bashingantahe* and some will only hear cases that the *Bashingantahe* could not solve.[249] A Burundian court often uses the minutes of *Bashingantahe* councils in its cases, uses a *Mushingantahe* as a witness in a court proceeding, or asks *Bashingantahe* to assist in the implementation of a ruling.[250] The tribunals reaffirmed the *Bashingantahe*'s decisions an average of 74.6% of the time from 1988 to 2003.[251] People continue to bring their disputes to the *Bashingantahe* today, especially for complicated land disputes.[252] According to one author, around 80% of disputes brought to the *Bashingantahe* are resolved without appeal.[253] They still play a fundamental role in social cohesion and intervene in most family and neighborhood conflicts.[254]

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248. *Id.* at 10; *see* JEROME LEWIS, MINORITY RIGHTS GRP. INT'L, THE BATWA PYGMIES OF THE GREAT LAKES REGION 8 (2000).

249. DEXTER & NTAHOMBAYE, *supra* note 142, at 17–18; SCHEYE, *supra* note 141, at 17. It seems that the *Bashingantahe*'s minutes and knowledge are used to clarify the factual issues underlying the presented dispute, as well as provide background information on the parties' prior relationship. DEXTER & NTAHOMBAYE, *supra* note 142, at 18; *see* SCHEYE, *supra* note 141, at 17.

250. DEXTER & NTAHOMBAYE, *supra* note 142, at 18; SCHEYE, *supra* note 141, at 17.

251. DEXTER & NTAHOMBAYE, *supra* note 142, at 19. This corresponds with an interviewed group's statement that formal courts affirm the *Bashingantahe's* decision an estimated 75% to 80% of the time. SCHEYE, *supra* note 141, at 17.

252. *See, e.g.*, Jillian Keenan, *The Blood Cries Out*, FOREIGN POLICY (Mar. 27, 2015), https://foreignpolicy.com/2015/03/27/the-blood-cries-out-burundi-land-conflict/.

253. Charles Manga Fombad, *Strengthening Constitutional Order and Upholding the Rule of Law in Central Africa: Reversing the Descent Towards Symbolic Constitutionalism*, 14 AFR. HUM. RTS. L.J. 412, 445–46 (2014).

254. Ingelaere & Kohlhagen, *supra* note 141, at 46–47.

Although some *Bashingantahe* may act corruptly, traditionally invested *Bashingantahe* are usually accorded more trust and influence, particularly compared to other judges or government authorities.[255] The ideals of the *Bashingantahe* also continue to be prevalent through many Burundians' *ad hoc* selection of their neighbors or coworkers to mediate their disputes if they exhibit *bushingantahe*.[256]

VI. APPLYING THE LESSONS OF THE *BASHINGANTAHE*

The *Bashingantahe* show how an ADR program might function and what benefits it might gain by adopting similar principles and making similar improvements. The institution's evolution to incorporate *ad hoc* selection of neighbors and coworkers who exhibit *bushingantahe* hints at the wider applicability and value of *Bashingantahe* ideals.[257] These respected individuals do not seem too far from informal arbitration in the United States. Moreover, Burundian complaints of a slow and expensive judicial system seem be echoed by many in the United States.[258] ADR programs can learn from the *Bashingantahe* that the closer conflict resolution institutionary are to the people in conflict, in terms of their selection, access, and knowledge, the more respected, utilized, and effective the institution.[259]

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255. SCHEYE, *supra* note 141, at 18; Ingelaere & Kohlhagen, *supra* note 141, at 47; Kwizera, *supra* note 148, at 154–55. The government's act of co-opting the institution played a role in its decline in public esteem. *See* Ingelaere & Kohlhagen, *supra* note 141, at 47; Naniwe-Kaburahe, *supra* note 11, at 159. Some *Bashingantahe* are described as corrupt, unprepared, or as not fulfilling their commitments. DEXTER & NTAHOMBAYE, *supra* note 142, at 20–21; Ingelaere & Kohlhagen, *supra* note 141, at 47.

256. Ingelaere & Kohlhagen, *supra* note 141, at 47; Litanga, *supra* note 140, at 72, 102.

257. *See* Litanga, supra note 140, at 102.

258. BROWN ET AL., *supra* note 53, at 3, 5–6; Sternlight, *supra* note 2, at 582, 586, 590; *see* VAN LEEUWEN, *supra* note 155, at 128.

259. *See* Litanga, *supra¸* note 140, at 70, 104–06. Comparing the authority of the *Bashingantahe* who are selected traditionally by their community and those who are appointed by the state demonstrates this principle. Similar phenomena appear in situations where the state has co-opted a local institution. A

The *Bashingantahe* exemplify how ADR can increase access to dispute resolution, preserve relationships among parties, increase efficiency, take advantage of informality, and use consent. They also show how an ADR system might function to best avoid the pitfalls of CAA and minimize the concerns about the inability of mediation to achieve social justice, the lack of public accountability, and the quality and ethical control over mediators.

A. *The* Bashingantahe *and the Benefits of ADR*

1. Access

The *Bashingantahe* are accessible to everyday Burundians, and it remains a "natural" recourse for many.[260] This is particularly true for those who are poor, uneducated, or marginalized.[261] The cost in time and money for each party is reduced due to the proximity of the *Bashingantahe*. They are physically located at the *colline* in which they operate and are available to the community within the community itself. This lowers the distance someone might have to travel to have a conflict solved, placing a lighter burden on time and money.[262] They have an intimate knowledge of the background of many disputes that come before them, such as having witnessed the contract at issue.[263] This means they

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comparable example is the *Gacaca* in Rwanda, who, like the *Bashingantahe*, were a traditional institution of conflict resolution that played a role in handling ethnic conflict. The *Gacaca* were less effective and respected when they became a "state instrument" solely under state control. *See id.* at 56–58, 62–63. A positive example of the value of proximity in increasing effectiveness of a method of conflict resolution is found in Venkatesh's description of the underground economy of Chicago's Southside and the clergy's role in informal conflict resolution between police, gangs, and the community. VENKATESH, *supra* note 4, at 250–64.

260. SCHEYE, *supra* note 141, at 17–18.

261. Fombad, *supra* note 253, at 445–46.

262. *See* Bhat, *supra* note 13, at 49; *see also* BROWN ET AL., *supra* note 53, at 9 (explaining how ADR can better serve disadvantaged groups).

263. DEXTER & NTAHOMBAYE, *supra* note 142, at 20. While the *Bashingantahe* often have background information on the property or issue at the center of a dispute, it does seem that they seek to maintain a sort of *de novo* review of the

require less time to become informed on the facts of the case. This is more accessible than the formal court system in Burundi, where resolution of a conflict can take up to ten years, and courts often do not have the funds to travel to local villages.[264]

In principle, consulting the *Bashingantahe* is free, although the party bringing the case is expected to share beer after a resolution, and there are some instances where a *Mushingantahe* will require beer or a fee before hearing the case or to release meeting minutes.[265] The remedies assigned by the *Bashingantahe* are more affordable than the formal courts as well.[266] The *Bashingantahe* are closer, cheaper, and faster than the formal courts, which benefits parties who otherwise would not be able to access conflict resolution. This also benefits the courts when they use *Bashingantahe* or information from their hearings in the courts' proceedings.

2. Preserving Relationships

ADR can help preserve relationships of people and businesses when the program is designed to encourage parties to engage each other and discuss the problem neutrally.[267] The *Bashingantahe* and their traditions place a heavy emphasis on reconciliation of parties, distinguishing it from the adversarial mindset of litigation.[268]

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dispute. For example, the *Mushingantahe* who first received the complaint recuse themselves from the panel hearing the parties. SCHEYE, *supra* note 141, at 17 n.52.

264. BROWN ET AL., *supra* note 53, at 9; DEXTER & NTAHOMBAYE, *supra* note 142, at 20; SCHEYE, *supra* note 141, at 17 n.51.

265. DEXTER & NTAHOMBAYE, *supra* note 142, at 12–13, 21.

266. Fombad, *supra* note 253, at 446.

267. Bernstein, *supra* note 22, at 2241; Bhat, *supra* note 13, at 49.

268. The *Bashingantahe* depend on the parties' satisfaction with the result of the resolution and their relationship to ensure compliance with the decision. *See* DEXTER & NTAHOMNBAYE, *supra* note 142, at 13. Reconciliation, as opposed to a zero-sum mindset, is one of the fundamental principles of the Bashingantahe, and parties must attempt it before any further hearing can continue. Naniwe-Kaburahe, *supra* note 11, at 156–57; Litanga, *supra* note 140, at 50.

Bashingantahe are selected in a way that encourages the preservation of relationships. They are invested based on their impartiality, fairness, and discretion, with an eye towards how they can repair harmony in families and villages.[269] With a procedural step that attempts to preserve a relationship, and a beer-sharing ceremony to cement that reconciliation, the *Bashingantahe* show their focus on repairing parties' relationships.[270] They have proven their institution can do as much, having reconciled criminals and victims during the ethnic conflict.[271]

3. Efficiency

The swiftness with which Burundians report the *Bashingantahe* handle their conflicts, along with their

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269. Naniwe-Kaburahe, *supra* note 11, at 155. It could be fair to question whether a *Mushingantahe* would favor one side over the other or jump to conclusions based on personal knowledge of one's past behavior, given that the *Bashingantahe* are members of the community themselves, the use of secret deliberations, and the fact that many *Bashingantahe* hearing a dispute likely know the surrounding factual history. In the United States, we may similarly question whether impartiality and fairness could be maintained with few procedural safeguards, solely based on a determination of a community that a person is generally impartial and fair, like the selection process described above. *See supra* pp. 25–26. This concern betrays the differences between Burundian and American cultural presuppositions on how to best protect impartiality and fairness in an institution. In a discussion of concepts of "good governance," Peter Uvin describes how Burundians generally tend to focus less on structural safeguards:

> [T]he overwhelming majority of Burundians do not demand the Western institutions of democracy . . . . They care far more for security and minimal development than for elections or human rights laws. At the same time, they deeply desire equity, respect, [and] an end to corruption. Burundians have a language, a set of values, to describe better governance with, and it is the language of the institution of *bashingantahe*. A deep adherence to values of truth, justice, [and] non-discrimination appeared everywhere in our conversations [with interviewees]. While at first sight similar to Western concepts of human rights and good governance, this *bashingantahe*-inspired notion of respect is less focused on 'right structures' and more on 'good people.'

UVIN, *supra* note 155, at 78.

270. *See* DEXTER & NTAHOMBAYE, *supra* note 142, at 12.

271. *Id.* at 16; Naniwe-Kaburahe, *supra* note 11, at 160–61.

knowledge of the situation and parties before the conflict arises, is relevant to efficiency as much as it is to accessibility.[272] Fewer delays and faster resolution means those who are otherwise priced out of the ADR market may now access it.[273]

Even without access to coercive capabilities like the formal courts, the *Bashingantahe* are successful at resolving disputes at the local level. *Bashingantahe* resolve an estimated 80% of disputes taken to them.[274] This is significant, given the *Bashingantahe*'s decisions are not binding. Of the controls the *Bashingantahe* have over compliance with their decisions, some may be more difficult and contentious to replicate than others, such as a high level of social ostracism for those who do not comply with their decisions. Using tools such as explaining their reasoning, compromising parties' desires, having a high court affirmation rate, and appointing someone to oversee enforcement of the decision may be reasonable steps that ensure compliance with the decision.[275] Successfully resolved conflicts mean the parties spend less resources rehashing the same problem through a different method.

Some suggest that ADR programs should limit recitation of the law to oral presentation without briefs to increase efficiency.[276] While some *Bashingantahe* hearings lack any written record, and so practice this in effect, this option does have the possibility of hurting the efficiency and accuracy of an appeal.[277]

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272. DEXTER & NTAHOMBAYE, *supra* note 142, at 20.

273. *See* Wood, *supra* note 16, at 449.

274. Fombad, *supra* note 253, at 445.

275. *See* DEXTER & NTAHOMBAYE, *supra* note 142, at 13, 19; Naniwe-Kaburahe, *supra* note 11, at 166. "On the whole, the verdicts given by the Bashingantahe were accepted because they were recognized as fair and honest." Ntahobari & Ndayiziga, *supra* note 214, at 17.

276. *See, e.g.*, Carver & Vondra, *supra* note 8, at 127.

277. *See* DEXTER & NTAHOMBAYE, *supra* note 142, at 13

4. Informality

Reliance on custom and tradition leads the *Bashingantahe* to function informally, giving them the flexibility to tailor solutions to a unique and complicated problem.[278] Informalism makes the main benefit of ADR possible: "the production of mutually beneficial resolutions of problems on the parties' own terms."[279] It tolerates mercy and a focus on reconciliation between the parties more than the formal system.[280]

With the *Bashingantahe*, informality allows parties to choose an arbitrator or mediator whom they trust and who has specialized knowledge of their matter.[281] Traditionally, potential parties select, with the rest of the community, the *Bashingantahe* that may one day hear their dispute, according to who they think exhibit ideal qualities for adjudication and mediation. Although it does not seem that parties may decide which *Bashingantahe* sit on the council during their adjudication, parties may choose which *Mushingantahe* they wish to approach to first mediate the dispute.[282]

Parties continue to informally approach respected individuals who exhibit *bushingantahe*, but are not invested as *Bashingantahe*, showing how informality gives them choice over a mediator. The lack of a strict adherence to precedent or procedural rules and reference to custom are what give rise to the benefits of a low cost system, which avoids a win-lose mindset, and supports repairing of

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278. *See* Bush & Folger, *supra* note 27, at 4–5.

279. *Id.* at 7.

280. *See* Nolan-Haley, *supra* note 73, at 69.

281. The ability to informally choose an arbitrator is also present in the United States. *See, e.g.*, VENKATESH, *supra* note 4, at 250–64 (discussing using *ad hoc* selection of community members for informal conflict resolution in parts of Chicago).

282. *See* SCHEYE, *supra* note 141, at 17 n.52; Litanga, *supra* note 140, at 50.

relationships.[283]

5. Consent

Bashingantahe decisions are not binding, and there is a lack of power of enforcement, rendering the institution voluntary. Although this opens up their decisions to non-compliance, the *Bashingantahe* seem to manage this risk through social influence, peer pressure, wisdom and persuasiveness of reasoning, trying to meet the desires of the parties, and appointing someone to oversee enforcement.[284]

The benefit of consent is that by feeling they had a role in selecting the mediator and choosing to participate in the process, the parties may be more likely to comply with the decision.[285] Parties exercise consent by selecting the *Mushingantahe* they wish to first bring the dispute to for reconciliation, and likely by selecting many of the *Bashingantahe* who sit on the council in their *colline*. Given that any member of the community can oppose the investiture of a *Mushingantahe*, the consent of the wider public to be judged by that person can be implied.

An alternative explanation is that consent to the process does not make parties more inclined to comply, but that parties who are more inclined to settle and comply are more likely to choose ADR.[286] In this case, the *Bashingantahe* are filling a demand for voluntary arbitration. According to this idea, requiring a party to use the institution and making the decisions binding imposes decisions on those who are not more inclined to negotiate and settle. The mediation would likely be less successful if one or both of the parties do not want to negotiate and only want to litigate. Mandating these kinds of parties to attend mediation would use time and resources that could be better used resolving another

283. *See* Bush & Folger, *supra* note 27, at 7.

284. DEXTER & NTAHOMBAYE, *supra* note 142, at 13

285. Spangler, *supra* note 12.

286. Bernstein, *supra* note 22, at 2243.

conflict.[287]

Assuming a functioning and accessible formal court system, an ADR program can tolerate some noncompliance, for the sake of vindicating legal rights that are sometimes not recognized in ADR. While the *Bashingantahe* have made progress towards greater inclusion of women and *Twa* as full members, there is still concern over their treatment as parties in a dispute, given their lower social standing in Burundian culture.[288] The reliance on consent would enable a party whose legal rights were violated in a mediation or arbitration decision to reject the decision and claim those rights in formal court.[289] For example, a woman who has a right to inherit property under formal Burundian law might not be able to find *Bashingantahe* who would enforce it.[290] Such a person could potentially seek to enforce those rights by the formal court, assuming an accessible and functioning formal court.

Consent plays a role in encouraging compliance, as the *Bashingantahe* cannot necessarily enforce compliance.[291] A voluntary system attracts those who wish to cooperate with the *Bashingantahe*'s decision. In a larger view, the reliance on consent is also advancing the public interests of enhanced self-determination and the parties' respect for each other.[292] Consenting to and taking an active role in mediation with another party can serve as "civic education" that builds a

287. *See id.*

288. *See, e.g.*, DEXTER & NTAHOMBAYE, *supra* note 142, at 13. This concern is reflected in the United States, as it pertains to women and other minority populations. *See* Yamamoto, *supra* note 49, at 1059–60. The ability of informal ADR programs to address society-wide injustice and involvement with these groups is discussed later in this Comment. *See infra* pp. 215–22.

289. *See* Bernstein, *supra* note 22, at 2243.

290. DEXTER & NTAHOMBAYE, *supra* note 142, at 13, 20, 39; *see* VAN LEEUWEN, *supra* note 155, at 128.

291. See the discussion of the reliance on persuasiveness of reasoning and social norms to encourage compliance, *supra* pp. 198–99 and accompanying notes.

292. Bush & Folger, *supra* note 27, at 36 (internal citation omitted).

capacity for consideration and respect for other groups by listening and responding to their case, and is a way to reverse learned dependency on outside experts and institutions.[293]

B. *The* Bashingantahe *and the Criticisms of ADR*

Even if a system of ADR is democratic, in that it is controlled by and proximate to the people who use it, some suggest that ADR just adds another layer of litigation to the court system. Besides, ADR is private and informal, which can be hostile to the rule of law and detrimental to achieving justice. Some of the actions of the *Bashingantahe* show how an institution of ADR can advance the ideals of social justice, inside and outside the context of arbitration. They show how an ADR program might effectuate public accountability and minimize the risks of informality, such as unqualified or unethical mediators. One of the key aspects of the institution is reconciliation through mediation.[294] Because of this focus, the *Bashingantahe* structure does not form another layer of litigation underneath the formal judicial system—it provides reconciliation.[295]

1. 'Just Another Layer to the Court System'

Although the *Bashingantahe* were co-opted as an auxiliary to the courts in the past and today local judges still refer cases to the *Bashingantahe*, the service they provide is reconciliation, not litigation.[296] This means the

293. *Id.*

294. DEXTER & NTAHOMBAYE, *supra* note 142, at 12–14, 18–20; VAN LEEUWEN, *supra* note 155, at 127.

295. *See* SCHEYE, *supra* note 141, at 17. Litigation and mediation may overlap in that they may result in the same legal outcome, but the goals are not the same. The themes of "fairness, discretion, natural justice, and good conscience" characterize equity and are prevalent in mediation. They are sometimes considered "anti-legal elements" and tend to disappear from conflict resolution mechanisms as the mechanism formalizes because they may not coincide with statutorily created penalties or rights. Nolan-Haley, *supra* note 73, at 58–62; *see* VAN LEEUWEN, supra note 155, at 127.

296. SCHEYE, *supra* note 141, at 17.

Bashingantahe have a different function, and so they do not operate as an extra layer of litigation beneath the formal court system.

The *Bashingantahe*'s primary goal of reconciliation counters the mindset of approaching ADR like a zero-sum game.[297] The *Bashingantahe* use a conciliatory tone and focus on continuing the relationship between the parties, much like a mediator between two businesses might use a positive tone to express the benefits of continuing to do business with each other.[298]

The *Bashingantahe* are natural and neutral expert witnesses themselves.[299] The presence of a neutral expert witness pressures the parties to negotiate and furthers the goal of reaching a conciliatory solution. Whereas the presence of a partisan expert causes the parties to harden their positions according to the testimonies of divergent witnesses, a neutral expert takes certain facts out of contention and prevents parties from manipulating some facts to their benefit.[300]

For parties who truly want to litigate, or act like they do, ADR will likely not be able to reconcile them. These parties will most likely appeal the arbitration decision and proceed onto litigation, with less time and money to spare.[301] Mediation should serve those who wish to reconcile, and the

297. A zero-sum approach to mediation increases expenses and time and makes the mediation less likely to succeed. A possible preliminary flaw of ADR is when "litigious habits worm their way into the process," and the "mediation" begins to balloon with excess motions, discovery, depositions, and witnesses. Carver & Vondra, *supra* note 8, at 120–21.

298. *Compare* Mubiala, *supra* note 138, at 230 (describing how the *Bashingantahe* promote a positive relationship between parties), *with* Carver & Vondra, *supra* note 8, at 129 (describing how a mediator promotes a positive relationship between parties).

299. *See* DEXTER & NTAHOMBAYE, *supra* note 142, at 12; *see e.g.,* Keenan, *supra* note 252.

300. Carver & Vondra, *supra* note 8, at 128.

301. *See, e.g.*, Brooker, *supra* note 2, at 14, 23, 25.

structure of the *Bashingantahe* encourages this by being voluntary.[302]

The simplified procedures, swifter process, focus on reconciliation, and lack of a penalty for appealing a decision to the formal court make the *Bashingantahe* function less like a lower-level trial court or CAA program. Instead, it is a separate institution that provides a separate service: equity through mediation under its own brand of customary law. Like those who voluntarily choose ADR, the Burundians' continued use of the *Bashingantahe* demonstrate a demand for reconciliation, around which the institution is structured to serve.

1. Social Justice Concerns

a. Inclusion of Vulnerable Groups

One concern of ADR is that its informal and private nature makes it ineffective at achieving social justice, in the sense that it does not protect parties that have significantly different power and status.[303] But the changes the *Bashingantahe* have made towards its treatment of vulnerable groups show how an ADR program could make process towards checking cultural biases and ensuring fair decisions.

The members of the community select *Mushingantahe* on the basis of their fairness, impartiality, and respect for human rights, who then must agree to uphold those principles.[304] The arbitration is traditionally free, and so the

302. *See* Ntahobari & Ndayiziga, *supra* note 214, at 17. This is said with the recognition that many do not have the option of pursuing formal litigation in Burundi because of the lack of access. *See* SCHEYE, *supra* note 141, at 22.

303. Bush & Folger, *supra* note 27, at 5, 30; Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology*, 9 OHIO ST. J. DISP. RESOL. 1, 14 (1993) (arguing that the unwritten, informal law of mediation avoids "[d]iscussion of blame or rights," and is "replaced by the rhetoric of compromise and relationship," which "thereby obscur[es] issues of unequal social power"); Sternlight, *supra* note 2, at 570–71.

304. Nindorera, *supra* note 148, at 22; Litanga¸ *supra* note 140, at 49; *see*

advantage and influence of money is reduced.[305] Their hearings are in public, they have an intimate knowledge of the circumstances of the dispute, and the explanation of the *Bashingantahe*'s reasoning is in common-sense terms.[306] As a result, the public has a better opportunity to recognize manifested prejudice and may select a different *Mushingantahe* to approach with a conflict or could run the biased *Mushingantahe* out of the village for an egregious violation of the oath.

Although some *Bashingantahe* are accused of partiality, the *Bashingantahe*'s procedures and involvement of *Twa* and women show a degree of public control over the informal hearings. They also show the responsibility the *Bashingantahe* feel towards the community and their resulting efforts to remain fair. As the *Bashingantahe* take steps to remain proximate in their selection process, explain decisions, and better involve vulnerable groups, the public can better check bias.[307]

b. Micro- and Macrosocial Justice

The *Bashingantahe* show how an ADR program might be structured to better produce "macro-level" changes to social

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Kwizera, *supra* note 148, at 152.

305. *See* Bhat, *supra* note 13, at 49.

306. DEXTER & NTAHOMBAYE, *supra* note 142, at 12. Although the hearings are public, the *Bashingantahe* deliberations are in secret. *Id.* at 13. In spite of the secret deliberations, however, Burundians view multi-person panels as more trustworthy than a single decision-maker like a judge in the court system. *See* Ingelaere & Kohlhagen, *supra* note 141, at 51.

307. This is said with the recognition that if the entire public is biased, then they likely will not be a check on similarly biased mediators. Social-wide norms then may not be the sole fault of the arbiter or mediators, and so the solution would be to change the norms of the public as much as it would be to change the norms of the ADR system. Still, the continued inclusion of women and *Twa* in the institution will likely aid in checking bias in decision-making. It may be one of the reasons why surveyed Burundians felt that *Bashingantahe* made their decisions without regard to sex, wealth, age, physical condition, ethnicity or political membership. DEXTER & NTAHOMBAYE, *supra* note 142, at 20.

justice.[308]

Both the community and the *Bashingantahe* have methods to change or develop the principles by which the *Bashingantahe* arbitrate. At *Bashingantahe* hearings, villagers may come to listen and give an opinion.[309] Also, the villagers exercise some localized control over investment and disinvestment of the mediators. The community can use their involvement as a lever to effectuate changes at the macro-level. The *Bashingantahe* can also choose to make decisions to advance the equality of parties, or otherwise contribute to social justice. The *Bashingantahe* have adapted their traditions and customs to advance social justice through their growing inclusion of women and *Twa*. The *Bashingantahe* can also interpret and apply the principles of *bushingantahe* to promote macro-justice, similar to a system of judge-made law.[310] When the *Bashingantahe* are "speaking the law" in arbitration, they can modify customary law "in the service of social evolution."[311]

Moreover, macro-level social justice can be achieved through the many actions that produce policy change, such as "legislative enactments, changes in legal doctrine, or shifts in political power."[312] The *Bashingantahe* have a history of working outside the sphere of mediation to support justice at the macro-level.[313] They have acted as

308. *See generally* Bush & Folger, *supra* note 27, at 3–4 (explaining how ADR can produce macro-level social equality by distributing micro-level justice to individual disputes).

309. Ntahobari & Ndayiziga, *supra* note 214, at 17.

310. The Bashingantahe apply customary law, and make decisions based on the values of *bushingantahe*. Nindorera, *supra* note 148, at 12. The Bashingantahe do not follow a strict adherence to precedent, as many Bashingantahe do not write down their decisions. This leads to the suggestion that NGOs should provide Bashingantahe with literacy education, and train them in preparing and storing records of their decisions. DEXTER & NTAHOMBAYE, *supra* note 142, at 21, 48.

311. Nindorera, *supra* note 148, at 12 (internal citation omitted).

312. Bush & Folger, *supra* note 27, at 4.

313. *See* Kwizera, *supra* note 148, at 152.

representatives of their *colline* and mobilized groups to arrest killers and looters during ethnic violence.[314] The *Bashingantahe* educate the public about their rights and teach them respect for the law.[315] The National Council of *Bashingantahe* makes public statements condemning sexual violence and supporting the freedom of the press.[316] The *Bashingantahe* also played a nation-wide role in reconciling offenders after the ethnic conflict.[317]

Local control over the *Bashingantahe* and their interpretation of *bushingantahe* can be used to advance social justice on a macro-level. The *Bashingantahe* have also taken steps that show that arbitrators and mediators can act outside their role and serve as community organizers and representatives who contribute to social justice.

2. Public Accountability Concerns

The *Bashingantahe* are public figures and their investment and contract with their community makes clear their accountability to the public. The local involvement is a source of legitimacy under which they make decisions on moral and legal questions and interpret the public values encompassed by *bushingantahe*.[318] The dispute resolution process is transparent, as the public may watch and

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314. Naniwe-Kaburahe, *supra* note 11, at 160–61.

315. Makobero, *supra* note 143, at 31, 36.

316. *E.g.*, Déclaration du Conseil National des Bashingantahe du 17 septembre 2008, *Halte au musellement de la presse, à l'insécurité et à la violence sexuelle faite aux femmes!*, 1, 3, https://www.uantwerpen.be/images/uantwerpen/container2143/files/DPP%20Burundi/Pouvoir%20judiciaire/Bashingantahe/ConsNatBash_Declar170908.pdf ("Il exprime sa profonde inquiétude suite à cette situation pour le moins inattendue dans un pays qui cherche à promouvoir la gouvernance par le dialogue et dont la Constitution reconnaît bel et bien la liberté de la presse et le droit d'expression de façon générale;" "[e]nfin, sur un autre plan, le Conseil National des Bashingantahe constate que l'ampleur des viols et des violences sexuelles exercés contre des femmes, des filles et de enfants devient de plus en plus une calamité dans notre pays.").

317. DEXTER & NTAHOMBAYE, *supra* note 142, at 16.

318. *See* McClintock & Nahimana, *supra* note 144, at 86.

contribute to the discussion.[319] Therefore, the *Bashingantahe* have a degree of democratic legitimacy to speak for the interests of the community.[320]

The history of the *Bashingantahe* shows that with public involvement in the process, through selection of arbitrators or witnessing hearings, an ADR system can be designed to maintain public accountability. Without public involvement, a conflict resolution system stands to lose legitimacy, as it did with those *Bashingantahe* who were appointed by the government. When the institution was vertically integrated, it became untrusted because the state co-opted control of the *Bashingantahe* from the *colline*.[321] The connection the *Bashingantahe* have with their communities is the vehicle of public accountably.

3. Quality and Ethical Concerns

ADR also raises the question of how to ensure mediators are ethical and of good quality. Mediation often relies heavily on the mediator's skill for the effort to succeed.[322] Even with sufficient skill, a mediator could be misled by an incomplete view of the facts surrounding the dispute and possibly without the procedural tools to request more information.[323]

One solution is the creation of a professional arbitrator or mediator corps, along with set ethical standards or competency tests.[324] But a requirement to use such a professionalized corps before the ability to sue in a court effectively creates a lower tier of courts, but without formal procedural protections.[325] The *Bashingantahe* function as a

319. DEXTER & NTAHOMBAYE, *supra* note 142, at 12.

320. *See* SCHEYE, *supra* note 141, at 1; Vi Thien Ho, *supra* note 177.

321. *See* DEXTER & NTAHOMBAYE, *supra* note 142, at 6; Kwizera, *supra* note 148, at 154–55.

322. Weiss, *supra* note 18, at 32.

323. *Id.* at 33.

324. Wood, *supra* note 16, at 448.

325. *Id.*

corps of professional arbitrators and mediators, and they have the benefit of accumulating experience and expertise through repeated exposure to disputes and devising solutions. However, they avoid the issues of a lower tier of courts, because the institution is voluntary. Parties may alternatively go through the courts or to another mediator, such as a respected neighbor or coworker.[326] Through a mediator corps, mediators can develop general dispute resolution experience, like how the *Bashingantahe* or career judges would accumulate on-the-job expertise over time.[327]

It would likely be difficult to replicate the intimate knowledge *Bashingantahe* have of parties' cases and circumstances outside the context of a small village or local neighborhood. The information a *Mushingantahe* has gained through day-to-day observation of behavior and agreements relies heavily on face-to-face interaction with local constituents.[328] A mediator in another context may not be able to have this level of prior face-to-face interaction with the parties before they have a dispute. One way to address this may be to use a group or panel in arbitration, like the *Bashingantahe*. Decision-making in groups can sometimes aid a lack of technical expertise by using "combined expertise," as one member of a panel may be able to inform or compensate for another.[329]

But even without intimate knowledge, the arbitrator's knowledge of the context of the dispute will aid the quality of the decision. There is a degree to which a mediator may be able to understand a community's broader context and social values if the mediator operates in the locality and is "organically connected" to the community, like the *Bashingantahe*. At least these mediators would be more

326. Although the *Bashingantahe* were designated as a lower tier of courts in the past. VAN LEEUWEN, *supra* note 155, at 127.

327. *See* Wood, *supra* note 16, at 447.

328. *See* DEXTER & NTAHOMBAYE, *supra* note 142, at 20.

329. *See* Wood, *supra* note 16, at 447–48.

likely to have a basic understanding of the values by which the public would like the dispute to be resolved.

The community's judgement exercised in selection and disinvestment suffices for an effective competency test and ethical standard in the case of the *Bashingantahe*. The qualities desired for a *Mushingantahe*, such as credibility, intelligence, and integrity, are made clear throughout the observation and selection process.

Mediators and arbitrators may also be corrupt, or develop biases against a party, and without a check on these actions, the result of a negotiation could be skewed.[330] Corrupt *Bashingantahe* exist, particularly where the state has wrested control of the selection process from the local communities.[331] Where the local community retains control, they still take action to monitor corruption and control violations of a *Mushingantahe*'s oath to be honest, impartial, and fair through disinvestment or banishment.[332]

Promoting local control over local mediators and arbitrators is not to say the state could not provide a competency test or ethical standard as well. State involvement or regulation should be balanced so that it does not substitute local control over the mediators for its own control. The experience of the *Bashingantahe* shows that distancing communities from the selection process removes a tool they have for quality control and public accountability.[333]

Each *colline* has a role in ensuring sufficient quality of

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330. Sternlight, *supra* note 2, at 587.

331. Ingelaere & Kohlhagen, *supra* note 141, at 47. For example, a requirement to provide beer upfront before *Bashingantahe* hear a case is like an unauthorized fee, instead of a shared gift at the end of the ceremony. *See* DEXTER & NTAHOMBAYE, *supra* note 142, at 20, 20 n.51.

332. DEXTER & NTAHOMBAYE, *supra* note 142, at 12.

333. *See* Kwizera, *supra* note 148, at 151–52. Comparing the relevance of the *Bashingantahe* to the *Gacaca* provides this principle as well. *See supra* note 259 and accompanying text.

the *Bashingantahe*. Certain aspects of the institution, such as using a multi-person panel and maintaining connection to the community help to make sure the *Bashingantahe* are making quality decisions. These are tools to prevent and correct corruption and systematic unfair decisions by a *Mushingantahe*.

VII. CONCLUSION

While the *Bashingantahe* have room for improvement, including a need for more training, greater scrutiny of corruption, greater involvement of vulnerable groups, and maintaining community involvement, their methods and principles offer potential solutions to many of the core concerns surrounding ADR.[334] As ADR programs struggle with striking a balance between formalism and informalism, many mix the two doctrines and end up with a program that suffers from the problems of formalism while achieving none of the benefits of informalism.[335] Adherence to some degree of informalism may be necessary for an ADR program to effectively deliver on the promised benefits of increased access, preservation of relationships, greater efficiency, informality, and consent.

The example of the *Bashingantahe* can serve as advice on how to best avoid the pitfalls of ADR, by promoting social justice, increasing public accountability, and ensuring mediators are qualified and held to ethical standards. The *Bashingantahe*'s answer is a system designed to be proximate to the community it serves, meaning that its flexible, informal nature can be used and adapted by the community to meet their needs. An ADR system with public selection of mediators or arbitrators, easier access, and mediators or arbitrators with more knowledge or understanding of the community results in a more respected,

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334. DEXTER & NTAHOMBAYE, *supra* note 142, at 7–8.

335. *See generally* Wood, *supra* note 16, at 453–56 (explaining how efforts to balance informalism with formalism can hurt the ADR process).

utilized, and effective institution.

In practice, this means ADR programs need to have a corps of mediators or arbitrators who are selected and evaluated by the communities they serve. This gives the community the ability to select those who have a certain degree of expertise or quality, or who match their values. ADR would not be a lower tier of the court system, acting as an additional forum for litigation, but could instead provide a different kind of public good or service, such as reconciliation of parties. Because the mediators and arbitrators are qualified to represent the voice of the community, they can expand their role outside of conflict resolution, and contribute to macro-level social justice as community organizers and mobilizers.

Increased local public involvement in selection and the process of ADR can be a check on bias and prejudice in an otherwise informal setting. ADR programs could also accomplish this by increasing the inclusion of vulnerable groups as mediators and arbitrators and use multi-member panels for adjudication. A multi-member panel also could have the benefit of increasing quality of the decisions and preventing opportunity for corruption.

If the arbitrators and mediators have an organic connection to the community, they are more likely to have better knowledge of the circumstances of the parties and their dispute, or at least the broader context of the community. This equates to more accurate decisions and more satisfied parties, meaning a greater chance of voluntary compliance. If the arbitrators are locally based, that also means cheaper and easier access for the parties who have a dispute.

An ADR program of this style should also be voluntary and non-binding. In a voluntary and non-binding program, parties are not channeled into a system that lacks procedural protections and infringes on their legal rights without their consent. It gives the parties an ability for recourse, and incentivizes the mediators to try to find common ground and

be effective if they wish to be utilized.

The methods and principles of the institution, centered around preserving democratic legitimacy through proximity to the public, give parties access to a way of resolving conflicts without lengthy proceedings, high costs, and destroying relationships. The *Bashingantahe* show this can be achieved with a sufficient degree of public accountability to ensure fairness and quality in their judgements. Parties must choose which forum they want to solve a dispute and in some cases a formal court may be the best answer. But when parties select ADR, the program should take the ideas of the *Bashingantahe* into consideration so it can better provide an efficient and fair solution.

APPENDIX: GLOSSARY OF TERMS[336]

Term	Definition
Bapfasoni	The status traditionally given to a wife of a *Mushingantahe*; related to *ubufasoni*.
Bashingantahe	More than one of such a person (plural).
Bashingantahe council	The traditional council made up of *Bashingantahe*.
Bushingantahe	Pronounced ubu shing' ga ta' he. The set of virtues that include justice, honesty, self-esteem, and an ethic of hard work. Roughly summed up as "integrity."
Colline	"Hill" in French, but it is an administrative unit that encompasses several hills, similar to a spread-out village or neighborhood.
Inararibonye	"Those who have seen many things." Traditionally, the council of women that settled conflicts among women.
Intahe	"Stick of justice," symbolizing the authority of a *Mushingantahe*.
Mushingantahe	An adult who exemplifies *bushingantahe*; a "wise man."
Ubufasoni	Dignity; the quality of being a good human.

336. This glossary is adapted from Nindorera, *supra* note 148, at 32. Throughout academic literature on this subject, different authors refer to these words differently. Most involve differences in spelling, such as using *Batwa* where another author uses *Twa,* or *Abashingantahe* and *Bashingantahe*. I have used the shorter labels for the sake of consistency. There is also confusion over whether to interpret *Bashingantahe* to mean the people and the institution or just the people, and whether to interpret *bushingantahe* as the name of the institution or the set of values. I adopt the definitions above, as used by Ingelaere & Kohlhagen, *supra* note 141, at 48–49.