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CONSENSUS, CONSCIENCE, AND JUSTICE: NAVIGATING ETHICAL DILEMMAS OF ADR IN SOUTH AFRICA AND THE BRICS CONTEXT

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Abstract. *Alternative Dispute Resolution (ADR) has gained prominence globally as a mechanism for resolving conflicts outside traditional court systems. In South Africa, ADR is not only a pragmatic response to judicial inefficiencies but also a constitutional tool for promoting access to justice, equality, and participatory democracy. However, the ethical dimensions of ADR, particularly in contexts marked by socio-economic disparities and cultural pluralism, pose significant challenges. This paper explores these ethical dilemmas within South Africa's ADR framework and compares them with similar issues in other BRICS nations. It argues that South Africa's unique blend of transformative constitutionalism and the ethical philosophy of Ubuntu offers a compelling model for ethically grounded ADR. The paper concludes by proposing strategies for strengthening ethical standards and fostering BRICS-wide cooperation in dispute resolution.*

Keywords: *Alternative Dispute Resolution, ADR, South Africa, ethical dilemmas, transformative constitutionalism, Ubuntu, access to justice, BRICS.*

1. Introduction

Alternative Dispute Resolution (ADR) has emerged as a vital mechanism for resolving disputes both within national jurisdictions and across international boundaries. Its appeal lies in its efficiency, flexibility, and capacity to alleviate the burden on formal judicial systems an especially pressing concern in emerging economies¹. In South Africa, ADR is embraced not only as a practical solution

¹ Bingham L. (2020). *The global rise of alternative dispute resolution*. Cambridge University Press.

to litigation delays but also as a means of advancing constitutional commitments to access to justice, equality, and participatory democracy¹.

Yet, ADR is not without its ethical complexities. Critical questions arise: Can mediator neutrality be maintained in environments characterized by stark socio-economic inequalities? Does the principle of confidentiality serve to protect vulnerable parties, or does it risk concealing unethical conduct? How can culturally embedded notions of fairness, such as the Southern African philosophy of Ubuntu — be reconciled with global norms of ethical practice?

These questions are not merely theoretical. They have tangible implications for justice outcomes and public trust in dispute resolution systems. This paper investigates these ethical challenges within South Africa's ADR landscape and situates them within the broader context of the BRICS nations, Brazil, Russia, India, China, and South Africa. By comparing South Africa's experiences with those of its BRICS counterparts, the paper identifies both shared ethical dilemmas and distinctive approaches to resolving them.

The central argument is that South Africa's transformative constitutionalism, when coupled with the ethical imperatives of Ubuntu, provides a robust framework for crafting ADR systems that balance efficiency with fairness and justice. The article unfolds in a structured progression. Section 2 examines the theoretical and constitutional foundations of alternative dispute resolution (ADR) in South Africa, highlighting how its evolution reflects broader principles of justice, equality, and transformation. Section 3 turns to the ethical dilemmas that arise within ADR practice, analysing tensions between neutrality, fairness, and accountability. Building on this, Section 4 provides comparative insights from other BRICS jurisdictions, drawing lessons from their institutional and cultural approaches to ethical regulation. Section 5 advances proposals for establishing ethically grounded ADR frameworks that integrate both international standards and indigenous values such as Ubuntu. Finally, Section 6 concludes with reflections on how ADR can strike a principled balance between consensus and conscience, ensuring that the pursuit of harmony does not come at the expense of justice.

2. Theoretical and constitutional foundations of ADR in South

2.1. ADR in Global and African Legal Traditions

Alternative Dispute Resolution (ADR) encompasses a range of mechanisms, including mediation, arbitration, conciliation, and negotiation, that serve either as alternatives to or complements for formal litigation². Globally, ADR is often

¹ De Vos P. (2018). Access to justice and ADR in South Africa // *Constitutional Court Review*, 6 (1). Pp. 34–57.

² Menkel-Meadow C. (2019). *Mediation: Theory, policy, and practice*. Oxford University Press.

promoted for its efficiency, cost-effectiveness, and ability to reduce the caseload of overburdened courts. However, in African contexts, ADR is deeply rooted in customary practices that prioritize communal harmony, relational restoration, and consensus-building over adversarial confrontation.

In South Africa, these indigenous traditions of dispute resolution, characterised by community involvement and reconciliation, intersect with formal legal systems. This convergence presents a unique opportunity to integrate culturally grounded ethical principles into modern ADR frameworks. As Chitere and Irungu¹ (2017) observe, African dispute resolution methods emphasize the restoration of social relationships and the maintenance of community cohesion, values that are increasingly recognized as essential to sustainable justice.

2.2. South Africa's Transformative Constitutionalism

South Africa's post-apartheid constitutional order is founded on the principle of transformative constitutionalism, a legal philosophy that seeks to redress historical injustices and promote substantive equality, social justice, and democratic participation². Within this transformative framework, ADR is not merely a procedural convenience; it is a constitutional imperative that supports the realization of fundamental rights.

Legislative instruments such as the Promotion of Access to Information Act (PAIA)³ and the Promotion of Administrative Justice Act (PAJA)⁴ reinforce the constitutional commitment to transparency, accountability, and inclusivity in dispute resolution. ADR mechanisms, when aligned with these values, become tools for empowering marginalized communities and enhancing access to justice. Thus, ADR in South Africa operates at the intersection of legal pragmatism and moral responsibility, requiring practitioners to be attuned not only to procedural fairness but also to the broader ethical implications of their work.

2.3. Ubuntu as an Ethical Lens

The Southern African philosophy of Ubuntu offers a profound ethical lens through which ADR can be understood and practiced. Rooted in notions of human dignity, relationality, and communal solidarity, Ubuntu emphasizes the interconnectedness of individuals within a community⁵. In the context of ADR,

¹ Chitere P., Irungu P. (2017). African dispute resolution traditions: Mediation and reconciliation // *African Journal of Legal Studies*, 12(1). Pp. 78–102.

² Klare K. (1998). Legal culture and transformative constitutionalism // *South African Journal on Human Rights*, 14(1). Pp. 146–188.

³ The Promotion of Access to Information Act 2 of 2000 (PAIA).

⁴ The Promotion of Administrative Justice Act 3 of 2000 (PAJA).

⁵ Letseka M. (2012). Ubuntu and moral responsibility in Africa // In: Murove M. W. (ed.). *African ethics: An anthology of comparative and applied ethics*. University of KwaZulu-Natal Press. Pp. 25–40.

Ubuntu encourages mediators and arbitrators to prioritize reconciliation, mutual respect, and restorative justice over adversarial victory.

This ethical orientation challenges dominant Western models of dispute resolution, which often emphasize individual rights, procedural neutrality, and adversarial logic. Instead, Ubuntu calls for a more holistic approach, one that recognizes the moral obligations of disputants and practitioners to foster healing, understanding, and social harmony. As such, Ubuntu not only enriches the ethical foundations of ADR in South Africa but also offers a compelling alternative to global norms that may overlook the cultural and relational dimensions of justice.

3. Core ethical challenges of ADR in South Africa

Despite its promise, ADR in South Africa is fraught with ethical complexities that must be addressed to ensure that dispute resolution processes are not only efficient but also just and equitable. This section explores five key ethical challenges that undermine the integrity and inclusiveness of ADR mechanisms.

3.1. *Neutrality and Power Asymmetries*

Neutrality is widely regarded as a foundational principle of ADR. Mediators and arbitrators are expected to remain impartial, facilitating dialogue without favouring any party. However, in socio-economically stratified contexts such as South Africa, true neutrality is difficult to achieve. Parties with greater financial resources, legal knowledge, or institutional power may exert disproportionate influence over the process, subtly coercing less empowered participants into accepting unfavourable settlements¹.

This imbalance raises critical ethical concerns. ADR practitioners must be trained to recognize and mitigate power asymmetries, ensuring that all parties can participate meaningfully and without intimidation. Failure to do so risks transforming ADR from a tool of justice into a mechanism of quiet coercion.

3.2. *Consent and Voluntariness*

The legitimacy of ADR hinges on the principle of voluntary participation. Parties must enter the process freely, with informed consent and a genuine willingness to resolve their disputes collaboratively. However, economic hardship, limited legal literacy, and lack of access to legal representation can compromise this voluntariness. Individuals may feel pressured to accept settlements they do not fully understand or agree with, particularly when ADR is presented as the only viable alternative to costly litigation².

¹ Boule L. (2018). *Mediation: Skills and Techniques*. Durban: LexisNexis.

² Fitzpatrick T. (2020). Voluntariness in mediation: Ethical challenges // *Mediation Quarterly*, 37 (3). Pp. 56–72.

Ethical ADR practice requires safeguards to ensure that consent is not only formal but substantive. This includes providing accessible information, legal support, and procedural clarity to all participants, especially those from vulnerable or marginalized communities.

3.3. Confidentiality vs Transparency

Confidentiality is often celebrated as a virtue of ADR, fostering open communication and protecting the privacy of disputants. However, it can also serve as a veil that conceals unethical conduct, systemic discrimination, or procedural irregularities. In South Africa, where historical injustices and institutional mistrust remain salient, the tension between confidentiality and transparency is particularly acute.

ADR practitioners must navigate this ethical dilemma with care. While confidentiality can promote trust and candour, it must not be used to shield misconduct or prevent scrutiny. Mechanisms such as ethical audits, anonymized reporting, and oversight by independent bodies can help balance privacy with accountability.

3.4. Professional Accountability of ADR Practitioners

South Africa currently lacks a unified ethical code or regulatory framework governing the conduct of ADR practitioners. This absence creates risks of bias, incompetence, and cultural insensitivity. Without clear standards and enforcement mechanisms, practitioners may operate with varying degrees of professionalism, undermining the credibility and fairness of ADR processes¹.

To address this gap, South Africa must develop comprehensive ethical guidelines and establish professional bodies responsible for certification, training, and disciplinary oversight. These structures should incorporate both international best practices and culturally relevant ethical principles, such as those derived from Ubuntu.

3.5. Cultural Pluralism and Ethical Universality

South Africa's rich cultural diversity presents both opportunities and challenges for ethical ADR. While multiculturalism allows for the incorporation of varied dispute resolution traditions, it also complicates the establishment of universally accepted ethical norms. Practices that are considered fair and respectful in one cultural context may be perceived as biased or inappropriate in another².

Integrating Ubuntu-based ethics with global standards requires careful negotiation and sensitivity. ADR frameworks must be flexible enough to accommodate cultural

¹ Keet A., Loots A. (2018). ADR ethics and professional accountability in South Africa // Potchefstroom Electronic Law Journal, 21(4). Pp. 1–27.

² Makofane W. (2021). Cultural pluralism and ADR ethics in South Africa // Journal of African Legal Studies, 18(1). Pp. 87–105.

pluralism while maintaining core ethical commitments to fairness, dignity, and justice. This balancing act is essential for building inclusive and contextually legitimate dispute resolution systems.

4. ADR in the BRICS context: shared ethical dilemmas

The ethical challenges facing ADR in South Africa are not unique. Across the BRICS nations, Brazil, Russia, India, China, and South Africa, similar dilemmas emerge, shaped by diverse legal traditions, socio-political contexts, and cultural values. This section offers a comparative overview of ADR practices in these countries, highlighting common ethical concerns and distinctive approaches.

4.1. India: Community Mediation and Representation

India has institutionalized community-based mediation through mechanisms such as Lok Adalats (People's Courts), which aim to resolve disputes outside the formal judicial system. These forums are particularly effective in handling civil, matrimonial, and minor criminal cases, offering swift and cost-effective resolutions¹.

However, ethical concerns persist. Ensuring voluntary participation and adequate representation for marginalized groups remains a challenge. In rural and under-resourced areas, parties may lack access to legal advice or feel pressured to accept decisions made by community elders or local authorities. The risk of informal coercion and unequal bargaining power underscores the need for safeguards that protect the rights and dignity of all participants.

4.2. Brazil: Efficiency vs Equity in Labour and Commercial ADR

Brazil has made significant strides in expanding ADR, particularly in the domains of labour and commercial disputes. The country's legal reforms have encouraged mediation and arbitration as alternatives to litigation, contributing to improved efficiency and reduced court backlogs².

Nonetheless, ethical tensions arise in cases involving socio-economic disparities. In labour disputes, for example, employers may wield disproportionate influence over employees, leading to settlements that favour corporate interests over worker rights. The challenge lies in balancing procedural efficiency with substantive fairness, ensuring that ADR does not become a tool for reinforcing existing inequalities.

4.3. China: Harmony and State Influence

China's ADR system is deeply influenced by Confucian principles of harmony and collectivism, which prioritize social stability and consensus over individual

¹ Bhat P. (2017). Community mediation and Lok Adalats in India: Ethical considerations // *Journal of Indian Law*, 9(2). Pp. 45–62.

² Ferraz O. (2019). Labour disputes and ADR in Brazil // *Brazilian Journal of Labour Law*, 14(2). Pp. 21–40.

rights. Mediation is widely practiced, often facilitated by government-affiliated bodies such as People's Mediation Committees¹.

While this approach promotes community cohesion, it raises ethical questions about state influence, voluntariness, and the subordination of individual rights. In some cases, disputants may feel compelled to conform to collective expectations or government directives, undermining the autonomy and fairness of the process. The tension between societal harmony and personal justice remains a central ethical dilemma in China's ADR landscape.

4.4. Russia: Reform and Institutional Trust

Russia has undertaken reforms to modernize its arbitration system, aiming to enhance transparency and attract foreign investment. However, persistent issues such as corruption, lack of institutional trust, and inconsistent enforcement continue to undermine the credibility of ADR mechanisms².

Ethical challenges in Russia mirror those in South Africa, including concerns about neutrality, transparency, and professional accountability. Without robust oversight and ethical standards, ADR risks becoming a venue for elite manipulation rather than equitable dispute resolution.

4.5. Comparative Insights: Shared Challenges and South Africa's Contribution

Across the BRICS nations, several common ethical dilemmas emerge:

- Power asymmetry between disputants
- Voluntariness compromised by socio-economic pressures
- Confidentiality that may obscure unethical conduct
- Lack of professional accountability and oversight

South Africa's experience offers valuable lessons. Its transformative constitutionalism provides a legal foundation for inclusive and rights-based ADR, while the ethical philosophy of Ubuntu introduces a culturally resonant framework for reconciliation and restorative justice. These elements position South Africa as a potential leader in shaping BRICS-wide ethical standards for ADR.

Collaborative efforts among BRICS countries, such as joint research, practitioner exchanges, and the development of shared ethical guidelines, could foster a more coherent and principled approach to dispute resolution across diverse legal and cultural contexts.

¹ Wang H. (2020). Ethics and mediation in contemporary China // *Asian Journal of Legal Studies*, 11 (2). Pp. 33–49.

² Ivanov S. (2018). Arbitration reforms and ethical dilemmas in Russia // *Russian Law Journal*, 6 (4). Pp. 12–28.

5. Towards an ethically grounded ADR framework

An ethically grounded ADR framework is indispensable for ensuring legitimacy, fairness, and public confidence in dispute resolution systems. Ethics function not merely as procedural guidelines but as normative anchors that sustain the moral authority of ADR practitioners and institutions¹. In the South African context, an ethical ADR system must balance global standards with local moral frameworks, particularly the values embedded in Ubuntu, the principle that one's humanity is affirmed through others². The following subsections outline key pathways towards this vision.

5.1. *Strengthening Ethical Codes and Professional Oversight*

South Africa should establish a formal ADR ethical charter integrating both international best practices and indigenous ethical principles. Such a charter should be modelled on global frameworks, such as the UNCITRAL Model Law on International Commercial Conciliation (2002) and the International Mediation Institute (IMI) Code of Conduct, while incorporating the restorative and communal values of Ubuntu. As Winks³ notes, harmonising Western professional ethics with African humanism fosters cultural legitimacy and moral coherence in ADR practice.

Mandatory ethics training for mediators and arbitrators, coupled with professional accreditation and certification, can promote uniform standards of conduct and competence. Oversight bodies, possibly under the Department of Justice or a national ADR Council, should be empowered to investigate complaints, issue sanctions, and uphold accountability. Such professional oversight mitigates risks of bias, misconduct, and procedural injustice⁴. Ethical regulation, thus, not only upholds fairness but enhances public trust in ADR institutions as viable alternatives to formal adjudication.

5.2. *Balancing Confidentiality and Transparency*

Confidentiality is a cornerstone of ADR; it ensures candour, protects sensitive information, and preserves relationships⁵. However, unchecked confidentiality can obscure unethical practices or procedural abuses. To maintain balance, ethical

¹ Boule L. (2018). *Mediation: Skills and Techniques*. Durban: LexisNexis.

² Mokgoro Y. (1998). Ubuntu and the Law in South Africa // Potchefstroom Electronic Law Journal, 1 (1). Pp. 16–32.

³ Winks B. (2019). Cultural Legitimacy and the Ethics of ADR in South Africa // South African Law Journal, 136 (2). Pp. 209–225.

⁴ De Brabandere E. (2020). Professional Ethics in International Arbitration: Challenges and Reforms // Arbitration International, 36 (1). Pp. 142–159.

⁵ Menkel-Meadow C. (1997). Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities // South Texas Law Review, 38. Pp. 407–454.

oversight structures should mandate periodic ethical audits and transparent reporting mechanisms that do not compromise party privacy. For example, anonymised summaries of disciplinary outcomes can enhance public confidence and demonstrate institutional integrity.

Furthermore, ethical frameworks should delineate exceptions to confidentiality in cases involving fraud, coercion, or violations of human rights. As noted by Stulberg¹, transparency mechanisms in mediation enhance accountability without eroding confidentiality's protective function. South Africa can adapt these principles within its ADR landscape, ensuring that ethical audits and oversight reports preserve both trust and justice.

5.3. Addressing Power Imbalances

Ethical ADR practice must actively redress power disparities that threaten voluntariness and fairness, particularly where parties differ in socio-economic or informational capacity. Access to legal aid, state-supported mediation assistance, and procedural safeguards, such as simplified language and independent advisors, ensure informed consent and equitable participation². The Constitution of the Republic of South³, underscores equality and dignity as foundational values, which must be operationalised within ADR ethics.

The Ubuntu-based notion of relational justice calls for mediators to adopt a facilitative, empathetic approach that recognises and uplifts the vulnerable⁴. Institutionalising such ethical sensitivity transforms ADR from a neutral procedural device into a participatory justice mechanism that embodies constitutional aspirations of transformation and inclusion.

5.4. BRICS Cooperation in Ethical Standards

As South Africa deepens its collaboration within the BRICS bloc, ethical convergence in ADR can become a vehicle for global South solidarity and legal innovation. BRICS nations share common developmental and justice-oriented concerns, positioning them to co-develop ethical standards that reflect plural legal cultures while promoting international credibility⁵.

¹ Stulberg J. (2021). Transparency and Accountability in Mediation Ethics // *Ohio State Journal on Dispute Resolution*, 36 (2). Pp. 319–336.

² Wing L. (2020). Mediation and Power: Ensuring Equity and Justice // *Conflict Resolution Quarterly*, 38 (1). Pp. 61–78.

³ Republic of South Africa. (1996). The Constitution of the Republic of South Africa, *Journal of Constitutional Development* // *Government Gazette*, 378 (17612). Pp. 1–147.

⁴ Bennett T. (2011). Ubuntu: An African Equity // (SSRN working paper / publication record). *South African Journal of Philosophy*, 30(3), Pp. 33–45.

⁵ Chandrasekhar S. (2022). Ethics and Development Cooperation among BRICS States: A Comparative Overview // *Journal of Global Legal Studies*, 14 (2). Pp. 95–112.

South Africa's constitutional and Ubuntu-driven model of ethical justice offers valuable insights for BRICS partners, particularly in humanising dispute resolution and aligning ethics with social justice. Joint initiatives, such as the establishment of a BRICS ADR Ethics Council or periodic forums, could facilitate knowledge exchange and ethical harmonisation. As Mlambo¹ observes, such South–South cooperation may pioneer a global ethical standard grounded in responsibility, respect, and relational justice.

6. Towards an Ethically Grounded ADR Framework

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¹ Mlambo T. (2023). Reimagining ADR in the Global South: Towards a Shared Ethical Framework // *Revista Brasileira de Alternative Dispute Resolution*, 5 (2). Pp. 72–81.

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³ Mokgoro Y. (1998). Ubuntu and the Law in South Africa // *Potchefstroom Electronic Law Journal*, 1 (1). Pp. 16–32.

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¹ *De Brabandere E.* (2020). Professional Ethics in International Arbitration: Challenges and Reforms // *Arbitration International*, 36 (1). Pp. 142–159.

² *Menkel-Meadow C.* (1997). Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities // *South Texas Law Review*, 38. Pp. 407–454.

³ *Stulberg J.* (2021). Transparency and Accountability in Mediation Ethics // *Ohio State Journal on Dispute Resolution*, 36 (2). Pp. 319–336.

⁴ *Wing L.* (2020). Mediation and Power: Ensuring Equity and Justice // *Conflict Resolution Quarterly*, 38 (1). Pp. 61–78.

⁵ *Bennett T.* (2011). Ubuntu: An African Equity // (SSRN working paper / publication record). *South African Journal of Philosophy*, 30 (3). Pp. 33–45.

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As South Africa deepens its collaboration within the BRICS bloc, ethical convergence in ADR can become a vehicle for global South solidarity and legal innovation. BRICS nations share common developmental and justice-oriented concerns, positioning them to co-develop ethical standards that reflect plural legal cultures while promoting international credibility¹.

South Africa's constitutional and Ubuntu-driven model of ethical justice offers valuable insights for BRICS partners, particularly in humanising dispute resolution and aligning ethics with social justice. Joint initiatives, such as the establishment of a BRICS ADR Ethics Council or periodic forums, could facilitate knowledge exchange and ethical harmonisation. As Mlambo, observes, such South–South cooperation may pioneer a global ethical standard grounded in responsibility, respect, and relational justice.

Visual Comparative Table Summarizing Ethical Challenges in ADR Across some BRICS Countries:

Country	Power Asymmetry	Voluntariness	Confidentiality vs Transparency	Professional Accountability	Cultural Integration
South Africa	High (socio-economic inequality)	Compromised by economic pressure	Risk of concealing misconduct	Lacks unified ethical code	Ubuntu-based ethics
India	Moderate (rural disparities)	Threatened by lack of legal literacy	Limited oversight	Variable standards	Community traditions
Brazil	High (corporate vs workers)	Pressured settlements	Corporate confidentiality concerns	Developing oversight	Legal pluralism
China	Moderate (state influence)	Influenced by collectivist norms	State-controlled mediation	Government-led ethics	Confucian harmony
Russia	High (elite manipulation)	Undermined by institutional distrust	Opaque arbitration practices	Weak enforcement	Post-Soviet legal culture

Source: Dr W.M. Mokofe

7. Conclusion and recommendation

Alternative Dispute Resolution (ADR) in South Africa represents both a practical innovation and a profound ethical undertaking. While ADR offers significant advantages, such as efficiency, accessibility, and the potential to alleviate judicial

¹ Chandrasekhar S. (2022). Ethics and Development Cooperation among BRICS States: A Comparative Overview // *Journal of Global Legal Studies*, 14 (2). Pp. 95–112.

backlogs, it also introduces complex ethical dilemmas that cannot be ignored. Issues of neutrality, voluntariness, confidentiality, professional accountability, and cultural pluralism underscore the need for a principled approach to dispute resolution.

South Africa's transformative constitutionalism provides a robust legal foundation for embedding ethical considerations into ADR processes. Coupled with the relational and restorative ethos of Ubuntu, this framework offers a distinctive model for balancing consensus and conscience, ensuring that ADR outcomes are not only expedient but also morally and socially just.

The comparative analysis of BRICS nations reveals shared challenges, including power asymmetries, compromised voluntariness, and insufficient oversight. Yet, it also highlights opportunities for collaboration. By leveraging South Africa's constitutional and cultural insights, BRICS countries can work toward developing harmonized ethical standards that respect diversity while promoting fairness and accountability.

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