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**LAW & HUMAN DIGNITY**

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# GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

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## DIGNITY AND CULTURE IN DISPUTE RESOLUTION

LOLA AKIN OJELABI\*

*This paper adopts a definition of human dignity that highlights the importance of recognition and respect. These two concepts are important in dispute resolution processes, particularly where cultural differences exist between parties, or between a party and the third-party decision-maker or dispute resolution practitioner. Although cultural differences are not in themselves causes of conflict and should indeed be celebrated, culture and identity are intricately linked, meaning cultural differences negatively influence disputes and lead to intractability. Cultural differences may also affect a dispute resolution process and its outcome, particularly in relation to parties' engagement in, and perception of, the process. To prevent negative implications of cultural differences, dignity in the form of respect and recognition is important. These two concepts may also form the basis of procedural justice which, when present, enhances satisfaction in a decision-making process by giving effect to voice. This paper explores how cultural differences may diminish voice quality and how respect and recognition may lead to empowerment, thus improving the quality of voice and, in turn, both process and outcome. It discusses the elements of respect and recognition that may accord dignity to parties.*

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## I INTRODUCTION

Dispute resolution (DR) is an important activity that forms part of the basic structure of society, for the very reason that disputes are socially constructed and inevitable. It takes many forms, from adversarial to non-adversarial processes and from peaceful to violent forms. DR processes differ, and different societies may prefer particular DR methods.<sup>1</sup> Traditional and indigenous methods of DR are part of every society,<sup>2</sup> although modern processes have emerged and been established. Some processes involve third parties who make final decisions, while others require disputants to make their own decisions in their own best interests. The non-adjudicatory processes of DR may involve third parties who facilitate the process or make recommendations. Contemporary DR processes have been categorised as determinative (arbitration and adjudication), facilitative (mediation, negotiation), advisory (conciliation, expert appraisal) and hybrid (med-arb, arb-med, med-arb-med) processes.<sup>3</sup>

Regardless of the process of DR, one thing is important: the opportunity for a party to contribute to the decision-making process or, simply put, voice. Procedural justice

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<sup>1</sup> William I Zartman, 'Introduction: African Traditional Conflict "Medicine"' in William I Zartman (ed), *Traditional Cures for Modern Conflicts: African Conflict "Medicine"* (SAIS African Studies Library, 1999) 1-11.

<sup>2</sup> Ibid.

<sup>3</sup> National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (Report, September 2003) 4-7.

literature shows the importance of voice in a decision-making process.<sup>4</sup> Arguably, voice is about recognition of parties' dignity. However, the quality of voice, and therefore the extent to which parties' dignity is recognised, may be limited in some decision-making processes. Using various conceptions of dignity, this paper explores how human dignity is, or ought to be, given effect in DR processes. This is an important consideration as questions have been raised about the capacity of certain alternative dispute resolution (ADR) processes to deliver justice in contexts, including cross-cultural contexts, infested with power disparity. Questions include:

Does a move away from formal legal processes threaten the impartiality of outcomes? Do the dynamics of ADR disadvantage those with less economic or social power? How are concepts of justice and approaches to dispute resolution inflected by culture, and how can approaches to ADR take seriously the challenges of intercultural justice, understanding, and negotiation?<sup>5</sup>

Some issues that have been raised in relation to mainstream, Western alternative DR processes in intercultural contexts include: translation of communication skills relevant to effective participation in DR processes across cultural boundaries; neutrality; a one-size-fits-all approach; institutionalisation and failure to train dispute resolution practitioners (DRPs) to 'assess their own cultural frames of reference [and how those] may limit access, understanding progress, or engagement in conflict processes'.<sup>6</sup> Kahane points to the manner in which legal processes that require third party neutrality favour dominant groups.<sup>7</sup> He argues that the approach to dispute resolution which involves:

A set of principles and procedures that can neutrally adjudicate between parties' rights and interests ... [represents] a culturally specific understanding of human identity and relationships, one held, as it happens, by powerful social groups. Principles and procedures that pretend to stand above culture may in fact operate to the advantage of some social groups and the disadvantage of

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<sup>4</sup> Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988) 63.

<sup>5</sup> Catherine Bell and David Kahane, 'Introduction' in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press, 2004) 1.

<sup>6</sup> Michelle LeBaron, 'Learning New Dances: Finding Effective Ways to Address Intercultural Disputes' in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press, 2004) 11, 13.

<sup>7</sup> David Kahane, 'What is Culture? Generalizing about Aboriginal and Newcomer Perspectives' in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press, 2004) 28-56.

others.<sup>8</sup>

The interaction between power and culture, and how this interaction shapes perception of what is right or wrong, makes dignity a useful concept for DR. This paper examines conceptions of dignity within DR processes, particularly those processes that are considered alternative to judicial processes and do not require determination by a third party. It argues that dignity is critical in these processes but also recognises that, in instances, the conception of dignity adopted and which subsequently grounds fundamental principles of a DR process, may maintain the status quo of inequality: voice may not result in the best outcome possible in the circumstances. In addition, the conception of dignity adopted may lead to coercion and imposition of cultural values different to those held by a party. Dignity as respect and recognition, however, may improve the quality of voice in a DR process involving cultural issues. The paper first details conceptions of dignity, followed by a discussion on culture and cultural differences in DR. It then considers three conceptions of dignity in the context of DR. It concludes by emphasising the need for dignity as respect and recognition in DR processes involving cultural differences due to the negative public discourse about culture and cultural differences that may be prevalent.

To summarise, the paper argues that DR processes involving cultural issues require application of the dignity principle. Conceptions of human dignity include autonomy, respect, recognition and substantive dignity but given the way cultural issues may arise in DR, dignity as respect and recognition are more important in enhancing parties' voice quality. In addition, DRPs ought to pay attention, not only to procedural justice elements, but also to the quality of outcomes.

## II CONCEPTIONS OF DIGNITY

Human dignity is a generally accepted concept present in state constitutions, applied as an interpretive tool in judicial decision-making, and forming the basis of various international covenants. It is referred to as a value, a principle, and a right, and the many

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<sup>8</sup> Ibid 29.

conceptions of human dignity are applied in different, and sometimes, conflicting ways.<sup>9</sup> The concept is old, dating to Roman times when dignity was about status, hierarchy and invariably power.<sup>10</sup> In theology, the belief that man is made in the image of God supports the inviolability of human life, which grounds the principle of the inherent dignity of mankind enshrined in the United Nations Declaration of Human Rights (UNDHR).<sup>11</sup> The UNDHR is viewed as bringing to life the moralised concept of dignity as opposed to dignity based on merit.<sup>12</sup> Dignity itself has an unsettled meaning in contemporary times. It has been labelled 'useless' on one hand, perhaps, due to its many uses, and on the other hand, an important concept due to its breadth.<sup>13</sup> Two types of claims can be made about dignity: substantive claims, which answer the question of 'what makes humans possess dignity' or 'in virtue of what do humans have dignity?'; and formal claims, which relate to the 'general conceptual features or conditions that we think apply to any suitable substantive claim'.<sup>14</sup> For this paper, no condition attaches to the dignity of human beings and dignity is accorded on the very basis that a person is human.

The moralised and unmerited conception of dignity is seen in Rao's conceptions of dignity, particularly the first conception which refers to the intrinsic worth of the human being regardless of social status or hierarchy.<sup>15</sup> For Rao, the 'inherent dignity focuses on human potential - not the exercise of such potential. It does not judge whether a person's reasoning, choices or criteria for self-worth are "dignified"'.<sup>16</sup> Rao goes on: 'inherent dignity is pluralistic and remains neutral about different conceptions of the good life'.<sup>17</sup> Dignity as full inherent dignity refers to the 'quality of value or worth belonging to every being with full moral status' which is 'indivisible' and 'inviolable';<sup>18</sup> not conferred or acquired, not determined by gender, race or ethnicity, socio-economic status, education or health. Human dignity conceived this way touches on the question of difference,

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<sup>9</sup> Neomi Rao, 'Three Conceptions of Dignity in Constitutional Law' (2011) 86(1) *Notre Dame Law Review* 183; Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6(2) *International Journal of Constitutional Law* 267; Lucy Michael, 'Defining Dignity and Its Place in Human Rights' (2014) 20(1) *The New Bioethics* 12.

<sup>10</sup> Remy Debes, 'Introduction' in Remy Debes (ed), *Dignity: A History* (Oxford University Press, 2017) 2.

<sup>11</sup> Rao (n 9) 185.

<sup>12</sup> Debes (n 10) 3.

<sup>13</sup> *Ibid* 8-9.

<sup>14</sup> *Ibid* 4.

<sup>15</sup> Rao (n 9) 196.

<sup>16</sup> *Ibid* 187.

<sup>17</sup> *Ibid* 187.

<sup>18</sup> Michael (n 9) 15.

whether considerations of difference should shape human interaction and conceptions of human dignity, and if yes, how. Does difference have anything to do with human dignity? This dignity stands even when difference/inequality is present; it stands regardless of difference, culture, capacity or capability, including disability, poverty, membership of a minority group, citizenship, being a migrant or alien, status or personality. In this conception, human dignity is not about status or rank, and it is not attributed based on merit or morality — it is the dignity that is held by being human.<sup>19</sup>

Rao's second conception of dignity is substantive dignity which refers to socially constructed standards of dignity. This dignity, Rao argues, 'depends on specific ideals of appropriateness and deems a person worthy or dignified to the extent that he conforms to such ideals'.<sup>20</sup> It is dignity that is imposed, and may sometimes be coercive because it may conflict with individual autonomy. In fact, it may be a form of dignity imposed via cultural hegemony. Dignity in this substantive form 'may require observance of certain social norms';<sup>21</sup> 'the community may define dignity based on its particular values and the government may justify policies on the grounds that they promote the public good and improve the lives of individuals by requiring them to meet these standards.'<sup>22</sup> It could also refer to the access of social and economic goods to maintain a minimum standard of living.<sup>23</sup> Conceiving dignity as substantive dignity is problematic for the very fact that it is inextricably linked with culture; it could, in fact, refer to cultural values and practices that are prevalent and viewed as exemplars of the 'good life' expected of everyone within the community. In multi-ethnic, diverse societies, this may give room to cultural imperialism, and the denigration of some cultural practices. It could also be grounds for discriminatory attitudes. Whether or not human dignity should be conceived as substantive dignity presents problems. On one hand, it is desirable that human beings abide by some values and principles in their interactions; these values may form the basis of morality, or what is right or wrong. However, could it be said that anyone who falls short of those standards and values loses their dignity? Perhaps they may be said to behave in an undignified

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<sup>19</sup> Michael (n 9) at 21-22 articulates different conceptions of dignity.

<sup>20</sup> Rao (n 9) 188.

<sup>21</sup> Ibid 222.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

manner, but their inherent dignity will, arguably, remain intact.<sup>24</sup>

Standards or social norms are desirable in any society, but they should be those that aid human dignity when conceived as the inherent worth of the human being; thus, promoting good treatment, self-esteem, self-worth and granting access to resources to achieve the minimum standard of living.

Another issue to be addressed in relation to substantive dignity is that a conflict may arise between acceptable social standards and dignity, in the form of autonomy or individual choice.<sup>25</sup> But as inherent dignity, as has been discussed, is that which belongs to all members of the human race and has nothing to do with particular community standards or individual choices,<sup>26</sup> respect and recognition should be key considerations in setting and applying standards.

Rao's third conception of dignity is dignity as recognition.<sup>27</sup> This third conception is what Jacobson articulates as social dignity: dignity-of-self and dignity-in-relation.<sup>28</sup> Dignity-of-self is the dignity an individual attaches to self, also referred to as dignity of identity. Dignity-in-relation is the dignity that is created by interaction with others, 'reflecting worth and value' to an individual: dignity in social context.<sup>29</sup> Similarly, for Schachter, respect for human dignity could be considered in two ways: how one thinks about others (subjective) and how one treats others (objective), with a preference for the latter.<sup>30</sup> This requires that 'high priority should be accorded in political, social and legal arrangements to individual choices in such matters as beliefs, way of life, attitudes and the conduct of public affairs' but this is not absolute.<sup>31</sup> This conception may be further explored in two ways: political and psychological. In political contexts, it is about 'the will and consent of the governed'. From a psychological perspective, it is about treatment that is accorded to others — not to demean or humiliate others. It is also about treating others in a manner

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<sup>24</sup> Debes (n 10) presents various origins of and claims to the foundation of 'dignity'.

<sup>25</sup> See, for examples of how this could occur, Rao (n 9) 226-234 where Rao discusses cases in which individual choice such as abortion, dwarf throwing, and self-representation by a person with a disability is trumped by other conceptions (community standards) of dignity.

<sup>26</sup> Rao (n 9) 242.

<sup>27</sup> *Ibid* 243

<sup>28</sup> Nora Jacobson, 'Dignity and Health: A Review' (2007) 64(2) *Social Science and Medicine* 292, 294.

<sup>29</sup> *Ibid* 294-295.

<sup>30</sup> Oscar Schachter, 'Editorial Comment: Human Dignity as a Normative Concept' (1983) 77(4) *The American Journal of International Law* 848, 849.

<sup>31</sup> *Ibid* 849-850.

that promotes their self-respect and self-esteem.<sup>32</sup>

For Rao, '[d]ignity as recognition focuses on ... community values and validates the unique personality and choices of individuals and groups within society'.<sup>33</sup> It 'is a dignity of difference, or recognition for individual and group difference ... and emphasizes the importance of *subjective* feelings about dignity, whether a person feels respected.'<sup>34</sup> It is dignity which considers everyone a respectable and reputable member of the community and, as such, is closely linked to the inherent worth of every human being.

As noted above, many authors point to the difficulty in applying dignity in practical terms. If it is accepted as an important norm, or considered, as Neal suggests, a substantive basic norm,<sup>35</sup> how should it be applied in practical terms? What are the principles or specific rights that dignity protects? Rao's work highlights the irreconcilableness of conceptions of dignity and difficulties that may arise, and that have arisen, in judicial application of the concept. Regardless, Rao urges the concept as indispensable and an approach might be to choose one conception. Neal argues that dignity cannot be conceived as 'a single concept, but rather a plurality of concepts grouped under 'an organising idea'',<sup>36</sup> and asserts that dignity is a criterion for measuring the validity of law. She further argues, relying on Waldron, that law's procedure is committed to respect for dignity in that it gives opportunity for both sides of a dispute to be heard; it promotes equal access, fair hearing and opportunity to be heard.<sup>37</sup> While there may be no agreement on the specific substance of dignity, it is no doubt commonly accepted as a fundamental good: it matters.<sup>38</sup>

Some authors have attempted to clarify how the concept should be applied. For example, Shultziner has outlined four principles that should guide judicial application of dignity:

1. That the application of human dignity in judicial decisions should be based on a

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<sup>32</sup> Ibid.

<sup>33</sup> Rao (n 9) 244.

<sup>34</sup> Ibid 248.

<sup>35</sup> Mary Neal, 'Respect for Human Dignity as 'Substantive Basic Norm'' (2014) 10(1) *International Journal of Law in Context* 26, 37.

<sup>36</sup> Ibid 38.

<sup>37</sup> Ibid 38-40.

<sup>38</sup> Adopting terminology used by Rao (n 9) in relation to courts adopting the concept: 'Constitutional Courts around the world ... regularly use the term dignity or human dignity *as if it matters*' (emphasis in original) at 186.

written law;

2. Judges should try to define what human dignity is and be explicit about its meaning;

3. Judges should attempt to use human dignity consistently in the same rulings and in future decisions; and

4. Human dignity should advance human rights rather than limit them.<sup>39</sup>

The application of the principle of human dignity as conceived by Shultziner raises a critical question of the role of the judge in formulating the substance of dignity, and the infiltration of personal beliefs and values, which are not addressed by the four principles. But at least no one would disagree with the assertion that ‘the right for protection against humiliation and degradation’ should be at the core of human dignity.<sup>40</sup> Humiliation and degradation, which are rife in many encounters, must be avoided. The next section considers these dignity concepts in relation to cultural difference. Why is cultural difference so problematic? It further considers the relationship with disputing and why dignity matters.

### III CULTURE, CULTURAL DIFFERENCE AND DIGNITY

Culture is an extremely complex concept with several approaches to its definition:<sup>41</sup>

- The historical approach emphasises tradition, custom and social heritage;<sup>42</sup>
- The psychological approach views culture as methods of adapting to natural, economic and political conditions and ways of learning or acquiring traditions, habits and attitudes;<sup>43</sup>
- The descriptive approach identifies a number of features including etiquette, art, marriage, language, morals, laws, beliefs and traditions;<sup>44</sup>

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<sup>39</sup> Doron Shultziner, ‘Human Dignity in Judicial Decisions: Principles of Application and the Rule of Law’ (2017) 25 *Cardozo Journal of International and Comparative Law* 435, 448.

<sup>40</sup> *Ibid* 452.

<sup>41</sup> Alfred L Kroeber and Clyde Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (Vintage Books, Random House, 1952) 13.

<sup>42</sup> *Ibid* 89.

<sup>43</sup> *Ibid* 107, 112.

<sup>44</sup> *Ibid* 81.

- The structural approach relates to the socio-political system defined as a ‘derived system of explicit and implicit designs for living, which tends to be shared by all, or specially designated members of a group’;<sup>45</sup> and
- The normative approach views culture as the ‘distinctive way of life of a group of people — their complete ‘design for living’.<sup>46</sup>

Culture influences practices, and practices develop into culture.<sup>47</sup> The list of things that make up culture indicate that culture is not homogenous. Traditions and customs differ from place to place; natural, economic and political conditions that require adaptation differ and, as such, methods of adaptation also differ. Languages, laws, political structures and art also differ from location to location. Culture is not homogenous, and it is not static; culture moves, it evolves.

Cultural difference abounds. Think Confucianism, Western, Arab, African and Asian as well as individualist/collectivist, low-context/high-context cultures. And even within each of these cultures, variations in social norms exist in relation to communication, time and space, and respect for elders. Laws, practices, norms, beliefs, ethical standards and principles are all culture, and this has consequences for conceptions of dignity. For instance, substantive dignity — that is, the conception of the good life — is based on acceptable social norms which, as already noted, differ considerably across cultures. As such, the substantive content of dignity may differ across cultures and speaking about culture is invariably speaking about difference. This has a lot to do with disputes.

In the social-constructionist paradigm, disputes are products of social interaction. Disputes may arise because social norms may not have been adhered to and rules, or laws, generally accepted, may have been breached or based on perception of non-adherence to social norms. Thus, a connection exists between conflict and culture, but ‘culture is rarely by itself *the* cause of conflict’.<sup>48</sup> Culture impacts conflict because ‘it is embedded in individuals’ communication styles, history, ways of dealing with emotions, values and

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<sup>45</sup> Ibid 119.

<sup>46</sup> Ibid 98.

<sup>47</sup> Clifford Geertz, *The Interpretation of Cultures: Selected Essays* by Clifford Geertz (Basic Books, 1973) 89; Kevin Avruch, *Context and Pretext in Conflict Resolution: Culture, Identity, Power and Practice* (Paradigm Publishers, 2013) 11 (‘Context and Pretext in Conflict Resolution’).

<sup>48</sup> Avruch, ‘Context and Pretext in Conflict Resolution’ (n 47) 11.

structures'.<sup>49</sup> According to Avruch, 'The mere existence of cultural differences is usually not the primary cause of conflict between groups. However, culture is always the lens through which differences are refracted and conflict pursued'.<sup>50</sup>

A dispute about the supply of goods or services may become infused with cultural issues rather than being strictly about the goods/services. Disputes turn on cultural differences, most times, because of existing public discourses about cultural groups including negative stereotypes, prejudices and assumptions. Ethnocentrism is another factor that leads to negative perceptions about other cultures. Passing negative judgement on other cultures' social norms, food, or traditions, based on one's own beliefs, is a cause of conflict.

Public negative discourse about cultural difference is rife. Nader asserts 'difference is a major preoccupation of our time' and rather than celebrate difference, '[d]o-gooders have deeply invested in difference as a "problem"'.<sup>51</sup> She states: '[w]ith all this talk about difference, similarities between locals and migrants are not noticed'.<sup>52</sup> In other words, we ought to celebrate difference rather than see it as a problem. But the horse has long bolted. Indeed, negative discourse about cultural (and racial) difference is the basis of many discriminatory policies and laws, and many conflicts in many parts of the world. This makes it important to consider how the difference discourse is proceeding and affecting disputes, disputing and dispute resolution. We need to pay attention to cultural difference in dispute resolution not because it is, in itself, a problem, but because cultural difference may hold the key to unlocking underlying issues in any dispute. The dispute may not be about the fence, or the noise, or whatever substantive issues the parties may be disputing over; the dispute may be easy to resolve on the facts, but parties may remain adamant or fail to problem-solve because of cultural difference. In addition, the dispute resolution process may not resolve the dispute because of transplantation issues, and resolution may not address the real issues in the dispute, paving way for future disputes. Cultural differences make conflicts intractable because the discourse is most often negative and laden with prejudice, stereotypes and ethnocentrism in relation to cultural identity.

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<sup>49</sup> Bernard Mayer, *The Dynamics of Conflict resolution: A Practitioner's Guide* (Jossey-Bass Inc, 2000) 16.

<sup>50</sup> Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 11.

<sup>51</sup> Laura Nader, *Culture and Dignity: Dialogues between the Middle East and the West* (John Wiley and Sons Incorporated, 2013) 24.

<sup>52</sup> *Ibid* 14.

Literature shows that disputes involving identity issues are more difficult to resolve because identity is 'who we are'.<sup>53</sup> Identity is closely related to culture because culture, as noted above, is about values, beliefs, traditions and practices. In addition, culture has a lot to do with creation of identity and the right to retain it. Taylor suggests an individual's concept of who they are is closely linked to their self-worth, self-esteem and self-confidence but defining identity is not based solely on the individual. As Taylor argues: 'we define our identity always in dialogue with, sometimes in struggle against, the things our significant others want to see in us', and 'the making and sustaining of our identity... remains dialogical throughout our lives'.<sup>54</sup> This articulation of identity is closely related to social dignity, or dignity in social context, as discussed above. For Taylor, the very reason that identity is derived from society makes dignity as recognition important. Taylor argues that each individual is seeking validation of their identity from the society in which they belong; a form of recognition. However, this attempt at validation can fail,<sup>55</sup> and does fail, because of negative stereotypes, prejudices and ethnocentrism, leaving the culturally different with feelings of low self-esteem, self-confidence and self-worth.

Arguably, negative public discourse on cultural difference is the result of failed attempts at validation or a failure of recognition maintained by 'the dynamics of power, authority, and hierarchy' within society.<sup>56</sup> Understanding power dynamics is critical as '[p]ower is always a factor that shapes whose cultural values are seen as legitimate, whose values are accommodated and how'.<sup>57</sup> DR processes are not immune to this failure to validate, as will be discussed in detail below. DRPs must pay attention to cultural differences in a DR process, considering how cultural differences relate to questions of identity, and how power may be influencing disputing and attempts to resolve them. Mediating these types of disputes with a restraint on ethnocentrism, cultural supremacy or imperialism may be an issue for DRPs. Thus, to quote Nader, 'a tolerance for difference, or the importance of cultural context'<sup>58</sup> is necessary in decision-making processes and in DR. Further,

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<sup>53</sup> Charles Taylor, 'The Politics of Recognition' in Amy Gutman (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, 1994) pt 1, 32-3; Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 68.

<sup>54</sup> *Ibid* 32-3.

<sup>55</sup> *Ibid*.

<sup>56</sup> Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 4.

<sup>57</sup> LeBaron (n 6) 14.

<sup>58</sup> Nader (n 51) 7.

reconciling cultural differences must 'be grounded in a philosophy of mutual respect, a knowledge of power distribution and of actions resulting from power inequities ... [and must be] based on culture and dignity'.<sup>59</sup>

Recognising the importance of addressing cultural differences in DR processes, Avruch identified two errors that DR practitioners may make: Type I and Type II errors.<sup>60</sup> These errors are based, to an extent, on universalist and relativist approaches to culture. Relativists question 'the existence of any absolute moral standards that are separate from their cultural ... context'.<sup>61</sup> On the other hand, universalists argue that due to the universality of human nature, certain generalisations can be made across all cultures.<sup>62</sup> Type I errors involve a complete disregard for cultural differences or culture in conflict analysis, in other words, lack of cultural sensitivity. Type II errors relate to overestimating the impact of cultural differences on culture or conflict resolution.<sup>63</sup> According to Avruch, Type II errors are most likely to occur in societies in which multiculturalism is a valued ideal.<sup>64</sup> He further argued that this approach may 'be deleterious for the weaker, disempowered, or subordinate parties in the conflict or dispute. It can affect the equity of the intervention's outcome, its justice'.<sup>65</sup> DR practitioners must strike a balance between Type I and Type II errors. The pathway is somewhere in between: cultural sensitivity with the willingness to address cultural practices that disempower parties or violate rights guaranteed to them by law. Dignifying DR — that is, DR that honours human dignity — is important.

Cultural differences may become an issue in disputes in many respects. There may be cultural differences between the parties and the DRP, referred to here as party(ies)/DRP

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<sup>59</sup> Ibid 194.

<sup>60</sup> Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 14.

<sup>61</sup> Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 39; Peter W Black and Kevin Avruch, 'Cultural Relativism, Conflict Resolution and Social Justice', *George Mason University* (Online Paper) <<http://www.gmu.edu/programs/icar/pcs/BlackAvruch61PCS.html>>.

<sup>62</sup> Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 72-77.

<sup>63</sup> Kevin Avruch, 'Type I and Type II Errors in Culturally Sensitive Conflict Resolution Practice' (2003) 20(3) *Conflict Resolution Quarterly* 351 ('Type I and Type II Errors'); Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 39.

<sup>64</sup> Avruch, 'Type I and Type II Errors' (n 63) 362. Cf Morgan Brigg and Kate Muller, 'Conceptualising Culture in Conflict Resolution' (2009) 30(2) *Journal of Intercultural Studies* 121: The authors disagree with Avruch, arguing that Avruch's categorisation prioritises (Western) social science. They instead argue for an approach which conceptualises culture as an 'empty signifier' that needs to be filled: at 132.

<sup>65</sup> Avruch, 'Type I and Type II Errors' (n 63) 366. Avruch argues that the price of overvaluing culture is paid by 'marginalized and disempowered immigrant/refugee communities ... particularly women and children': at 365.

cultural differences; cultural differences between the parties, that is, party/party (or inter-party) cultural differences; cultural differences which lead to inner conflicts for one party, that is, intra-party cultural differences; and as between a party(ies) and the DR process, that is, cultural appropriateness of the process. Isabelle R. Gunning has discussed how negative cultural myths held by parties and the mediator impact on the mediation process.<sup>66</sup> She counselled that DRPs should intervene where necessary by injecting equality into the mediation, ensuring that the choice of DRPs represent parties' cultural groups. In the same vein, I have previously argued that a values-approach may be adopted in conflict resolution to address underlying issues and to promote social justice in relation to process and outcome. The values will assist the mediator and parties to address aspects of the dispute related to cultural differences and power imbalances.<sup>67</sup>

#### IV DIGNITY AND DISPUTE RESOLUTION

Application of the principle or value of human dignity in decision-making/DR processes can be explored based on three different conceptions of dignity. The first is the conception of human dignity as the capacity of humans to reason and make free moral decisions — humans are autonomous beings. In this sense, human dignity is said to be synonymous with individual autonomy or the capacity for self-determination, which is procedural. The second conception is substantive dignity — 'the enforcement of substantive values ... *living in a certain way*',<sup>68</sup> particularly the aspect that promotes 'access to social and economic goods, enabling one to maintain a certain minimum standard of living'.<sup>69</sup> Arguably, the whole idea of promoting access to justice is based on this conception of human dignity. Access to justice is referred to as the right of individuals to access processes for the efficient and effective resolution of their disputes. The principles of access to justice are accessibility, appropriateness, equity, efficiency, and effectiveness.<sup>70</sup> The third conception is dignity as recognition of individual or group particularities/identity. In decision-making processes, human dignity could be applied to

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<sup>66</sup> Isabelle R Gunning, 'Diversity Issues in Mediation: Controlling the Impact of Negative Cultural Myths' (1995) 1995(1) *Journal of Dispute Resolution* 55.

<sup>67</sup> Lola Akin Ojelabi, 'Values and the Resolution of Cross-Cultural Conflicts' (2010) 22(1) *Global Change, Peace and Security* 53 ('Cross-Cultural Conflicts').

<sup>68</sup> Rao (n 9) 187.

<sup>69</sup> Michael (n 9) 22.

<sup>70</sup> Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report, September 2009) 8.

arrive at conclusions that accord human worth, give recognition to the individual's basic need to be recognised as a valued member of the community or to feel valued as a member of the community. This strand of human dignity is arguably both substantive — that is, whether outcomes satisfy community conceptions of dignity — and procedural, in the form of respect accorded to the individual in a dispute resolution process.

This section discusses each of these conceptions of dignity and how they are reflected in mediation and negotiation processes, paying attention to principles/underlying values. In doing this, it explores to what extent the principles and underlying values could be said to emanate from or support human dignity.

### *A Human Dignity as Autonomy and Dispute Resolution*

This dignity refers to the capacity of humans to reason and make free moral decisions. As noted above, it is sometimes considered synonymous with individual autonomy, that is, 'the ability of each person to determine for himself or herself a view of the good life'.<sup>71</sup> It differs from collective autonomy, which is the ability of a group to determine what the good life is. There is a point to be made of this in DR, and it is about parties' freedom of choice in relation to process and outcome — the extent to which parties choose the process, select the procedure to be followed, and determine the outcome of the DR process. Not many DR processes exemplify this full autonomy.

Autonomy is a concept with many conceptions. As noted by Gerald Dworkin, the 'concept is an abstract notion that specifies in very general terms the role the concept plays' and the 'filling out of an abstract concept with different content is what is meant by different conceptions of the same concept'.<sup>72</sup> The very general terms of autonomy — that is, what the various conceptions have in common — 'is a certain idea of persons as self-determining'.<sup>73</sup> In this paper, Immanuel Kant's conception of individual is adopted as it considers the position of the human being as self-determining in relation to others.

For Kant, '*rational nature exists as an end in itself*' and 'rational beings stand under the law that each of them should treat himself and all others never merely as a means but always

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<sup>71</sup> Taylor (n 53) 57.

<sup>72</sup> Gerald Dworkin, 'The nature of autonomy' (2015) 2015(2) *Nordic Journal of Studies in Educational Policy* 7, 9-10.

<sup>73</sup> *Ibid* 10.

also as an end in himself.’<sup>74</sup> This is the basis of Kant’s principle of autonomy, which, in turn, forms the basis of human dignity as freedom of choice.<sup>75</sup> Kant articulates the principle of autonomy as requiring one to ‘[a]lways choose in such a way that the maxims of [one’s] choice are incorporated as universal law in the same volition’.<sup>76</sup> This articulation arguably means that autonomy requires a consideration of others; however, not directly as to make it appear as if one is acting based on others’ instructions or preferences, but indirectly in the sense of considering whether the *maxims of the choice* are universal, that is, applicable in similar situations.<sup>77</sup> This universality attribute is why autonomy forms the basis of human dignity. Human dignity is universal, and in Kant’s terms, a categorical imperative. Human beings are not to be treated as means to ends, but ends in themselves; they should have full autonomy or agency in making decisions and freedom to make decisions in their own best interests.

DR processes that give effect to this autonomy are, arguably, dignifying processes. These processes promote party decision-making and require parties to consider other parties’ interests while aiming at a win-win solution where all parties’ interests can be met.<sup>78</sup> These processes are referred to as collaborative problem-solving or cooperative processes, of which negotiation and mediation are part when conducted in their pure forms. Principled negotiation, which also forms the basis of pure facilitative mediation, has four elements: separate the people from the problem, focus on interests and not positions, invent multiple options prior to deciding, and apply objective criteria.<sup>79</sup> These elements support human dignity as autonomy.

In negotiation and mediation, parties are the ultimate decision-makers. By focusing on the problem and not the people, they refrain from an attack on the person. Negotiators must recognise they ‘are dealing not with abstract representatives ... but with human beings [with] emotions, deeply held values, and different backgrounds and viewpoints’.<sup>80</sup> The

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<sup>74</sup> Immanuel Kant, *Groundwork for the Metaphysics of Morals*, tr Jonathan Bennett (Early Modern Texts, 2017) 32.

<sup>75</sup> *Ibid* 34.

<sup>76</sup> *Ibid* 37.

<sup>77</sup> *Ibid* 36–37.

<sup>78</sup> William Ury, Roger Fisher and Bruce Patton, *Getting to Yes: Negotiating an Agreement Without Giving In* (Random House Business Books, 2012) 11.

<sup>79</sup> *Ibid* 11.

<sup>80</sup> *Ibid* 20-21.

relationship between the parties in this process should be based on ‘trust, understanding, respect’ but, of course, this is not always the case. As noted by William Ury, Roger Fisher and Bruce Patton, people ‘are prone to cognitive biases, partisan perceptions, blind spots, and leaps of illogic’, they ‘get angry, depressed, fearful, hostile, frustrated, and offended. They have egos that are easily threatened’ and ‘see the world from their own personal vantage point’<sup>81</sup> without consideration for others. They teach that the way to separate the people from the problem is to avoid these human pitfalls through a focus on relationship, *giving value* to the other party, empathy, refraining from blaming, and face-saving, among other things. This is the responsibility of parties in negotiation because they control the process and outcome of negotiation. Both parties have a ‘voice’ in the decision-making.<sup>82</sup>

To further elaborate on autonomy and DR, a fundamental value of mediation is self-determination, which is also sometimes referred to as party autonomy.<sup>83</sup> Mediation, particularly facilitative mediation, is defined as a process ‘that promotes the self-determination of participants.’<sup>84</sup> Self-determination is the parties’ freedom to make decisions in their own best interests without interference from others, including other parties and DRPs. It is promoted through the third party’s role of providing support to the parties.

Questions have been raised about the extent to which parties in mediation exercise self-determination. Concerns about self-determination relate to the level of impartiality of DRPs, including whether they give advice to parties or pressure parties to reach a settlement. Other concerns include the extent to which a party may participate in the process, including whether they have a voice and the effectiveness of their voice in the process. The latter concern can be further explored through a consideration of factors that may limit the effectiveness of a party’s voice.<sup>85</sup> These factors are multiple and include:

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<sup>81</sup> Ibid.

<sup>82</sup> John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (Lawrence Erlbaum Associates, 1975) 1-2.

<sup>83</sup> Ellen Waldman, *Mediation Ethics: Cases and Commentaries* (Jossey-Bass, 2011) 371.

<sup>84</sup> National Mediator Accreditation System, *Practice Standards* (at July 2015) cl 2.2 (‘NMAAS Practice Standards’): Mediation is defined as a process ‘that promotes the self-determination of participants and in which participants, with the support of a mediator: (a) communicate with each other, exchange information and seek understanding (b) identify, clarify and explore interests, issues and underlying needs (c) consider their alternatives (d) generate and evaluate options (e) negotiate with each other; and (f) reach and make their own decisions.’

<sup>85</sup> Lola Akin Ojelabi, ‘Exploring Voice as a Justice Factor in Mediation’ (2019) 38(4) *Civil Justice Quarterly* 459 (‘Exploring Voice’).

lack of familiarity with process; not understanding responsibility in the process; power imbalance, including informational asymmetry; access to resources; lack of understanding of legal issues; lack of access to legal representation or other professional support; and the involvement of repeat players. Full exercise of individual autonomy may be inhibited by these factors. Other salient factors include cultural bias, stereotypes, and prejudices and incorrect assumptions about a party in relation to their cultural identity, including race and ethnicity.<sup>86</sup> Delgado et al have found 'ADR increases the risk of prejudice toward vulnerable disputants' and 'ADR is most apt to incorporate prejudice when a person of low status and power confronts a person or institution of high status and power.'<sup>87</sup> These concerns are about how culture and power play out in DR processes.<sup>88</sup>

In mediation, ethical standards impose certain obligations on third parties to ensure effective participation in the process. Under the Australian National Mediator Accreditation System Practice Standards, the mediator is responsible for ensuring procedural fairness.<sup>89</sup> This responsibility includes ensuring free and voluntary decision-making,<sup>90</sup> identifying undue influence and promoting informed consent,<sup>91</sup> giving opportunity to speak and be heard,<sup>92</sup> and enabling balanced negotiation between parties.<sup>93</sup> Also based on the value of self-determination, the mediator must refrain from pressuring parties to reach an agreement or to agree to particular terms.<sup>94</sup> To ensure that parties are in a position to make informed decisions, the mediator must allow sufficient time for parties to obtain independent professional advice or information.<sup>95</sup> In the event that power imbalance will jeopardise self-determination and informed decision-making, the mediator should terminate or suspend the process.<sup>96</sup> In addition, the mediator must

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<sup>86</sup> Kahane (n 7) 28-56.

<sup>87</sup> Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee and David Hubert, 'Fairness and Formality: Minimizing the Risk of prejudice in ADR' (1985) *Wisconsin Law Review* 1359, 1400, 1402.

<sup>88</sup> Kahane (n 7).

<sup>89</sup> NMAS Practice Standards (n 84) pt III, cl 7.1 provides that a 'mediator must conduct the mediation in a fair, equitable and impartial way without favouritism or bias in act or omission'.

<sup>90</sup> *Ibid* cl 7.4.

<sup>91</sup> *Ibid*.

<sup>92</sup> *Ibid* cl 7.5.

<sup>93</sup> *Ibid* cl 7.4, 7.7.

<sup>94</sup> *Ibid* cl 7.4 and cl 10(1)(c) which provides that the mediator must have understandings of the ethical principle of self-determination.

<sup>95</sup> *Ibid* cl 7.6.

<sup>96</sup> *Ibid* cl 6, 11.

'be alert to changing balances of power in mediation and manage mediation accordingly',<sup>97</sup> and have understandings of ethical principles including self-determination, confidentiality, procedural fairness and equity, and withdrawal from and termination of process.<sup>98</sup> All these are procedural safeguards for self-determination or party autonomy, but when stereotypes and prejudices based on culture and its practices are entrenched and held by the DRP, these procedural safeguards become ineffective in countering indignities.

In fact, one criticism about the processes of principled negotiation and mediation is that elements are not translatable across cultures, and where translated, or where those with different cultural practices, values and beliefs are required to use them, the processes themselves may be inhibiting. One reason for this is that the modern processes of principled negotiation or mediation are based on the individualist rather than the collectivist paradigm. The individualist makes decisions from the perspective of the individual self, while collectivists make decisions from the perspective of the collective self, that is, self in relation to the in-group or cultural group. The underlying values of the processes are Western, individualist values which those from collectivist cultures may find difficult to participate in.<sup>99</sup> This again, may diminish autonomy, and therefore, the dignity of parties. Also, rules around neutrality of the third party may not work well in cultures where elders provide advice and give direction on how the matter in dispute ought to be settled.<sup>100</sup>

To accord dignity to every party in a DR process, the five core interests of any human being must be satisfied. The interests are autonomy, appreciation, affiliation, role and status. Failure of the DRP to pay attention to these interests may 'generate strong negative emotions' but '[a]ttending to them can build rapport and a positive climate for problem-solving'.<sup>101</sup> The reason is not far-fetched: human dignity is a universal need. Each of the

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<sup>97</sup> Ibid cl 6.

<sup>98</sup> Ibid cl 10(c).

<sup>99</sup> Larissa Behrendt, 'Cultural Conflict in Colonial Legal Systems: An Australian Perspective' in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press, 2004) 116, 124-5.

<sup>100</sup> See, eg, Chief Justice Robert Yazzie, 'Navajo Peacemaking and Intercultural Dispute Resolution' in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press, 2004) 107.

<sup>101</sup> Ury, Fisher and Patton (n 78) 32.

five core needs can be traced to the concept of human dignity.<sup>102</sup> The concept of autonomy has been addressed in this section. Paying attention to the voice of a party is an important core need. This approach would go a long way to safeguard the dignity of parties in DR.

*B Human Dignity as Respect and Recognition in Dispute Resolution*

Another concept of dignity is respect and recognition. As noted above, respect is necessary in realising party autonomy or self-determination. DRPs and DR theorists emphasise the importance of respect in DR processes. The word ‘respect’ is defined as ‘esteem or deferential regard felt or shown’, ‘to treat with consideration; refrain from interfering with’, ‘the condition of being esteemed or honoured’, and ‘consideration or regard, as to something that might influence a choice’.<sup>103</sup> Self-respect is the ‘proper esteem or regard for the dignity of one’s character’.<sup>104</sup> Respect as directed toward self and others is important in consideration of dignity in DR. Appreciation — the ‘desire to be recognized and to valued’<sup>105</sup> — is a human need, and the ‘pursuit of positive self-worth (self-esteem) is a universal human characteristic’.<sup>106</sup>

Self-respect will influence the extent to which a person might be free to participate in the DR process, and respect for others is about how a party might treat other parties in the DR process. To realise self-respect, it is important to consider an aspect of dignity — dignity-of-self and dignity-in-relation — discussed above. Dignity-of-self relates to individual identity, which may also be shaped by the identity of the cultural group to which an individual belongs. In ‘The Politics of Recognition’, Charles Taylor discusses the connection between recognition and identity, identity being ‘a person’s understanding of who they are, of their fundamental defining characteristics as a human being’.<sup>107</sup> Taylor further asserts this identity

... is partly shaped by recognition or its absence, often by *mis*recognition of others, as so a person or group can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or

<sup>102</sup> Ibid. Autonomy is referred to as ‘the desire to make your own choices and control your own fate’.

<sup>103</sup> *The Macquarie Concise Dictionary* (Revised Third Edition, 2004) ‘Respect’.

<sup>104</sup> Ibid.

<sup>105</sup> Ury, Fisher and Patton (n 78) 32.

<sup>106</sup> Shultziner (n 39).

<sup>107</sup> Taylor (n 53) 25.

contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.<sup>108</sup>

No doubt, nonrecognition or misrecognition of minority cultures abound in the form of stereotypes, prejudices, ethnocentric attitudes, policies and approaches, mistreatment, imposition of legal systems and denial of cultural rights, deprivation of access to basic needs and so on. These forms of misrecognition or nonrecognition have significant consequences in DR spaces. They can sometimes be replicated, either consciously or unconsciously, by the DRPs, the institution, or the process of DR. In addition, nonrecognition or misrecognition affects the self-esteem and self-confidence of individual members of misrecognised or nonrecognised cultural groups. They could have adopted 'a depreciatory image of themselves ... internalized a picture of their own inferiority. So that even when some of the objective obstacles to their advancement fall away, they may be incapable of taking advantage of new opportunities ... and suffer the pain of low self-esteem.'<sup>109</sup> Misrecognition, Taylor asserts, is not just about 'a lack of due respect. It can inflict a grievous wound ...'<sup>110</sup> Individuals from minority groups coming into DR processes may carry some of these wounds with them, and DR processes and practices, including the attitudes and behaviours of DRPs, should not perpetuate these forms of misrecognition or nonrecognition. In fact, it is argued that to the extent possible, DR processes and practices should not allow maintenance of the status quo, or follow the individualist paradigm to the extent that the outcomes of processes reflect these forms of misrecognition or nonrecognition.

As noted above, cultural differences may sometimes be a source of imbalance of power in a DR process. This is particularly true where a party from a minority cultural group is unfamiliar with the process; is not equipped to fully participate in the process, in terms of language and role in the process; and lacks relevant information for effective participation due to disadvantage in ability to access relevant information. The DRP should pay attention to all of these forms of disadvantage in facilitating the process. A strict adherence to self-determination, with restrictions on the DRP not to intervene in any way, may

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<sup>108</sup> Ibid.

<sup>109</sup> Ibid 25-26.

<sup>110</sup> Ibid 26.

further disadvantage a party. While self-determination is a useful value, particularities of parties in the process must be taken into consideration.

DRPs must also be self-aware. They must be conscious of how their beliefs, attitudes and approaches may perpetuate misrecognition. Carol Izumi, in her paper titled 'Implicit Bias and the Illusion of Mediator Neutrality', considers the requirement of neutrality in mediation processes.<sup>111</sup> Neutrality (sometimes referred to or confused with impartiality) — referred to as a lack of input or interest in the outcome of the process — is a core value of mediation. It 'legitimizes the mediation process because the parties, rather than the mediator, are in control of decision-making' and 'parties' expectation of mediator neutrality is the basis upon which a relationship of trust is built'.<sup>112</sup> The essence and implications of neutrality in mediation has been the subject of much debate, but there are divergences in the definitions and requirement of neutrality. Arguably, there is a spectrum of practice but, as Izumi suggested, neutrality has four key elements: 'no conflict of interest; process equality; outcome-neutrality; and lack of bias, prejudice, or favouritism toward any party'.<sup>113</sup> The issue is how, and the extent to which, these elements may perpetuate disadvantage in a DR process.

In most jurisdictions, a mediator is referred to as an impartial third party required to act fairly, equitably and free from bias or favouritism.<sup>114</sup> Some Codes of Conduct specifically mention how bias may arise, including from mediators' perceptions of parties' personal characteristics, background, beliefs and values. These provisions are significant because they specifically address bias based on parties' personal attributes including, for example, race, ethnicity or religion. They also raise awareness of the mediator to unconscious bias by highlighting discriminatory tendencies on the part of the mediator.<sup>115</sup>

To conclude this section, DRPs need to do more to ensure that recognition and respect

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<sup>111</sup> Carol Izumi, 'Implicit Bias and the Illusion of Mediator Neutrality' (2010) 34 *Washington University Journal of Law & Policy* 71.

<sup>112</sup> *Ibid* 76.

<sup>113</sup> *Ibid* 79.

<sup>114</sup> NMAS Practice Standards (n 84); Mediation Institute, *Code of Ethics and Conduct for Members* (at 2018) cl 13; European Commission, *European Code of Conduct for Mediators* (at 2018) cl 2.2; American Bar Association, *Model Standards of Conduct for Mediators* (at September 2005) standard II; Singapore Mediation Centre, *Singapore Mediation Centre Neutral Evaluation Service Code Of Conduct* (at January 2007) cl 2.

<sup>115</sup> This bias on the part of mediators has been identified as occurring. See Delgado et al (n 87); Izumi (n 111) 71.

form the bedrock of DR in every case, are accorded to each party, and each DRP is aware of their own biases and prejudices and can put those aside in the matter before them. This recognition and respect is that of human dignity — the dignity that is accorded to every human being, including equal rights and immunities devoid of prejudices and biases. But it is also a recognition of the ‘unique identity’ of each individual because of the history of discrimination against the cultural group with which they identify. It is the recognition of the possibility of individuals having internalised such prejudices and biases to the extent they are not expectant of dignified treatment, so that whatever they receive, short of the discriminatory treatment they were expecting, becomes acceptable.

Procedural justice literature sheds some light on why minority groups may be satisfied with outcomes that may be considered of lower quality than outcomes received by individuals from mainstream groups. Procedural justice literature shows that people will be satisfied with outcomes of DR processes that are imbued with elements of procedural justice, including voice — the opportunity to speak and to be heard in the process. Voice provides a ‘cushion of support’<sup>116</sup> which may make unfair outcomes acceptable. This is referred to as the fair process effect. The fair process effect is captured as follows: ‘the more ... voice is available, the more an otherwise intolerable outcome ... becomes relatively acceptable’.<sup>117</sup>

Research conducted by Folger et al found that ‘when subjects were not certain that they had been treated inequitably, the voice procedure was rated fairer’ and ‘when people learn that someone else agrees that they have been denied their just desserts ... the positive impact of voice seems to be negated’.<sup>118</sup> Two things are worthy of note here: uncertainty about the quality of treatment (or lack of knowledge about what a fair treatment should look like) and alignment of views on the fairness of outcome with those of third parties lead to the frustration effect. Where an individual has internalised prejudices and biases against their identity, they may have low expectations which then

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<sup>116</sup> Lind and Tyler (n 4) 67.

<sup>117</sup> Robert Folger, David Rosenfield, Janet Grove and Louise Corkran, ‘Effects of “Voice” and Peer Opinions on Responses to Inequity’ (1979) 37(12) *Journal of Personality and Social Psychology* 2253, 2254.

<sup>118</sup> Ibid 2259-2260. See also Robert J Bies and Debra L Shapiro, ‘Voice and Justification: Their Influence on Procedural Fairness Judgments’ (1988) 31(3) *The Academy of Management Journal* 676 where the authors concluded that ‘a voice procedure that creates feelings of procedural fairness may serve as a decision-makers strategy to maintain people’s support for an unfavourable decision’: at 683 .

make unfair outcomes, as measured by society standards, acceptable to them.<sup>119</sup>

The foregoing argument is strengthened by a US study on the effect of race and gender on small claims adjudication and mediation in the US. The research found that the level of satisfaction with mediation among minority women was higher regardless of the fact they received less when they were claimants and paid more as respondents.<sup>120</sup> This could be due to having low expectations, lacking information to make a comparison between outcomes of their cases and similar cases, and satisfaction with the outcome, due to being treated fairly by the DRP, thus obscuring substantive unfairness.<sup>121</sup> Recognition based on human dignity as a fundamental value should also extend to recognition of the unique identity of the individual and the impact historical memory and years of misrecognition or nonrecognition has had on them, and invariably on the quality of their voice in DR processes. Human dignity should also be considered in the form of a dignified outcome.

### *C Substantive Dignity and Dispute Resolution*

Substantive dignity is about one's conception of the good life, but even this conception of the good life may be distorted by misrecognition and nonrecognition. However, this section focuses on that aspect of dignity that guarantees dignity in the form of 'access to social and economic goods, enabling one to maintain a certain minimum standard of living'.<sup>122</sup> As noted above, access to justice forms part of the conception of the good life based on the universal principle of human dignity. Access to justice for the disadvantaged is a concern for the international community as reflected in Sustainable Development Goal (SDG) 16.3, which is to 'promote the rule of law at the national and international

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<sup>119</sup> See detailed discussion in Akin Ojelabi, 'Exploring Voice' (n 85) 464-67.

<sup>120</sup> Michele G Herman et al, *The MetroCourt Project Final Report, A Study of the Effects of Ethnicity and Gender in Mediated and Adjudicated Small Claim Cases at the Metropolitan Court Mediation Center, Bernalillo County, Albuquerque, New Mexico: Cases Mediated or Adjudicated September 1990 – October 1991 (Final Report, January 1993)*. Other studies point to disadvantages that result from adopting a procedural justice framework for evaluating justice in mediation. See, eg, Gunning (n 67) who argued 'The classic and apparently neutral language that mediators are admonished to use - "How would you like to see this resolved" or "What did the other party say" - can unintentionally contribute to the repetition of whatever is the primary narrative and its interpretive framework': at 79-80 and 'For a primary narrative, the one which nests most comfortably within the larger cultural myths, to be transformed, the context and moral codes must be changed': at 25. See also Rebecca L Sandefur, 'Access to Civil Justice and Race, Class and Gender Inequality' (2008) 34(1) *Annual Review of Sociology* 339, 345-47.

<sup>121</sup> Jill Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9(2) *Murdoch University Electronic Journal of Law*.

<sup>122</sup> Michael (n 9) 22.

levels, and to ensure equal access to justice for all'.<sup>123</sup> SDG 16.3 is not only relevant for developing countries, but also for developed nations where access to justice may not be guaranteed equally for all citizens. This SDG focuses on ensuring equal access to justice for all and there is currently a push to have access to civil justice recognised as an important aspect of achieving SDG 16.<sup>124</sup>

The access to justice movement was most influential in the uptake of ADR processes and their institutionalisation.<sup>125</sup> Access to justice is about ensuring 'that the interests of the poor, minorities, and diffuse public interests can be taken into account'.<sup>126</sup> It is not, however, just about gaining access to a DR forum/process but also about just outcomes both individually and socially.<sup>127</sup> This requires making DR processes visible to parties, so they can use them, but also a guarantee for both procedural and substantive justice. In conceptualising what an access to justice approach to mediation should look like, five principles have been identified:

1. Mediation outcomes should not reflect the power, wealth, status and privilege of parties.
2. The quality of outcomes should not be measured based predominantly on acceptability to parties.
3. Practitioners should engage in holistic dispute analysis including an assessment of the nature of the dispute, parties' characteristics and relevant societal standards, including social and legal constructions of justice.
4. Law (legal principles) is useful to society and relevant in the resolution of disputes.
5. Mediators have some responsibility in ensuring procedural justice (that is, a fair process) and promoting substantive justice (that is, a fair

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<sup>123</sup> See 'Goal 16: Promote just, peaceful and inclusive societies', *Sustainable Development Goals* (Web Page) <<https://www.un.org/sustainabledevelopment/peace-justice/>>.

<sup>124</sup> See Peter Chapman and Sumaiya Islam, 'Equal Access to Civil Justice for All: How Will We Know When We Get There?', *SDG Knowledge Hub* (Web Page, 9 April 2018) <<http://sdg.iisd.org/commentary/guest-articles/equal-access-to-civil-justice-for-all-how-will-we-know-when-we-get-there/>>. See also 'Peace, Justice, and Strong Institutions: Why They Matter', *United Nations* (Web Page) <[https://www.un.org/sustainabledevelopment/wp-content/uploads/2017/01/16-00055p\\_Why\\_it\\_Matters\\_Goal16\\_Peace\\_new\\_text\\_Oct26.pdf](https://www.un.org/sustainabledevelopment/wp-content/uploads/2017/01/16-00055p_Why_it_Matters_Goal16_Peace_new_text_Oct26.pdf)>.

<sup>125</sup> Mary Anne Noone and Lola Akin Ojelabi, 'Ensuring Access to Justice' (2014) 40(2) *Monash University Law Review* 529, 561- 62.

<sup>126</sup> Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999) 31.

<sup>127</sup> Mauro Cappelletti and Bryant Garth, 'Access to Justice: The World-Wide Movement to make Rights Effective' in Mauro Cappelletti and Bryant Garth (eds), *Access to Justice: A World Survey* (Sitjhoff and Noordhoff, 1978) 6.

outcome).<sup>128</sup>

This approach counters the ambivalence of mediators in focusing on substantive aspects of a dispute based on neutrality-cum-party self-determination. The principles 'support the mediator in addressing inequality and its effects on the mediation process and outcomes'.<sup>129</sup> These principles were developed to apply in all settings where inequality may be present but could also apply where inequality is due to identity or cultural differences.

The principles of access to justice: accessibility, appropriateness, equity, efficiency, and effectiveness are relevant in measuring access to justice,<sup>130</sup> and are all relevant in measuring the quality of access to justice that are available to minority groups. They address questions such as whether parties understood and were supported to exercise their rights, or whether the choice not to exercise rights were free and informed; whether attention was paid to the real causes of the problems; whether access was fair and equal; whether fair outcomes were delivered efficiently; and whether best outcomes have been delivered.

#### V CONCLUSION – DIGNIFYING CULTURE IN DISPUTE RESOLUTION

This paper has canvassed the importance of dignity in DR processes involving cultural differences. Culture and dignity are both complex concepts, each with multiple meanings and approaches to defining them. Nonetheless their complexities do not diminish their relevance in human interaction and DR processes. The paper has considered various conceptions of dignity, identifying three conceptions that are relevant in DR: dignity as individual autonomy, dignity as recognition and respect, and substantive dignity. There are aspects of these conceptions of dignity in DR in the form of self-determination, procedural justice, effective participation in a DR process, respect in the form of treatment by the DRP and other parties in the process, and ensuring access to justice. Dignity as autonomy is important as it recognises the importance of the individual making decisions

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<sup>128</sup> Lola Akin Ojelabi, 'An Access to Justice Approach to Mediation and the Construction of Positive Legal Professional Identity' (2016) 23(3) *International Journal of the Legal Profession* 321, 323–24 ('An access to justice approach').

<sup>129</sup> *Ibid.*

<sup>130</sup> Noone and Akin Ojelabi (n 125).

in their own best interests. However, in circumstances where prejudice, stereotypes, and biases based on cultural identity have been internalised by a party, the outcomes might be short of what societal standards dictate in similar circumstances. This consideration is important in disputes involving cultural issues not because culture is problematic and a cause of disputes, but because identity is formulated in relation to others. Forms of nonrecognition or misrecognition based on cultural identity are prevalent in many societies and DR processes and practitioners should not turn a blind eye. DR processes must accord human dignity to all parties in a dispute and identify when cultural identity begins to impede the course of justice.

But it is also possible for cultural identification to obstruct the course of justice in another sense. This is the sense in which a claim to culture is used to support undignified treatment of another — the demonisation of culture.<sup>131</sup> In these instances, also, a DRP must not turn a blind eye, but must be willing to address indignities that are consequences of such demonisation. This requires cultural competency and awareness, but it also points to the need for generally acceptable values that are necessary to give effect to culture and identity in form of respect and recognition and resist cultural practices that support the undignified treatment of another.<sup>132</sup> Individual autonomy is not absolute; mutual respect and recognition is relevant even when both parties have the same cultural identity.

Giving effect to culture in a DR process will require the DRP to pay attention to the following:

1. Identify cultural norms that may be important to parties and embed cultural norms, where possible, in the process. They may also form criteria for evaluating outcomes.

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<sup>131</sup> This has been discussed in detail in Lola Akin Ojelabi, 'Dispute Resolution and the Demonisation of Culture' (2014) 25(1) *Australasian Dispute Resolution Journal* 30, 30 where it was stated that demonisation 'describes situations in which culture has been or is being labelled an obstacle, one way or another, to the resolution of disputes; where culture is used by perpetrators of abuse as an excuse for human rights violations or atrocious acts, and the deprivation of basic needs in dispute situations; and where culture is used by victims of abuse to excuse perpetrators' actions. Culture influences the path of dispute, making it intractable and prolonged, most of the time with little or no respect for human dignity and worth.'

<sup>132</sup> Lola Akin Ojelabi, 'Adopting culture-specific dispute resolution processes in Australia: Which way forward for access to justice?' (2015) 29 *Australian Journal of Family Law* 235. See also Ayelet Shachar, 'Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law' (2008) 9(2) *Theoretical Inquiries in Law* 573-607.

2. Recognise how public discourse on cultural identities may be impacting on the DR process and address them.
3. Recognise demonisation of culture and address based on values that are considered universal.<sup>133</sup>

To achieve the above, a DRP must possess cultural sensitivity and be culturally aware, both of themselves and others. They must identify their own biases and take steps to conduct the process in a culturally dignifying manner.

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<sup>133</sup> Ibid. See, eg, 'Criteria for QAP Intercultural Certification', *International Mediation Institute* (Web Page) <<https://www.imimmediation.org/orgs/cag-icc/>>.

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