

# Mediation and Access to Justice in Africa: Perspectives from Ghana

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I. INTRODUCTION

In recent years, alternative dispute resolution (“ADR”)<sup>1</sup> processes, particularly mediation, have been promoted in developing countries under the banner of access to justice.<sup>2</sup> One result is that many African countries are experiencing a transformation of their

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1. The term “ADR” refers to non-judicial dispute resolution. It is variously defined as “alternative dispute resolution,” “appropriate dispute resolution” or “amicable dispute resolution.” In this Article the term “ADR” refers to alternatives to the court adjudication of disputes. These processes include negotiation, mediation and arbitration and various hybrids of these processes. See STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION, AND OTHER PROCESSES 2–3 (6th ed. 2012).

2. See, e.g., William Davis & Helga Turku, *Access to Justice and Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 47 (2011).

civil justice systems as modern dispute resolution<sup>3</sup> gains a strong foothold throughout the African continent. ADR's informality and focus on non-adversarial justice has captured the imagination of many African states concerned with spiraling rates of litigation, backlogged court calendars,<sup>4</sup> and citizens' lack of meaningful access to justice.<sup>5</sup> Influenced by promises of increased flexibility and efficiency in resolving disputes, greater access to justice, and in some cases, promotion of foreign investment, legislators and policy-makers have become active both in promoting and in privatizing modern dispute resolution processes.<sup>6</sup>

There is nothing new about the use of informal and non-adversarial dispute resolution in African states.<sup>7</sup> Many of them have a long tradition of using customary dispute resolution processes including negotiation, mediation, and arbitration to resolve legal and social conflicts.<sup>8</sup> There are long-standing connections, for example, between contemporary western and traditional African mediation models. Various African commentators have observed that mediation as now

3. The Pound Conference is considered the beginning of the modern dispute resolution movement. GOLDBERG ET AL., *supra* note 1, at 5–7.

4. See, e.g., Ernest E. Uwazie, *Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability*, 16 AFR. CTR. FOR STRATEGIC STUD. 1 (2011); Joseph Blocher, *Building on Custom: Land Tenure Policy and Economic Development in Ghana*, 9 YALE HUM. RTS. & DEV. L.J. 166, 170 (2006); see also Patrick Tabaro, *Alternative Dispute Resolution is the Magic Wand to Solve Case Backlog in Our Courts*, THE OBSERVER (Sept. 14, 2012), [http://www.observer.ug/index.php?option=com\\_content&view=article&id=20722&catid=57](http://www.observer.ug/index.php?option=com_content&view=article&id=20722&catid=57) (describing ADR as the “magic wand” for getting rid of crowded case dockets); *Banking Industry Mediation Center Pilot at Strathmore Law School Offers Complimentary Services in an Effort to Promote Alternative Dispute Resolution Practices*, KENYA BANKERS ASSOCIATION (June 3, 2014), <http://www.kba.co.ke/home/92-latest-news/290-banking-industry-mediation-center-pilot-at-strathmore-law-school-offers-complimentary-services-in-an-effort-to-promote-alternative-dispute-resolution-practices> (reporting that it typically takes five years for banking related cases to be resolved in courts of Kenya).

5. See Richard C. Crook, Kojo Asante & Victor Brobbey, *Popular Concepts of Justice and Fairness in Ghana: Testing the Legitimacy of New Or Hybrid Forms of State Justice 2* (Afr. Power & Pol. Programme, Working Paper No. 14, 2010) [hereinafter *Popular Concepts of Justice*].

6. Amadou Dieng, *ADR in Sub-Saharan African Countries*, in ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES 611, 614 (Arnold Ingen-Housz ed., 2d ed. 2011) (saying it is a viable alternative to litigation). Ngor A. Garan, *S. Sudan's Chief Justice Calls for Speedy Dispute Resolution*, SUDAN TRIBUNE, (Sept. 13, 2011) <http://www.sudantribune.com/spip.php?article40137>.

7. For a discussion of what added value is brought by modern dispute resolution processes, see *infra* notes 141–45 and accompanying text.

8. Dieng, *supra* note 6, at 612 (describing the indigenous Sub-Saharan justice system where arbitration and mediation were “an integral part of institutional justice”). The author describes how in many Sub-Saharan countries, mediation and conciliation were traditionally used in employment and family law. *Id.* at 615; See Laura

practiced in the West “has deep roots in black Africa,”<sup>9</sup> and that court-connected ADR is simply traditional mediation as “practiced by our forebears.”<sup>10</sup> More recently, the death of South African statesman, Nelson Mandela, has shed light on interest-based problem-solving, consensus-building, forgiveness, reconciliation and other publically admired forms of dispute resolution that Mandela practiced.<sup>11</sup>

However, as modern dispute resolution enters its third decade of practice in several emerging democratic African countries,<sup>12</sup> not everyone is enthusiastic. There have been some ripples of resistance against ADR’s emphasis on the goals of settlement and peacemaking.<sup>13</sup> For some parties, there is a perception that these goals require too much compromise, posing a threat to their legal and customary rights,<sup>14</sup> while leaving them with less than their fair share of the legal pie.<sup>15</sup> Why should they put their faith in a legal system which seems to work against, not for, their legal rights.

Nader & Elisabetta Grande, *Current Illusions and Delusions About Conflict Management In Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 573 (2002) (discussing traditional mediation and negotiation in Eritrea); William Ury, *Wandering out to the Gods: Lessons in Dispute Resolution from the San*, 8 TRACK TWO 22 (1999).

9. Nabil N. Antaki, *Cultural Diversity and ADR Practices in the World*, in ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES 286 (Jean-Claude Goldsmith et al. eds., 2006).

10. *ADR System of Adjudication Catching Is Successful*, GHANA WEB, (Apr. 15, 2012), <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=235952>; see also Samuel O. Manteaw, *Legal Education in Africa: What Type of Lawyer Does Africa Need?*, 39 MCGEORGE L. REV. 903, 938 (2008) (arguing that mediation is a core African value that could be revived through establishing mediation clinics as part of African legal education).

11. ROBERT H. MNOOKIN, *BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT* 106–136 (2011) (discussing Nelson Mandela’s decision to begin negotiations with the South Africa apartheid government that had imprisoned him).

12. Nigeria enacted the Arbitration and Conciliation Act in 1990. Arbitration and Conciliation Act (1990) (Nigeria); Côte D’Ivoire created the Court of Arbitration in 1993. Resolution CCI/AG2/RES/No. 9/93, General Assembly of the Chamber of Commerce and Industry (1993) (Côte D’Ivoire); Kenya passed the Arbitration Act of 1995. Arbitration Act (1995) (Kenya); Tunisia also passed the Arbitration Code. Arbitration Code (1993) (Tunis.); Alternative Dispute Resolution Act, Act 798 (2010) (Ghana).

13. Resistance to mediation has not been limited to African countries. See Carrie Menkel-Meadow, *Variations in the Uptake of and Resistance to Mediation Outside of the United States*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2014 at 189, 189–221 (Arthur W. Rovine ed., 2015); Jacqueline Nolan-Haley, *Mediation: The Best and Worst of Times*, 16 CARDOZO J. CONFLICT RESOL. 731, 736 (2015).

14. See *infra* notes 231–59 and accompanying text.

15. See *infra* notes 231–38 and accompanying text; see also Richard C. Crook & Kojo Pumpuni Asante, *The State, ‘Hybrid institutions’ and the Provisions of More Accessible Justice in Africa: The Case of Ghana’s Commission on Human Rights and Administrative Justice*, 27 HARV. HUM. RTS. J. 1, 8 (2014), available at <http://harvard>

Given these concerns, it is time to consider some of the important questions raised by mediation and ADR's promise of access to justice in Africa. Reflection is critical at this time as several African countries seek to increase international trade and commercial development. Without meaningful access to justice, including viable commercial arbitration and mediation regimes, it will be difficult to advance these trade and development goals.<sup>16</sup> What is the relationship between the important values and normative principles of customary African dispute resolution and modern dispute resolution? What would prompt an African country to use a dispute resolution process such as mediation in its legal system? How does ADR add value to customary African dispute resolution? How have litigants responded to the availability of ADR processes, such as mediation? What are litigants' perceptions of justice when they participate in ADR processes such as mediation? To what extent has mediation's promise of access to justice been fulfilled?<sup>17</sup>

This Article responds to these inquiries through the lens of the evolving mediation regime in Ghana,<sup>18</sup> where the term "ADR" frequently refers to the mediation process.<sup>19</sup> While not representative of all African countries, Ghana provides a useful model for emerging

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hrj.com/2014/11/the-state-hybrid-institutions-and-the-provision-of-more-accessible-justice-in-africa-the-case-of-ghanas-commission-on-human-rights-and-administrative-justice/ (last visited Nov. 19, 2015) discussing mediation conducted in the Ghana Commission on Human Rights and Administrative Justice where parties resisted mediators' efforts to compromise in cases that involved alimony, child support, child custody which may have involved prior histories of domestic violence.

16. In August 2014, leaders of African nations met with President Obama in Washington, D.C. for a three day U.S.-Africa Leaders Summit. Among the topics for discussion were trade and investment opportunities. See *African Leaders Gather for US Summit*, BBC (Aug. 4, 2014), <http://www.bbc.com/news/world-us-canada-28644487> (last visited Aug. 12, 2014) [hereinafter *African Leaders*].

17. This type of review is not unique for Africa. For a critique of the ADR process of Lok Adelet see Mark Galanter & Jayanth K. Krishnan, "*Bread for the Poor*": Access to Justice and the Rights of the Needy in India, 55 *Hastings L.J.* 789 (2004) (describing a lack of fairness in the process and the absence of consent).

18. My interest in Ghana's ADR development grows out of mediation and conflict resolution training that I conducted in Ghana during the summers of 2011 and 2012 with Professors John Feerick, Elayne Greenberg, Paul Kirgis, Nene Amegatcher and Michael Owusu as part of a collaborative project with Fordham University School of Law, St. John's University School of Law, the Ghana School of Law and the Giving to Ghana Foundation.

19. Richard C. Crook, *Alternative Dispute Resolution and the Magistrate's Courts in Ghana: A case of practical hybridity 1-5* (Afr. Power & Pol. Programme, Working Paper No. 25, 2012) (referring to the process of "ADR mediation") [hereinafter *Magistrate's Courts*]; see also Bénin et al., *Alternative Dispute Resolution Services in West Africa: A Guide for Investors* 18 (2003) (stating that "most ADR cases in Ghana are in mediation and conciliation").

democracies in Africa that still wish to maintain traditional values. The success of this model depends in large measure upon how the ADR access to justice project takes into account local customs and traditions.<sup>20</sup> Ghana leads Sub-Saharan African countries in its promotion of modern ADR and incorporation of aspects of traditional dispute resolution into the formal legal system.<sup>21</sup> As the first Sub-Saharan African country to have gained independence from colonial powers, Ghana has experienced two decades of relative peace and security, benefiting from significant direct foreign investment and socioeconomic improvements.<sup>22</sup> Although Ghana has been confronted with recent financial difficulties,<sup>23</sup> and has had its share of ethnic conflicts, which plague so many African countries in the post-colonial era,<sup>24</sup> it is still generally considered to be West Africa's most stable democracy.<sup>25</sup> Like many other African states, Ghana has a dual legal system that includes customary dispute resolution by traditional authorities and a formal legal regime. Both systems have faced difficulties caused by the lack of resources to manage crowded court dockets in the formal legal system,<sup>26</sup> as well as challenges to the authority of traditional decision makers.<sup>27</sup> Responding to these problems, the state has turned to court-connected ADR, promoting modern dispute resolution methods while at the same time incorporating aspects of traditional dispute resolution into the formal legal system. However, there has been a lack of confidence in modern dispute resolution by

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20. See Isaac Owso-Mensah, *Politics, Chieftaincy and Customary Law in Ghana's Fourth Republic*, 6 J. PAN AFR. STUD., 261 (2014).

21. Dieng, *supra* note 6 at 615.

22. Owso-Mensah, *supra* note 20 at 261.

23. Ghana announced that it would seek financial aid from the International Monetary Fund (IMF) to help strengthen its currency, which has become one of the worst performing currencies. See *African Leaders, supra* note 16; see also *The Mighty Fallen: Africa's Former Jewel Struggles To Regain Its Gleam*, THE ECONOMIST (June 20, 2015), <http://www.economist.com/news/middle-east-and-africa/21654648-africas-former-jewel-struggles-regain-its-gleam-mighty-fallen> (discussing Ghana's problems with currency, corruption, power crisis and seasonal floods).

24. Hizkias Assefa, *Coexistence and Reconciliation in the Northern Region of Ghana*, in RECONCILIATION, JUSTICE, AND COEXISTENCE: THEORY & PRACTICE (Mohammed Abu-Nimer ed., 2001) (describing peacemaking and reconciliation efforts to resolve major ethnic conflict in Northern Ghana); Ulrike Schmid, *Legal Pluralism as a Source of Conflict in Multi-Ethnic Societies: The Case of Ghana*, 46 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 5 (2001) (describing ethnic conflicts in northern Ghana).

25. See Chetan Kumar, *Building National "Infrastructures for Peace": UN Assistance for Internally Negotiated Solutions to Violent Conflict*, in PEACEMAKING: FROM PRACTICE TO THEORY 384, 389 (Susan Allen Nan et al. eds., 2011).

26. Paul Kirgis, *Status and Contract in an Emerging Democracy: The Evolution of Dispute Resolution in Ghana*, 16 CARDOZO J. CONFLICT RESOL. 101 (2014).

27. Uwazie, *supra* note 4 at 2.

some potential users. This distrust is linked to what they perceive as ADR's emphasis on compromise through settlement and peacemaking at the expense of enforcing individual litigants' legal rights.<sup>28</sup> The state has reacted to this resistance from litigants with compulsion,<sup>29</sup> a strategy that goes against the grain of consensual decision-making, which permeates customary African dispute resolution.

The basic thesis of this Article is that modern dispute resolution in African states may not always be the best solution for providing access to justice and remedying underdeveloped or overburdened judicial systems unless more traditional values are taken into account, particularly the tradition of consensual decision-making. Consent gives legitimacy to decision-making,<sup>30</sup> ADR and in particular, mediation programs, as implemented in Africa under the banner of access to justice have at times conflicted with local customs and traditions surrounding dispute resolution, especially the long-standing custom of consensual decision-making. The resulting clash of traditions has caused negative reactions. This Article will examine traditional and modern dispute resolution practices in democratic African countries, with a particular emphasis on Ghana. Ghana's experience can offer some policy prescriptions, with this Article arguing that modern mediation is a useful addition to the legal systems of African countries when it takes into account the African context and culture. Mediation is better able to deliver authentic access to justice when it builds upon traditional dispute resolution systems and is adopted and promoted as a consensual process. In short, this Article makes a twofold argument. The first is that mediation as implemented in African legal systems should take into account local traditions and customs in order to be a vehicle for access to justice. The second is that consensual decision-making should find space in modern African dispute resolution.

Part I offers a brief history of ADR and its connections to the access to justice movement and describes some general critiques of ADR's access to justice claims. Part II examines the relationship between customary and modern African dispute resolution, the significant connections and competing tensions between both systems, and some perceptions of ADR's added value to African dispute resolution. Part III focuses on Ghana's experience with mediation as a vehicle for

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28. See *infra* notes 231–59 and accompanying text.

29. See *infra* note 216 and accompanying text. Commercial Division of the High Court of Ghana, High Court Civil Procedure Rules (C.I. 47).

30. Elisabetta Grande, *Alternative Dispute Resolution, Africa and the Structure of Law and Power: The Horn in Context*, 43 J. AFR. L. 63, 64 (1999).

delivering access to justice. It describes the Ghanaian legal system, the development of modern ADR in Ghana, litigants' experiences with mediation, including attitudes towards procedural justice in mediation, and finally the challenges facing mediation in Ghana. Part IV considers lessons learned from Ghana's experience in developing mediation programs, cautioning against ready acceptance of western models of mandatory mediation and suggesting instead fidelity to the customary tradition of consensual decision-making.

## II. BRIEF HISTORY OF ADR AND ITS CONNECTION TO THE ACCESS TO JUSTICE MOVEMENT

Popular notions of access to justice are focused on empowering individuals to exercise their legal rights in the civil justice system. Under customary international law, access to justice refers generally to a person's right to seek a remedy before an impartial court of law or tribunal.<sup>31</sup> The idea of access to justice is also part of a worldwide law reform movement described more than thirty-seven years ago by the late comparative law scholar, Mauro Cappelletti, and Professor Bryant Garth in their international study of access to justice.<sup>32</sup> One of the three waves of reform they identify is the promotion of systemic reform of the legal system through ADR settlement processes.<sup>33</sup> Today, ADR is part of a strong wave of reform in the United States and throughout the developed world,<sup>34</sup> as well as in many developing countries.<sup>35</sup> Some of its successes are based on the as-

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31. In the United States, access to justice is associated with access to courts. *See Developments in the Law Access to Courts*, 122 HARV. L. REV. 1153 (2008).

32. Mauro Cappelletti & Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report*, in ACCESS TO JUSTICE (Mauro Cappelletti & Bryant Garth eds., 1978).

33. Two other areas of reform included: (1) making legal aid accessible to the poor; and (2) providing legal representation for diffuse interests. Mauro Cappelletti and Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFFALO L. REV. 181, 198 (1978).

34. *See* Margherita Saraceno, *Justice: Greater Access, Lower Costs* 5 (Amsterdam Ctr. for L. & Econ., Working Paper No. 2014-01, 2014) (claiming that in developed countries there is a strong impression that citizens have excessive access to justice).

35. *See, e.g.*, G.M. Filisko, *Labor Lawyer Lands a Labor of Love—Planting Mediation Firmly in India*, ABA J. (Oct. 1, 2013, 8:00 AM), [http://www.abajournal.com/magazine/article/labor\\_lawyer\\_lands\\_a\\_labor\\_of\\_loveplanting\\_mediation\\_firmly\\_in\\_india/](http://www.abajournal.com/magazine/article/labor_lawyer_lands_a_labor_of_loveplanting_mediation_firmly_in_india/) (describing development of court mediation in India); *see also* Amy J. Cohen, *Debating the Globalization of U. S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 309 (observing that "ADR is now routinely shipped abroad as part of international development projects"). The IFC has produced two documents on ADR development, the Alternative Dispute Resolution Guidelines and the Alternative Dispute Resolution Center Manual. *See Alternative Dispute Resolution Center Manual: A Guide for Practitioners on Establishing and Managing ADR*



sumption that the availability of ADR processes enhances access to justice.<sup>36</sup>

The most popular form of ADR is the mediation process.<sup>37</sup> The promotional rhetoric offered by mediation advocates includes promises of greater efficiency in resolving disputes through cost and time savings,<sup>38</sup> greater satisfaction through party self-determination,<sup>39</sup> opportunities for preserving relationships, the potential for creative solutions, process flexibility, informality, and conservation of court resources.<sup>40</sup> Mediators enhance parties' understanding of their disputes, improve communications between them, and strengthen parties' problem-solving abilities. Taken together, these benefits offer possibilities for providing access to justice.<sup>41</sup>

Some critics argue, however, that ADR's access to justice claims demand more scrutiny.<sup>42</sup> Dame Hazel Genn believes for example,

*Centers* (2011), [https://www.wbginvestmentclimate.org/advisoryservices/upload/15322\\_MGPEI\\_Web.pdf](https://www.wbginvestmentclimate.org/advisoryservices/upload/15322_MGPEI_Web.pdf).

36. See, e.g., Access to Justice Review Northern Ireland: The Report 62 (Aug. 2011), [https://www.courtsni.gov.uk/enGB/Publications/Public\\_Consultation/Documents/Access%20to%20Justice%20Review%20Northern%20Ireland%20%20The%20Report/Access%20to%20Justice%20Review%20FINAL%20REPORT.pdf](https://www.courtsni.gov.uk/enGB/Publications/Public_Consultation/Documents/Access%20to%20Justice%20Review%20Northern%20Ireland%20%20The%20Report/Access%20to%20Justice%20Review%20FINAL%20REPORT.pdf) (stating that "the availability of a menu of ADR mechanisms for use in differing types of legal disputes enhances access to justice and should be promoted by the Department and stakeholders in the justice system"). The language of the EU Directive on Mediation is clear that its objective is to enhance access to justice within EU member states. The fifth paragraph of the Preamble to the Directive makes this clear: "(5) The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice should encompass access to judicial as well as extrajudicial dispute resolution methods." See Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, 2008 O.J. (L 136) 3, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>.

37. See Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 655 (2013–2014) (reporting from a multi-jurisdictional study of litigants' perceptions of legal procedures that litigants preferred mediation, the judge trial and negotiation by attorneys with clients present over all other examined procedures).

38. Judges are frequent proponents of the efficiency benefits of mediation. See Jennifer Reynolds, *Judicial Review: What Judges Write When They Write About Mediation*, 5 PENN ST. Y.B. ON ARB. & MEDIATION 111, 143–145 (2013).

39. But see Donna Shestowsky, *Disputants Preferences for Court—Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549 (2008) (arguing that disputing parties' ability to influence how their disputes are resolved are often co-opted by the courts).

40. See, e.g., LAURENCE J. BOULLE, MICHAEL T. COLATRELLA, JR. & ANTHONY P. PICCHIONI, *MEDIATION: SKILLS AND TECHNIQUES* 3 (2008).

41. See generally REGULATING DISPUTE RESOLUTION – ADR AND ACCESS TO JUSTICE AT THE CROSSROADS (Felix Steffek et al., 2013).

42. Hazel Genn, *What is Civil Justice For? Reform, ADR, and Access to Justice*, 24 YALE J.L. & HUMAN. 397 (2012).

that mediation does not provide access to the courts or even to substantive justice based on legal rights. For her, mediation is simply a settlement process.<sup>43</sup> Professor Owen Fiss has famously argued against settlement because it deprives parties of the remedial help of a lawsuit that access to the courts provides.<sup>44</sup> Professor Deborah Hensler has criticized mediation for its lack of public norms to guide agreements. She argues that this might lead some disputants to think that mediation is an unfair process.<sup>45</sup>

Some of these critiques suggest a lack of understanding about the nature of mediation and other consensual ADR processes. Not every dispute calls for the elaborate trappings of court adjudication with its attendant costs and delays. While mediation does not provide access to the courts, it does provide access to dispute resolution and it can certainly provide parties with a sense of justice and fairness when their disputes are resolved according to the terms they have freely chosen. Rather than relying on public norms to guide agreements, in the classic form of mediation, the parties themselves are encouraged to generate the norms that will govern their dispute.<sup>46</sup>

### III. RELATIONSHIP BETWEEN CUSTOMARY AND MODERN AFRICAN DISPUTE RESOLUTION

The integration of modern dispute resolution processes into legally pluralistic African justice systems has been accomplished through multiple mechanisms. In some cases, the ADR project has involved merging traditional dispute processes with modern ADR.<sup>47</sup> In others, there have been varied adaptations of western ADR models.<sup>48</sup> To a large degree, these integration efforts have been initiated by the United Nations and western non-governmental organizations,<sup>49</sup> as part of the access to justice movement.<sup>50</sup>

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43. *Id.* at 4, 7–8.

44. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); See Nader & Grande, *supra* note 8.

45. Deborah Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 90–94 (2002).

46. Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L. J. 703, 708 (1997).

47. See Phyllis E. Bernard, *Begging for Justice? Or, Adaptive Jurisprudence? Initial Reflections on Mandatory ADR to Enforce Women's Rights in Rwanda*, 7 CARDOZO J. CONFLICT RESOL. 325, 339–49 (2006).

48. See, e.g., Alternative Dispute Resolution Act, Act 798, §§ 63–88 (2010) (Ghana).

49. In 2008, the UN published a Guidance Note on Rule of Law Assistance and recommended that development projects establish “alternative or traditional dispute resolution mechanisms” as part of a broader justice reform project. Guidance Note of

### A. Customary Dispute Resolution: A Consensual Undertaking

Customary dispute resolution, anchored in the values of consent and reconciliation, has a long and revered history of providing access to justice for citizens in African societies. It exists today in many African countries side by side with modern ADR, as seen for example in the Rwandan Gacaca<sup>51</sup> and the Mato Oput reconciliation process of the Acholi society.<sup>52</sup> In addition to disputing parties, the key players in customary dispute resolution are family heads, elders, chiefs,<sup>53</sup> and queen mothers.<sup>54</sup> These individuals manage and resolve conflicts through processes that could be identified as negotiation, mediation, arbitration,<sup>55</sup> or as other forms of adjudication.<sup>56</sup> In some countries, customary arbitration remains the dominant form of dispute resolution.<sup>57</sup> Customary dispute resolution generally operates within a communitarian framework with variations depending upon the customs and practices acceptable in a particular region,<sup>58</sup> ethnic groups, or community.<sup>59</sup> It remains an integral part of people's lives in multiple communities in Africa.<sup>60</sup>

African customary dispute resolution is at its core a consensual undertaking. The process is voluntary and any decision must be

the Secretary-General, UN Approach to Rule of Law Assistance 7 (Apr. 2008), <http://www.unrol.org/files/RoL%20Guidance%20Note%20UN%20Approach%20FINAL.pdf>.

50. See *supra* notes 31–41 and accompanying text.

51. Bernard, *supra* note 47, at 328.

52. Tim Murithi, *African Approaches to Building Peace and Social Solidarity*, 6 AFR. J. ON CONFLICT RESOL. 9, 24–27 (2006). The Acholi region of Africa is located in Uganda.

53. See generally K. A. BUSIA, *THE POSITION OF THE CHIEF IN THE MODERN POLITICAL SYSTEM OF ASHANTI: A Study of the Influence of Contemporary Social Changes on Ashanti Political Institutions* (1968).

54. *Id.* at 19–21.

55. Most disputes that implicate such customs or cultural practices affecting these peoples are still resolved through a process of customary arbitration. See Emilia Onyema, *The New Ghana ADR Act 2010: A Critical Overview*, 28 ARB. INT'L 101, 122 (2012).

56. WILLIAM I. ZARTMAN, *Conclusions: Changes in the New Order and the Place for the Old*, in *TRADITIONAL CURES FOR MODERN CONFLICTS: AFRICAN CONFLICT "MEDICINE"* 219, 220 (William I. Zartman ed., 2000).

57. Blocher, *supra* note 4, at 201.

58. See, e.g., WILLIAM L. URY, *Dispute Resolution Notes from the Kalahari*, 6 NEGOTIATION J. 229 (1990).

59. Onyema, *supra* note 55, at 123.

60. For example, Uganda's Land Act 1998 allows traditional dispute resolvers to mediate land disputes. Blocher, *supra* note 4, at 201; see also Paul F. Kirgis, *Status and Contract in an Emerging Democracy: The Evolution of Dispute Resolution in Ghana*, 16 CARDOZO J. CONFLICT RESOL. 101 (2014).

based on mutual agreement.<sup>61</sup> While the officiating chiefs or elders do have authority to ultimately make decisions, the consent of the parties involved in the conflict as well as that of the community is what truly validates the decision-making process.<sup>62</sup> The goal of customary dispute resolution is to achieve solutions that meet the needs of all and can be honored by all, whether it is as local as the Bushman trying to reach a consensus in the contained community of the Kalahari Desert<sup>63</sup> or as global as Nelson Mandela practicing patient consensus-building on the world stage.<sup>64</sup>

Reconciliation is also a predominant cultural value in many African dispute resolution systems.<sup>65</sup> Customary dispute resolution authorities focus on restoring harmony to the community, encouraging consensus, and reconciling competing interests.<sup>66</sup> An offending party may be required to apologize to the community<sup>67</sup> or to a specific individual<sup>68</sup> before any settlement is finalized. In the criminal context, customary dispute resolution emphasizes bringing the offender back into the community,<sup>69</sup> making restitution, and providing other forms of atonement as a means of encouraging forgiveness.<sup>70</sup> Reconciliation is linked to mutual consent, as both the victim and the offender have to agree to the final outcome.<sup>71</sup>

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61. PENAL REFORM INTERNATIONAL, ACCESS TO JUSTICE IN SUB-SAHARAN AFRICA: THE ROLE OF TRADITIONAL AND INFORMAL JUSTICE SYSTEMS 23 (2001), <http://www.penalreform.org/wp-content/uploads/2013/06/rep-2001-access-to-justice-africa-en.pdf> [hereinafter PENAL REFORM INTERNATIONAL].

62. Grande, *supra* note 30, at 64 (noting that party and community consent “still remains the main source of legitimization of the decision. . .”).

63. Ury, Track Two, *supra* note 8, at 24.

64. *Emulate Mandela's Selfless Life-Speaker Urges Politicians*, GHANA NEWS AGENCY, Dec. 12, 2013, <http://www.ghananewsagency.org/social/emulate-mandela-selfless-life-speaker-urges-politicians-68461>.

65. ZARTMAN, *supra* note 56, at 222.

66. Ury, Track Two, *supra* note 8, at 24, 25 .

67. See Kirgis, *supra* note 60, at 105–07 (describing a customary dispute resolution proceeding conducted by a Queen Mother in Ghana where the Queen Mother requested that the offending party kneel before her and apologize to her, as representative of the community, for her breach of customary law before accepting the parties' proposed settlement).

68. Crook, *Magistrate's Courts*, *supra* note 19, at 13 (describing boy who had to kneel before mother and apologize).

69. ZARTMAN, *supra* note 56, 220–22. This is the source of our restorative justice programs.

70. Nancy Erbe et al., *Negotiating and Mediating Peace in Africa*, 9 PEPP. DISP. RESOL. L.J. 457, 486 (2009).

71. PENAL REFORM INTERNATIONAL, *supra* note 61, at 23.

## B. *The Modern ADR Project in Africa*

Modern ADR has come of age in many African countries.<sup>72</sup> Mediation and arbitration programs are now available through courts, community centers, and private dispute resolution organizations in major capital cities and regional centers.<sup>73</sup> African universities are conducting ADR research and producing significant ADR scholarship.<sup>74</sup> The roots of these developments can be traced to earlier usage of ADR processes to advance peacemaking and the rule of law in Africa. For over twenty-five years, ADR processes have been viewed as a curative for many developing African states experiencing internal and external crises.<sup>75</sup> There are several strands of ADR development in Africa from the initial peacemaking efforts in the post-colonial era to the more recent rule of law and access to justice initiatives.

### 1. *Peacekeeping and Rule of Law Programs*

Early use of modern ADR processes was directed toward peacemaking initiatives as ethnic conflicts in post-Colonial Africa raised

72. One example is the number of dispute resolution programs throughout Africa. See, e.g., THE GHANA ARBITRATION CENTER, <http://www.ghanaarbitration.org> (last visited July 16, 2014); LAGOS COURT OF ARBITRATION AND INTERNATIONAL CENTRE FOR ARBITRATION AND ADR, <http://www.lagosarbitration.org> (last visited July 16, 2014); REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION – LAGOS, <http://www.rcicalagos.org> (last visited July 16, 2014); KIGALI INTERNATIONAL ARBITRATION CENTRE – RWANDA, <http://www.kiac.org.rw> (last visited July 16, 2014); THE ARBITRATION FOUNDATION OF SOUTHERN AFRICA, <http://www.arbitration.co.za> (last visited July 16, 2014); AFRICA ADR, <http://www.africaadr.com> (last visited Jul. 16, 2014); EQUILLORE – SOUTH AFRICA, <http://www.equillore.com/wp/> (last visited July 16, 2014); REPUBLIQUE DEMOCRATIQUE DU CONGO CENTRE NATIONAL D'ARBITRAGE, DE CONCILIATION ET DE MEDIATION, <http://www.cenacom.cd> (last visited July 16, 2014); CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION, <http://www.crcica.org.eg> (last visited July 16, 2014).

73. There are over sixteen regional and national ADR centers in West Africa. See Bénin et al., *supra* 19; see also *supra* note 72 and accompanying text describing centers.

74. See, e.g., CENTER FOR MEDIATION IN AFRICA AT THE UNIVERSITY OF PRETORIA, <http://www.up.ac.za/centre-for-mediation-in-africa/> (last visited July 16, 2014); AFRICA CENTRE FOR DISPUTE SETTLEMENT AT THE UNIVERSITY OF STELLENBOSCH BUSINESS SCHOOL, <http://www.usb.ac.za/disputesettlement/> (last visited July 16, 2014); CENTRE FOR CONFLICT RESOLUTION AT THE UNIVERSITY OF CAPE TOWN, <http://www.ccr.org.za/index.php> (last visited July 16, 2014); Kenya Bankers Association, *Banking Industry Mediation Center Pilot at Strathmore Law School Offers Complimentary Services in an Effort to Promote Alternative Dispute Resolution Practices*, BANKING INDUSTRY MEDIATION CENTER (June 3, 2014) <http://www.kba.co.ke/home/92-latest-news/290-banking-industry-mediation-center-pilot-at-strathmore-law-school-offers-complimentary-services-in-an-effort-to-promote-alternative-dispute-resolution-practices>.

75. Ken Ahorsu & Robert Ame, *Mediation with a Traditional Flavor in the Fodome Chieftaincy and Communal Conflicts*, 1 AFR. CONFLICT & PEACEBUILDING. REV. 6, 7 (2011).

serious concerns by the United Nations (“UN”) and other multi-lateral organizations about the power games being played by leaders attempting to retain their political status. Professor Nancy Erbe observes that concerns related to power and power-sharing were the critical dispute resolution questions facing most African countries at this time.<sup>76</sup> Responding to the continuing crises created by ethnic conflicts, nine UN peacekeeping missions were deployed to Africa during the 1990s.<sup>77</sup> At the same time, using traditional interventionists approaches, multiple organizations within Africa were also involved in a wide range of peacekeeping activities from special representatives, military monitoring, and mediation assistance, to actual peacekeeping forces.<sup>78</sup> These interventions, however, were not particularly effective in minimizing or reducing ethnic conflict.<sup>79</sup> Large scale, destructive conflicts have also not been amenable to resolution through ADR techniques.<sup>80</sup>

Similar to peacekeeping projects, rule of law programs played a role in exporting modern ADR regimes to Africa.<sup>81</sup> In an effort to prevent and manage conflict in Africa,<sup>82</sup> multiple organizations including the American Bar Association,<sup>83</sup> non-governmental

76. Erbe et al., *supra* note 70, at 463; *see also* Nader & Grande, *supra* note 8, at 582–83 (describing issues with military power).

77. I. William Zartman, *Introduction to TRADITIONAL CURES FOR MODERN CONFLICTS: AFRICAN CONFLICT “MEDICINE”* 1, 2 (I. William Zartman ed., 2000).

78. *Id.* at 2–3.

79. *Id.* at 3 (noting that “. . . African conflicts remain[ed] impervious to these attentions”).

80. *See generally* J. Edward Torgbor, *Constructive Dispute and Conflict Resolution: A Technique for Resolving Serious Conflicts in Africa*, 25 *ARB. INT’L* 121 (2009) (arguing that these procedures are often too formalized to deal effectively with some of the complex conflicts throughout Africa and that new models be designed that are more appropriate for African conflicts).

81. For a general understanding of the term “rule of law” *see generally* BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2005). (relevant pages supplied by author).

82. *See, e.g.*, Uwazie, *supra* note 4, at 3 (describing ADR projects in Ethiopia and Ghana funded by the U.S. Department of State, and a project in Nigeria funded by the World Bank).

83. *See, e.g.*, Bernard, *supra* note 47 (describing an ABA African Law Initiative funded by the MacArthur Foundation to develop a model for culturally appropriate mediation and arbitration in Rwanda in 2004); Phyllis E. Bernard, *Eliminationist Discourse in a Conflicted Society: Lessons For America From Africa?*, 93 *MARQ. L. REV.* 173, 202–05 (2009) (describing an ABA Africa Project for mediation training in the Niger Delta in 2002). The USAID provided support for the Rwandan Gacaca, a customary form of mediation, to establish truth and foster reconciliation after the Rwandan genocide. Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 *Y.U. J. INT’L L. & POL.* 355, 357 n.6 (2002); US Agency of International Development, *Development Programs in Rwanda*, RELIEFWEB (Apr. 5, 2004) <http://reliefweb.int/report/rwanda/development-programs-rwanda>.

organizations,<sup>84</sup> and institutions such as the World Bank<sup>85</sup> and the U.S. Department of State have been active in bringing ADR and mediation training programs to Africa.<sup>86</sup> The concept underlying this intervention was that that resolution of ordinary disputes would help to ensure the stability needed for the prevention or resolution of more serious and pervasive disputes.<sup>87</sup> Because access to justice is considered an essential element of the rule of law,<sup>88</sup> many of these programs<sup>89</sup> incorporated ADR in rule of law projects for Africa<sup>90</sup> as a

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84. See, e.g., Center for African Peace and Conflict Resolution at California State University, <http://www.csus.edu/org/capcr/about%20capcr.html> (last visited November 24, 2015).

85. In Ghana, for example, the World Bank has provided ADR training for chiefs. Crook, *Magistrate's Courts*, *supra* note 19, at 3 n.2.

86. See, e.g., Scott Brown et al., *Conflict Management Group, Alternative Dispute Resolution: Practitioners Guide*, USAID (1998), <http://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf>. The World Bank acting through its private sector group, the International Finance Corporation (IFC) is involved in several ADR projects in developing countries. Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295 n.45 (2006); see also *IFC Alternative Dispute Resolution: Product Development*, WORLD BANK GROUP, [https://www.wbginvestmentclimate.org/uploads/ADR%20Factsh\\_eet.pdf](https://www.wbginvestmentclimate.org/uploads/ADR%20Factsh_eet.pdf). For a general discussion of how donor funded ADR program, USAID and the World Bank promote ADR in development programs, see Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, 5 HARV. NEGOT. L. REV. 339 (2000).

87. Eghosa E. Osaghae, *Applying Traditional Methods to Modern Conflict: Possibilities and Limits*, in *TRADITIONAL CURES FOR MODERN CONFLICTS: AFRICAN CONFLICT "MEDICINE"* 201, 213 (I. William Zartman ed., 2000).

88. Access to justice is considered an essential element in the rule of law. See Marianna Hernandez Crespo, *From Noise to Music: The Potential of the Multi-Door Courthouse (Casas de Justicia) Model to Advance Systemic Inclusion and Participation as a Foundation for Sustainable Rule of Law in Latin America*, 2012 J. OF DISP. RESOL. 335 (2012) (arguing that citizen participation is an essential ingredient of civil society).

89. See, e.g., *Alternative Dispute Resolution Work Continues in Liberia*, AMERICAN BAR ASSOCIATION RULE OF LAW INITIATIVE (Nov. 2008), [http://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/africa/liberia/news/news\\_liberia\\_alternative\\_dispute\\_resolution.html](http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/liberia/news/news_liberia_alternative_dispute_resolution.html) (describing a mediation training that was conducted to improve dialogue between elders and villagers in a community water dispute); see also *Rwanda Programs*, American Bar Association Rule of Law Initiative, [http://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/africa/rwanda/programs.html](http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/rwanda/programs.html) (last visited November 17, 2015) (describing mediation training in Rwanda).

90. See, e.g., James Michael, *Alternative Dispute Resolution and the Rule of Law in International Development Cooperation*, 2011 J. DISP. RESOL. 21 (2011); For a general discussion of whether ADR has had a negative impact on rule of law development in countries with corrupt regimes, see Cynthia Alkan, *Lost in Translation: Can Exporting ADR Harm Rule of Law Development?*, 2011 J. DISP. RESOL. 165 (2011); Jean Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law?*, 56 DEPAUL L. REV. 569 (2007).

means of providing access to justice.<sup>91</sup> With the growing sophistication and knowledge about ADR's benefits, enthusiasm has likewise grown. ADR processes are now promoted not only to deal with violent ethnic conflicts, but other difficult problems facing African countries as well, such as reintegrating child soldiers back into the community, dealing with national debts,<sup>92</sup> preventing judicial corruption, and working with ineffectual court systems.<sup>93</sup> Mediation holds a particular attraction as offering a viable alternative in legal dualist systems where both formal law and African customary law are in place. Some scholars argue that when both of these institutions have problems, mediation is able to offer a "healthy competition for chiefs in the justice marketplace."<sup>94</sup>

## 2. Access to Justice, Court Programs, and Compulsory Mediation

A separate wave of ADR development has occurred in various African court systems where ADR court rules are already in place.<sup>95</sup> In several countries, mediation is a mandatory feature in the civil justice system<sup>96</sup> or is in some way incorporated into civil litigation.<sup>97</sup>

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91. Whether ADR, however, is consistent with the rule of law, is a contested matter. See Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1 (2011); see also Sternlight, *supra* note 90.

92. See, e.g., Erbe et al., *supra* note 70, at 459.

93. Data from a study of mediation practice in The Gambia showed that parties preferred local level mediation where they perceived the courts to be inept. The same study parties expressed a dislike of the judicial system because it did not express their beliefs. Mark Davidheiser, *Harmony, Peacemaking, and Power: Controlling Processes and African Mediation*, 23 CONFLICT RESOL. Q. 281, 290–292 (2006).

94. Chi Mgbako & Kristina Scurry Baehr, *Engaging Legal Dualism: Paralegal Organizations and Customary Law in Sierra Leone and Liberia*, in THE FUTURE OF AFRICAN CUSTOMARY LAW 170, 179, 191, 200 (Jeanmarie Fenrich et al. eds., 2011).

95. For notable examples, see, e.g., Federal High Court Civil Procedure Rules 2000 Order 20 (Nigeria), South Africa (<http://www.justice.gov.za/legislation/rules/rules.htm>), Tanzania (<http://www.scribd.com/doc/113774001/The-High-Court-Commercial-Division-Procedure-Rules-2012-Gn-No-250-of-2012>), Uganda (<http://www.ulii.org/ug/legislation/consolidated-act/71>), Ghana (<http://www.judicial.gov.gh/index.php/library-services/supreme-court-rules#>), Namibia (<http://www.newera.com.na/2014/06/02/damaseb-applauds-mediators/>).

96. Job Bwire, *Uganda: Mediation Fastens Dispensation of Justice*, ALL AFRICA (June 20, 2013), <http://allafrica.com/stories/201306201336.html>; Bernard, *supra* note 47 (describing Mediation Committees in Rwanda); Edwin Musoni, *Pressure Eased On Courts As Local Mediators Resolve 32,000 Cases*, THE NEW TIMES (Oct. 18, 2013), <http://www.newtimes.co.rw/news/index.php?i=15514&a=71342> (describing how local mediation committees have alleviated some of the pressure on local court dockets and also empowered citizens to resolve their own conflicts). Under the High Court Civil Procedure Rules, mediation is a mandatory pre-trial procedure in the Commercial division of the High Court of Ghana. See Dieng, *supra* note 6, at 616.



The enthusiastic response of many African countries to ADR results from a convergence of several factors including overburdened courts, lack of access to justice,<sup>98</sup> and a perception that ADR is a way to enhance access to justice.<sup>99</sup> This idyllic view is exemplified in Uganda's description of ADR as a "magic wand" to remedy the problem of crowded dockets in the commercial courts.<sup>100</sup>

Some countries have adapted modern dispute resolution to accommodate their traditional values as seen in the Mediation Committees established in Rwanda following the genocide of 1990 -1994.<sup>101</sup> Countries that are not as adaptable as Rwanda may face challenges when they fail to account for context and culture in ADR program design.<sup>102</sup> A notable example is the cultural norm of respect for the elderly.<sup>103</sup> In Uganda, a court-connected mediation program met with resistance for using law students as mediators. The disputing parties were accustomed to having elders act as mediators in customary mediation and they resisted the idea of youthful facilitators.<sup>104</sup> Other

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97. The U.K. law firm of Herbert Smith Freehills conducted a survey on the use of ADR in African countries in which they sought a response to the following question: "Are parties to litigation or arbitration required to consider or submit to alternative dispute resolution before or during proceedings?" The study reports that the following countries have in some way incorporated mandatory mediation into certain civil litigation processes: Algeria, Chad, Equatorial Guinea, Gabon, Malawi, Namibia, Nigeria, Republic of Congo, Rwanda, Senegal, Sierra Leone, Tanzania, Uganda, Morocco (only in divorce cases). *Dispute Resolution in Africa: Legal Guide*, HERBERT SMITH FREEHILLS (March 2013), <http://www.herbertsmithfreehills.com/-/media/Files/PDFs/2014/Guide-to-dispute-resolution-in-Africa-TEASER.pdf>.

98. Uwazie, *supra* note 4, at 2-3.

99. See, e.g., J. Charles Kajimanga, Enhancing Access to Justice Through Alternative Dispute Resolution Mechanisms-The Zambian Experience, Keynote Address at the Kenyan Branch of the Chartered Institute of Arbitrators Annual Regional Conference (July 25, 2013), <http://www.ciarb.org/zambia/ABSTRACT%20-%20ENHANCING%20ACCESS%20TO%20JUSTICE%20THROUGH%20ALTERNATIVE%20DISPUTE%20RESOLUTION%20MECHANISMS%20%20THE%20ZAMBIAN%20EXPERIENCE.pdf>.

100. See Anthony P. Greco, *ADR and a Smile: Neocolonialism and the West's Newest Export in Africa*, 10 PEPP. DISP. RESOL. L.J. 649, 666-67 (2010) (describing Uganda's mandatory court-connected mediation program).

101. See Bernard, *supra* note 47, at 347-51.

102. See Julia Ann Gold, *ADR Through A Cultural Lens: How Cultural Values Shape Our Disputing Process*, J. DISP. RESOL. 289 (2005); Amanda Stallard, *Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution*, 17 OHIO ST. J. DISP. RESOL. 463 (2001-2002).

103. See Crook's description of a mediation session in Ghana where the mediator advised a son to apologize to his mother as part of the mediated settlement and the son offered the apology while kneeling down. Crook, *Magistrate's Courts*, note 19, at 13.

104. See Greco, *supra* note 100; see also Alexandra Crampton, *Addressing Questions of Culture and Power in the Globalization of ADR: Lessons From African Influence on American Mediation*, 27 HAMLINE J. PUB. L. & POL'Y 229, 235-36 (2005-2006)

problems in developing court mediation programs in some countries have been the lack of professionally trained mediators,<sup>105</sup> and the continuing lack of funds to support an ADR infrastructure<sup>106</sup> that is largely dependent upon donors.<sup>107</sup>

### 3. *Critique of Modern ADR Developments in Africa*

The exportation of western ADR models to Africa as part of access to justice initiatives has been a highly contested enterprise. Early critiques objected to the exportation of western ADR models to Africa, as forms of global imperialism<sup>108</sup> and an imposition of Western harmony ideology.<sup>109</sup> While some scholars questioned whether ADR programs were even appropriate for Africa,<sup>110</sup> others argued that customary dispute resolution processes should be maintained,<sup>111</sup> given their value in promoting reconciliation and restorative justice practices.<sup>112</sup> More recently, scholars have proposed “blending” traditional African values, norms and ethnographic practices with modern ADR.<sup>113</sup>

Some critics of modern ADR developments in Africa argue that ADR is a controlling process that has transplanted legal traditions from other cultures,<sup>114</sup> and that needs to be understood in the context of power dynamics.<sup>115</sup> Others claim that current efforts by outside

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(noting the importance of choosing mediators with standing in the community in Ghana).

105. Dieng, *supra* note 6, at 615 (discussing Sub-Saharan former French colonies).

106. Crook, *Magistrate’s Courts*, *supra* note 19, at 9 n.17 (reporting that mediators had not been paid for nearly a year).

107. *See* Dieng, *supra* note 6, at 620.

108. *See, e.g.*, Crampton, *supra* note 104, at 239 (discussing the imperialism critique of American ADR).

109. Laura Nader & Elisabetta Grande, *From the Trenches and Towers: Reply: Current Illusions and Delusions About Conflict Management In Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 631, 632 (2002) (claiming that the western harmony model of dispute resolution may be less helpful than the rule of law in some cases). *But see* Davidheiser, *supra* note 93 (challenging Nader’s critique of ADR as harmony ideology).

110. Laurel Rose, *Are ADR Programs Suitable for Africa?*, Africa Notes, 1996, at 5–7. Laurel Rose points out the conceptual problems of comparing modern American ADR with conflict resolution in African communities.

111. *See, e.g.*, Laurence Juma, *Africa, Its Conflicts and Its Traditions: Debating a Suitable Role for Tradition in African Peace Initiatives*, 13 MICH. ST. J. INT’L L. 417, 468–69 (2005) (discussing the weaknesses of ADR approaches, focusing in particular on mediation in African conflicts).

112. *See* Dieng, *supra* note 6, at 614.

113. Ahorsu & Ame, *supra* note 75, at 8.

114. Nader & Grande, *supra* note 8, at 573–94.

115. Grande, *supra* note 30, at 69.

professionals have failed to bridge the gap between theory and practice in resolving conflict. Outside professionals have made little difference in the lives of the parties affected by conflict due to an “entry and exit” type of involvement where these professionals simply enter conflict zones to respond to specific situations and then leave. People living in the conflict zones who need more than a quick fix are left without the assistance and skills to manage and resolve daily conflict situations.<sup>116</sup> There is also a concern that despite state support for ADR programs, many suffer from lack of sustainable financing as well as inadequate human resources.<sup>117</sup>

a. *Tensions between Customary and Modern African Dispute Resolution Illustrate Differences between Western and Customary Styles of Mediation*

As ADR becomes integrated in local dispute resolution systems, scholars have observed significant connections between customary African dispute resolution and modern ADR processes.<sup>118</sup> In particular, the traditional African values of reconciliation and forgiveness are now embedded in popular forms of non-adversarial justice, including transitional justice schemes,<sup>119</sup> and restorative justice practices such as victim offender mediation. At the same time however, there still exist significant differences among the traditions of both modes of dispute resolution, particularly with respect to the Western mediation values of neutrality, party self-determination,<sup>120</sup> and confidentiality. These values are incorporated into popular standards of practice in the United States, and they distinguish Western style mediation with its focus on individualism and autonomy from the collective culture of customary African mediation. Through using the United States as an example, one can see the differences in practices between Western and customary African styles of mediation. It should be noted however that the distinction between Western and customary African values are not absolute but are evolving and adaptive dynamics.<sup>121</sup>

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116. Erbe et al., *supra* note 70, at 466.

117. Dieng, *supra* note 6, at 620.

118. See, e.g., Juma, *supra* note 111; Antaki, *supra* note 9, at 286.

119. See Assefa, *supra* note 24, at 165.

120. There are other differences including confidentiality. Due to its communal nature, customary mediation may not be private. There is in some cases only a qualified confidentiality. Ahorsu & Ame, *supra* note 75, at 14.

121. Bernard, *supra* note 47, at 338 (2006).

i. *Neutrality*

In the modern mediation process, neutrality is assumed to be an overarching value. The western-inspired Model Standards of Conduct for Mediators are typical in this regard: “A mediator shall conduct mediation in an impartial manner and avoid conduct that gives the appearance of partiality.”<sup>122</sup> However, this understanding of the role of the mediator is not universally shared among different cultures.<sup>123</sup> It lies in contrast to the more directive role for African mediators for whom peace is the ultimate goal,<sup>124</sup> and is somewhat different from Zartman’s description of the traditional African mediator as a wise and moral person who searches for a common understanding of the problem and a shared solution,<sup>125</sup> a moral mediator rather than a mediator with muscle.<sup>126</sup> Other studies of African mediators show more pronounced differences on the value of neutrality. One study of Gambian mediators showed that neutrality is not a favored virtue in mediators. Instead, mediators actively direct the mediation discussions and express their opinions.<sup>127</sup> Ahorsu and Ame talk about qualified neutrality in traditional Ghanaian mediation, which is practiced in order to establish a new relationship among the parties when there is power asymmetry among them.<sup>128</sup> Crampton describes Ghanaian forms of mediation where the mediator’s authority comes from the community rather than the state and where the role of the mediator is both to “facilitate and counsel.”<sup>129</sup>

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122. Model Standards of Conduct for Mediators, Standard II.B (Sept. 2005), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf); see also The European Code of Conduct For Mediators, available at [http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.pdf](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf); Mediation Principles and Guidelines, United Nations (July 7, 2010), available at [http://www.un.org/en/ombudsman/pdfs/Mediation\\_Division.pdf](http://www.un.org/en/ombudsman/pdfs/Mediation_Division.pdf) (stating that “A mediator is impartial and independent and does not have any personal interest in the potential outcome.”).

123. See Carrie Menkel-Meadow, *Mediating Multi-Culturally: Culture and the Ethical Mediator*, in *MEDIATION ETHICS: CASES & COMMENTARIES* 305–338 (Ellen Waldman ed., 2011).

124. Ahorsu & Ame, *supra* note 75, at 28 (discussing Ewe customary law and stating that “[p]eace is so central to the community’s wellbeing that no sacrifice for peace is too great”).

125. ZARTMAN, *supra* note 56, at 221.

126. *Id.* at 221, 222.

127. Davidheiser, *supra* note 93, at 295 n.7. Davidheiser reports that Gambians have a preference for evaluative mediators and that weak disputants may best be served by evaluative, directive mediation as in Gambia. *Id.* at 287.

128. See Ahorsu & Ame, *supra* note 75, at 14.

129. Crampton, *supra* note 104, at 236. (Stating that mediators “are expected to be fair in their judgments but are not expected to be neutral in the sense of being anonymous to the participants or disinterested in the terms of settlements”).

Compared to the mediator's role in the United States, the African approach is more directive, and would likely be considered overreaching. While there is considerable debate in the United States over the appropriate role of the mediator,<sup>130</sup> such as whether facilitative approaches should be preferred over evaluative forms of mediation, the concept of a mediator who expresses opinion or offers counsel to the parties would not be the norm in the United States.<sup>131</sup>

## ii. *Party Self-Determination*

A second tension between customary and modern dispute resolution derives from the individualistic notion of party self-determination. The Model Standards of Conduct for Mediators provide that self-determination is the controlling principle of mediation.<sup>132</sup> This means that the parties who are affected by a dispute are the ultimate decision-makers in the outcome of that dispute. As a highly individualistic value, self-determination is in tension with the communitarian values of African dispute resolution. Professor Elisbetta Grande observes that “[m]ediation and negotiation in traditional societies cannot be understood without introducing the societal structure, relationships among groups and particularly the relationship between the individual and the group. . . the individual does not exist outside the group. . . . rights and duties are only ascribed to the group.”<sup>133</sup> Regarding African mediators generally, Nabil observes the necessity of the mediator's search for an “honorable compromise” and “preserving major interests and above all, the honor of both parties”<sup>134</sup>

The United States, in comparison to many African countries, has a highly individualistic culture. Certainly in family or environmental cases, there would be consideration of relevant interests other than the parties participating in the mediation. However, the primary emphasis with individual mediations is on the parties to the dispute and the values that matter to them. This is consistent with western style mediation's focus on individualism and autonomy.<sup>135</sup>

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130. See e.g., DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION*, 2nd ed. (2012).

131. With the parties' consent, however, the mediator might offer a recommendation or other type of proposal to settle the case. *Id.* at 282–83.

132. Model Standards of Conduct for Mediators, Standard I (2005).

133. Grande, *supra* note 30, at 66.

134. Antaki, *supra* note 9, at 286.

135. See e.g., Amanda Boniface, *African Style Mediation and Western Style Divorce and Family Mediation: Reflections for the South African Context*, 15 Potchefstroom Electronic L. J. (2012); Nina Meierding, *Mediation: Staying Culturally Relevant in a*

### iii. Confidentiality

Modern mediation practice assumes that confidentiality is a necessary ingredient in the mediation process to ensure fairness.<sup>136</sup> The justification for this assumption is trust. If parties know that neither the mediator nor opposing parties can use information from a mediation session, they will feel free to share information that may lead to the resolution of the dispute. To this end, the Model Standards of Conduct for Mediators require that mediators maintain the confidentiality of all information obtained in the mediation session unless the parties agree otherwise.<sup>137</sup> The Standards also emphasize the confidentiality of any private sessions the mediator may have with one of the parties.<sup>138</sup> While confidentiality is not always honored in practice, it is the norm in modern mediation.

In contrast, mediation as practiced in customary dispute resolution is a transparent process, offering some degree of accountability.<sup>139</sup> Informal traditional systems treat a dispute between individuals as belonging to the whole community.<sup>140</sup> Because of the high degree of public participation, confidentiality is a difficult goal to achieve.

## 4. *The Refinements Brought by ADR and Mediation to Traditional African Dispute Resolution*

Given the tensions between important values and normative principles of traditional and modern dispute resolution, a simple question arises: why would African justice systems be inclined to adopt Western ADR and its seemingly foreign principles of neutrality, self-determination, and confidentiality in their dispute resolution processes? Her Ladyship Chief Justice Georgina Wood of Ghana's Supreme Court offered a powerful response to this question in an address at the Marian Conflict Resolution Center at the Catholic University in Sunyani, explaining that ADR should not be understood as alien to Africa's traditional approach to conflict resolution. Rather, it should be understood as a revision of traditional ADR and

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*Multicultural World*,, MEDIATE.COM, <http://www.mediate.com/acrcommercial/docs/Meierding%20Mediation%20%20%20Staying%20Culturally%20Relevant%20in%20a%20Multicultural%20World%283%29.pdf>.

136. John Feerick, *The Peace-Making Role of a Mediator*, 19 OHIO ST. J. ON DISP. RESOL. 229, 229 (2003).

137. Model Standards of Conduct for Mediators, Standard V (A) (2005).

138. Model Standards of Conduct for Mediators, Standard V (B) (2005).

139. Bernard, *supra* note 47, at 349.

140. PENAL REFORM INTERNATIONAL, ACCESS TO JUSTICE IN SUB-SAHARAN AFRICA: THE ROLE OF TRADITIONAL AND INFORMAL JUSTICE SYSTEMS 22 (2000).

thus a “value added.” Why? Because it might provide greater fairness than what might be available in more traditional settings where, for the sake of peace, fairness is “glossed over.” Particularly in the case of land disputes, chiefs, as the traditional dispute resolution professionals, are sometimes perceived as incapable of being impartial.<sup>141</sup> Other ADR refinements that are perceived to add value include parties’ right to choose their neutral third-party facilitator and to work together to decide the outcome of their disputes. Mediation also offers parties the opportunity to speak freely regardless of their age or gender.<sup>142</sup>

Other commentators have responded to the “why ADR in Africa” question by noting its beneficial effects for women. In some cases ADR helps women gain greater access to justice.<sup>143</sup> More generally, ADR offers relief for fragile court systems that have failed to gain parties’ confidence because of their inability to provide timely and affordable justice.<sup>144</sup> Without a functioning, efficient court system, unresolved local disputes have the potential to explode into larger conflicts.<sup>145</sup>

#### IV. ACCESS TO JUSTICE AND MEDIATION: GHANA’S EXPERIENCE

Ghana is an emerging democratic country in sub-Saharan Africa and has zealously embraced the ADR access to justice project. It thus provides a useful vantage point from which to reflect on lessons learned from one African country’s experience with mediation as an access to justice tool. Ghana is a former British colony that was the first sub-Saharan nation to gain independence.<sup>146</sup> Formerly known as the Gold Coast, an area that one scholar has described as a “colony

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141. Richard C. Crook, *Customary Justice Institutions and Local Alternative Dispute Resolution*, in *CONTESTING LAND AND CUSTOM IN GHANA* 150 (Janine M. Ubink & Kojo S. Amanor eds., 2009).

142. Georgina Theodora Wood, Address at The Catholic University of Ghana (Aug. 1, 2011) (transcript available at [http://mariancrc.org/wp-content/uploads/2011/09/MCRC\\_openingKeynote.pdf](http://mariancrc.org/wp-content/uploads/2011/09/MCRC_openingKeynote.pdf)).

143. Kwadwo Appiagyeyi-Atua, *Alternative Dispute Resolution and its Implications for Women’s Access to Justice in Africa—Case Study of Ghana*, 1 *FRONTIERS OF LEGAL RES.* 36 (2013) [hereinafter *ADR and Women*] (claiming at the same time, however, that women have not been able to benefit fully from ADR because of the inherent gender biases in the formal justice system in Africa that have become embedded in ADR).

144. Uwazie, *supra* note 4, at 1–2.

145. *Id.* at 1.

146. TUNDE OBADINA, *THE MAKING OF MODERN AFRICA* 76 (Robert I. Rotberg & Victor Ojajorotu eds., 2014).

knocked together. . .from an incongruous ragbag of territories,”<sup>147</sup> Ghana achieved independence in March 1957 under the leadership of Kwame Nkrumah,<sup>148</sup> who renamed the country Ghana<sup>149</sup> and became its first president following elections in 1960.<sup>150</sup>

From its leadership in gaining independence from colonial rulers to active involvement in ADR by the judiciary, Ghana has been at the forefront in promoting modern ADR practices in Africa.<sup>151</sup> Ghana has been active in institutionalizing mediation in both political and legal conflicts. It has been acknowledged for its leadership role in establishing National Peace Councils to mediate intra-state conflict<sup>152</sup> and in modernizing its civil justice system where a comprehensive ADR law was passed in 2010, energizing an already active ADR agenda.<sup>153</sup> Proud of its problem-solving heritage, one commentator boasts that most “Ghanians know that ‘mediation’ as a portal for dispute resolution is our creation.”<sup>154</sup> In addition to establishing a solid track record in ADR development over the last two decades,<sup>155</sup> Ghana has also developed strong infrastructures for peacemaking initiatives.<sup>156</sup> State-supported enthusiasm for ADR has inspired legislators with the ambitious vision of spreading the good news, bringing “. . .ADR to

147. THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA: THE WHITE MAN'S CONQUEST OF THE DARK CONTINENT FROM 1876 TO 1912* 674 (Random House 1991).

148. He was secretary General of the Gold Coasts Nationalist Party and a Pan-Africanist leader. [http://autocww2.colorado.edu/~toldy2/E64ContentFiles/AfricanHistory/Nkrumah, Kwame.html](http://autocww2.colorado.edu/~toldy2/E64ContentFiles/AfricanHistory/Nkrumah,Kwame.html).

149. It was named Ghana after the 11th century African empire that was once powerful in the north. See Obadina, *supra* note 146 at 76.

150. *Id.*

151. Dieng, *supra* note 6, at 616. See Kirgis, *supra* note 26.

152. Andries Odendaal, *The Usefulness of National Mediation in Intra-State Conflict in Africa*, in *Mediation Arguments* (Ctr. for Mediation in Afr. U. Pretoria, *Mediation Arguments* No. 3, 2013). The National Peace Council's mandate is “to facilitate and develop mechanisms for conflict prevention, management and resolution and to build sustainable peace in the country. . .” *Id.* at 9. Mediation is the primary process used in resolving social and political conflict. *Id.*

153. Alternative Dispute Resolution Act, Act 798 (2010) (Ghana).

154. Dennis Adjei-Brenyah, *Some Reflections on Ghana's Search for Alternative Dispute Resolution*, GHANA WEB, (Mar. 2, 2010), <http://www.ghanaweb.com/GhanaHomePage/features/artikel.php?ID=177621>. Other Ghanaians make similar claims. See Senyo M. Adjabeng, *Alternative Dispute Resolution in Ghana*, MEDIATE.COM (Aug. 2007), <http://www.mediate.com/articles/adjabeng3.cfm> (claiming that, “[i]n reality, the principles of ADR have been in existence in Ghana, dating as far back as pre-colonial days”).

155. For example, the Ghana Arbitration Center, ADR Coalition-Ghana, and other provider organizations are heavily involved in ADR activities in Ghana. See Manteaw, *supra* note 10, at 939.

156. See Andries Odendaal, *Local Peacebuilding in Ghana: A Case Study*, available at [www.i4pinternational.org/files/213/3.local%20p+ghana.doc](http://www.i4pinternational.org/files/213/3.local%20p+ghana.doc) (last visited Nov. 19, 2015).



the ‘doorsteps of every person in Ghana,’ and making it a ‘household term’.”<sup>157</sup>

Persuaded by similar access to justice rhetoric that was successful in institutionalizing mediation in the United States, courts in Ghana have formally embraced ADR.<sup>158</sup> The Chief Justice of Ghana has strongly urged cooperation in adopting ADR,<sup>159</sup> promising that it will bring greater access to justice and thereby enhance human rights protection. She has claimed that it is “crucial that all stakeholders in the administration of justice support the Judicial Service’s policy of making ADR a major component of justice delivery in Ghana.”<sup>160</sup> ADR providers and private provider organizations have multiplied,<sup>161</sup> and professional legal education has incorporated the study of ADR.<sup>162</sup>

### A. *Dispute Resolution in the Ghanaian Legal System*

The Ghanaian legal regime is a pluralistic system of law, drawing from both customary Ghanaian law and modern legal systems.<sup>163</sup> The Gold Coast Supreme Court Ordinance in 1876<sup>164</sup> imposed English common law in Ghana, but colonial rulers retained Ghanaian customary law as long as it was “not. . .repugnant to natural justice,

157. Memorandum from Attorney General and Minister for Justice Betty Mould-Iddrisu on Alternative Dispute Resolution Act 798 (on file with author).

158. See Amy J. Cohen & Michal Alberstein, *Progressive Constitutionalism and Alternative Movements in Law*, 72 OHIO ST. L.J. 1083, 1091 (2011). Part of this may be due to the active involvement of the current chief justice and leaders of the bar who came to the United States in the early 1990s and trained in ADR and mediation. The chief justice was a strong factor in the emergence of ADR in Ghana. See Wood, *supra* note 142.

159. “I use this occasion to once again appeal to court users to make full use of ADR as an effective tool in justice administration.” *Id.* at 5.

160. Chief Justice Wood stated that access to justice is “a basic human right and is the chief means of defending all other constitutionally guaranteed rights and freedoms.” *Id.* at 3.

161. See Adjabeng, *supra* note 154, at 3 (claiming that “[o]ther private individuals and organizations have also contributed immensely to ADR advocacy and practice in the Country. These include the ADR Coalition of Ghana, The Ghana Arbitration Centre, Ghana Association of Chartered Mediators and Arbitrators (GHACMA), Gamey & Gamey Academy of Mediation, and West Africa Dispute Resolution Centre (WADREC).”).

162. In the view of some scholars, Ghana has taken a leadership role in Africa in promoting ADR. Dieng, *supra* note 6, at 616.

163. Ahorsu & Ame, *supra* note 75, at 12; Owusu-Mensah, *supra* note 20 at 261; see also The Colonial Era: British Rule of the Gold Coast, available at <http://countrystudies.us/ghana/8.htm> (last visited November 18, 2015).

164. Joseph B. Akamba & Isidore Kwadwo Tufuor, *The Future of Customary Law in Ghana*, in THE FUTURE OF AFRICAN CUSTOMARY LAW 205 (Jeanmarie Fenrich, Paolo Galizzi & Tracy E. Higgins eds., 2011).

equity and good conscience.”<sup>165</sup> English common law brought with it all the accoutrements of the adversarial system, including its focus on formal courts and the litigation process. Customary law is recognized as part of the law of the country in Ghana’s 1992 constitution,<sup>166</sup> and it is not uncommon for cases to refer to it.<sup>167</sup>

Prior to the introduction of common law, the traditional customary justice system focused on non-adversarial, amicable, and peaceful methods of settlement.<sup>168</sup> The processes used in Ghanaian customary law for resolving disputes included negotiation, mediation and arbitration.<sup>169</sup> These dispute resolution processes are conducted by chiefs,<sup>170</sup> queen mothers,<sup>171</sup> clan heads, family elders, and communal leaders. Chiefs continue to occupy positions of power today,<sup>172</sup> and have been referred to as “the first port of call” for many Ghanaians who seek justice.<sup>173</sup> They belong to the various Houses of Chiefs,<sup>174</sup> and are vested with primary responsibility for resolving disputes

165. Sup. Ct. Ordinance, No. 4 §19 (1876).

166. Julie A. Davies & Dominic N. Dagbanja, *The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective*, 26 ARIZ. J. INT’L & COMP. L. 303 (2009).

167. Even today, conflicts that relate to customs or cultural practices are still resolved through a process of customary arbitration. Onyema, *supra* note 55, at 116.

168. Customary law has been defined as “a normative order observed by a population, having been formed by regular and social behavior and the development of an accompanying sense of obligation.” Gordon R. Woodman, *A Survey of Customary Laws in Africa in Search of Lessons for the Future*, in THE FUTURE OF AFRICAN CUSTOMARY LAW 9, 10 (Jeanmarie Fenrich, Paolo Galizzi & Tracy E. Higgins eds., 2011). “African customary law could be described as ‘the organic or living law of the indigenous people’ in Africa.” “Abdulummini A. Oba, *The Future of Customary Law in Africa*, in THE FUTURE OF AFRICAN CUSTOMARY LAW 58, 59 (Jeanmarie Fenrich, Paolo Galizzi & Tracy E. Higgins eds., 2011).

169. Wood, *supra* note 142.

170. See, e.g., K. A. BUSIA, *supra* note 53; Louise Mueller, *The Persistence of Asante Chieftaincy Under Colonial Rule: Explanation of an Enigma*, 15 AFRICANA STUDIA 61, 61–85 (2010). See George M. Bob-Milliar, *Chieftaincy, Diaspora, and Development: The Institution of Nkosuohene in Ghana*, 108 AFR. AFF. 433, 543–44 (2009) (discussing the history of chieftaincy).

171. See Marijke Steegstra, *Krobo Queen Mothers: Gender, Power, and Contemporary Female Traditional Authority in Ghana*, 55 AFR. TODAY 105, 114–15 (2009). For a description of a hearing before a queen mother, see Kirgis, *supra* note 26 at 104–07.

172. Ahorsu & Ame, *supra* note 75, at 10–11. There have been activities initiated by the World Bank, the Ghana Judicial Services and the National House of Chiefs to re-empower Chiefs to resolve domestic disputes. See Manteaw, *supra* note 10, at 938.

173. Kwesi Appiah, *Report on Access to Justice – Scoping Study of the Justice (Formal and Informal) Sector in Ghana*, STAR-GHANA 1, 8 (Apr. 2013).

174. At the apex of the Chief Tenancy is the National House of Chiefs, which is responsible for the “study, interpretation, and codification of customary law with a view to evolving, in appropriate cases, a unified system of rules of customary law” and evaluating those “customs and usages that are outmoded and socially harmful.” Ghana Const. ch. 22, art. 272 (b)–(c); see also Chieftaincy Act, 1971, Act 370 §§ 40–46

through customary arbitration.<sup>175</sup> The Chief Tenancy Act confers on all chiefs the power to act as an arbitrator in customary arbitration in any dispute where the parties consent.<sup>176</sup> Inclusion of queen mothers in the Council of Chiefs is now part of a reform of the chieftaincy.<sup>177</sup>

Traditional justice systems are still very much operative today,<sup>178</sup> co-existing with the formal legal regime. In some cases, awards obtained in the informal system of justice may be brought to the formal courts for enforcement.<sup>179</sup> However, these systems face multiple challenges in delivering justice. A recent report on access to justice in Ghana identified six problems with traditional ADR processes: cost, lack of fairness, cases that do not belong in the traditional processes such as murder and rape, bias, difficulty of enforcing awards at the local level, negative attitudes by the judiciary and the bar towards traditional processes.<sup>180</sup> The report concluded, however, that traditional systems of justice are usually a better fit for local communities because they employ inquisitorial and restorative methods of dispute resolution rather than the adversarial, win-lose focus approach of litigation.<sup>181</sup>

### 1. *Development of “Modern” ADR in Ghanaian Courts*

Ghana’s formal court system,<sup>182</sup> while functioning, was plagued with some of the same problems that affect many court systems: inefficiency, high costs,<sup>183</sup> case backlog, inadequate resources, and

(1971). Two significant problems facing chiefs today are the lack of guidelines for conducting customary arbitration proceedings and the fact that defendants are not informed that they are being summoned to the customary tribunal in order to resolve their dispute through arbitration. Appiah, *supra* note 173, at 8.

175. JANINE UBINK, *IN THE LAND OF THE CHIEFS: CUSTOMARY LAW, LAND CONFLICTS, AND THE ROLE OF THE STATE IN PERI-URBAN GHANA* 156 (2008).

176. Chieftaincy Act, 2008, Act 759 § 30 (2008).

177. *Inclusion of Queen-mothers in House of Chiefs is Constitutional - Dr. Danaa*, MYJOYONLINE.COM (Feb. 1, 2014, 2:01 PM), <http://news.myjoyonline.com/news/2014/January-2nd/inclusion-of-queen-mothers-in-house-of-chiefs-is-constitutional-dr-danaa.php>.

178. See e.g., Paul Kirgis, *supra* note 26, at 104–07 (describing customary court hearing by the Paramount Queen Mother of Sunyani in a dispute involving two women, a wholesaler of dried fish, and a retailer who was unable to pay for the fish she had purchased on credit).

179. Appiah, *supra* note 173, at 13.

180. *Id.*

181. *Id.*

182. See Ghana Const. ch. 11 (1992).

183. High costs are still a problem according to a recent Access to Justice Report, which states “The formal court system is a business, an industry, and a club.” Appiah, *supra* note 173, at 6.

corruption.<sup>184</sup> All of these factors acted as an impetus for ADR to become an access to justice vehicle in Ghana. The development of modern ADR in Ghana can be traced to the Courts Act of 1993 (Act 459), which encouraged the use of ADR in the courts.<sup>185</sup> In 2001 the Lord Chief Justice established an ADR Task Force to make policy recommendations for implementing ADR into the court system, and four years later he issued a policy directive to institutionalize ADR in the judicial system.<sup>186</sup> The Ghanaian judiciary responded by setting out a five-year strategic plan for ADR.<sup>187</sup> Since 2005, the District Courts (formerly Magistrate Courts) have offered court-connected mediation to interested parties<sup>188</sup> with glowing results according to one African commentator — “Families have been reunited, marriages have been repaired, children have been saved and their future secured and Land Lords and their vulnerable tenants have patched up beautifully in unity, resolving to live together in peace.”<sup>189</sup> In 2009, the Chief Justice established a separate National ADR Directorate to coordinate all ADR activities within the Judicial Service.

All of these efforts culminated in the passage of the Alternative Dispute Resolution Act (Act 798)<sup>190</sup> in 2010, comprehensive legislation which included a full range of ADR processes — arbitration, conciliation, mediation, and negotiation. A significant aspect of the Act is the attempt to integrate customary and modern dispute resolution with the intentional inclusion of customary arbitration<sup>191</sup> and mediation in the formal legal system.<sup>192</sup> There are completely new provisions for statutory mediation in the mainstream civil justice regime, yet the mediator’s powers are more consistent with traditional<sup>193</sup>

184. See *Legal Regime Too Expensive in Ghana – Nana Oye*, GHANA WEB (June 16, 2010), <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=184324>.

185. Courts Act, 1993, Act 459 §§ 72–73 (1993) (permitting out of court settlement).

186. Ghana commits to strengthening a wider use of ADR to resolve disputes, available at <http://adrresources.com/adr-news/608/ghana-adr-resolve-disputes>.

187. Judiciary embraces ADR for the courts, available at <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/Judiciary-embraces-ADR-for-the-courts-CJ-157836>.

188. Crook, *Magistrate’s Courts*, *supra* note 19, at 1.

189. Senyo M. Adjabeng, *Gender Justice in Ghana Through Court-Connected ADR*, MEDIATE.COM (July 2009), <http://www.mediate.com/articles/adjabengs4.cfm>.

190. For a general discussion of the Act, see Onyema, *supra* note 55.

191. Alternative Dispute Resolution Act, Act 798 § 81(1) (2010) (Ghana).

192. *Id.* § 113.

193. The Act suggests norms that mediators should follow in guiding the parties—“the principles of objectivity, fairness and justice, and shall give consideration to, among other things, the rights and obligations of the parties, the usages of the trade

rather than Western approaches.<sup>194</sup> Favoring the value of settlement, the Act provides for the encouragement of settlement by the arbitrator using mediation<sup>195</sup> or other procedures.<sup>196</sup> Finally, the Act calls for an ambitious educational plan to establish ADR centers throughout Ghana.<sup>197</sup>

Response to the Act was mixed. For some scholars it was an occasion that deserved to be celebrated.<sup>198</sup> A leading ADR practitioner and President of the Ghanaian Bar Association described it as “indeed a Daniel come to judgment, solving what was once the predicament of Ghanaians who had to resort to the expense, delay and adversarial nature associated with the normal court process.”<sup>199</sup> The Chief Justice of Ghana welcomed the new legislation, particularly its inclusion of customary arbitration within the purview of the Act. Focusing on the importance of transparency with customary arbitration she expressed hope that “a clear knowledge of the process of customary arbitration as reproduced in the Act would serve as a checklist for our elders and traditional rulers when they sit in arbitration and therefore reduce the number of awards which are invalidated by the courts.”<sup>200</sup> Popular commentary proclaimed that ADR enhanced access to justice by persons who were unable to access justice through the established court trial system.<sup>201</sup>

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concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.” *Id.* § 74(5).

194. See Blocher, *supra* note 4, at 189–95 (arguing for better integration of customary law with statutory law in Ghana in dealing with land disputes).

195. Mediation is essentially a voluntary process. Section 63 provides that a party to any agreement may with the consent of the other party submit a dispute in respect of that agreement to mediation. Alternative Dispute Resolution Act, Act 798 § 63 (2010) (Ghana). “Mediation proceedings commence only when a party accepts the invitation for mediation.” A failure to respond to an invitation within 14 days of the invitation is deemed to be a rejection of the invitation. *Id.* Section 64, however, gives courts the power to refer a case to mediation for the purpose of facilitating a resolution. *Id.* § 64. It is unclear how this will be interpreted. The parties are free to choose their own mediation. *Id.* § 65.

196. *Id.* § 47.

197. *Id.* §§ 114–24.

198. Edward Torgbor, *Ghana’s Recently Enacted Alternative Dispute Resolution Act 2010 (Act 798): A Brief Appraisal*, 16 IBA ARB. NEWS 41 (Mar. 2011).

199. Nene A. O. Amegatcher, *A Daniel Come to Judgment: Ghana’s ADR Act, A Progressive or Retrogressive Piece of Legislation* 31 (Sept. 20, 2011) (paper delivered at the Ghana Bar Association Annual Conference) (on file with the author). Onyema, *supra* note 55.

200. *CJ Asks Ghanaians to Patronise Alternative Dispute Resolution*, GHANA WEB (Oct. 6 2010), <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=194762> (last visited Nov. 18, 2015).

201. Adjabeng, *supra* note 154.

Other stakeholders were less than enthusiastic about the new ADR law. Fearing a loss of their authority and power under customary law,<sup>202</sup> some traditional chiefs claimed that there had been no role for them in designing the new dispute system. One particular critique by some chiefs is that they were not given the opportunity to participate in the development of the law,<sup>203</sup> which radically changed the position of customary arbitration.<sup>204</sup> Responding to the chiefs' concerns and seeking their support for the new ADR Act, Ghana's Chief Justice acknowledged the continuing vitality of customary arbitration, promising that it now stands "shoulder to shoulder with the other universally accepted basic mechanisms. It has served our nation well and will continue to do so for a long time to come. This is why I would humbly appeal to our Nananom (chiefs) to take advantage of opportunities that stand to broaden their knowledge and skills in ADR practice."<sup>205</sup>

In offering her strong support for the new ADR law, the Chief Justice and others have voiced the same concerns that were heard in the United States prior to its adoption of court-related ADR programs, namely, that courts are overburdened with cases and under-resourced.<sup>206</sup> In Ghana, a high volume of land disputes and low settlement rates had combined to create a crisis in managing court dockets.<sup>207</sup> Frequent rhetoric in support of ADR echoes the familiar themes of its providing access to justice,<sup>208</sup> efficiency in courts and

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202. For a discussion of the power of the chiefs, see Davies & Dagbanja, *supra* note 166, at 322–23.

203. Kirgis, *supra* note 26, at 124–25. This claim was disputed by some of those individuals who assisted in drafting the act. See Paul Kirgis, *Customary Arbitration in an Evolving Africa*, ADR PROF BLOG (Aug. 14, 2011), <http://www.indisputably.org/?p=2592>.

204. In Ghana, customary law is defined in Chapter 4, Article 11 (3) of the Ghana Constitution. It refers to rules of law which by custom are applicable to specific communities in Ghana. Constitution of the Republic of Ghana 1992, ch. 004, art. 11(3).

205. Wood, *supra* note 142.

206. But see Richard C. Crook, *Access to Justice and Land Disputes in Ghana's State Courts: The Litigants' Perspective*, 50 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 25 (2004) [hereinafter *Land Disputes*] (arguing that ADR mechanisms are unlikely to be successful in Ghana unless they provide an equivalent degree of authority and enforceability to the courts).

207. *Id.* at 24.

208. In a recent report on access to justice in Ghana, formal ADR mechanisms, such as court connected ADR, are identified as one of five formal avenues of access to justice. Informal avenues of access to justice are community-based dispute resolution mechanisms, chieftaincy-based ADR processes, faith based resolution systems and processes, and extra-legal dispute resolution mechanisms by criminal groups. Appiah, *supra* note 173, at 4.

supporting the interests of the parties. Commentators variously described ADR as: “a reliable partner to the traditional justice system,”<sup>209</sup> “a compliment to the court system by making access to justice cheaper, easier, expeditious, non-adversarial and faster;”<sup>210</sup> and “effective and guarantees the interests of both parties.”<sup>211</sup>

Since the ADR Act was passed, several parties have expended significant energy towards developing ADR awareness.<sup>212</sup> The Judicial Service of Ghana has been active in supporting mediation training<sup>213</sup> and public education about ADR. The Commercial Division of the High Court of Ghana has issued rules making mediation a mandatory pre-trial procedure.<sup>214</sup> Outside the Judicial Service, other institutionalized forms of ADR have been established.<sup>215</sup>

## 2. ADR Developments Outside the Courts

Apart from developments in the courts, ADR also expanded to the private sector and community programs.<sup>216</sup> The Ghana Arbitration Centre was created in 1996 to handle commercial

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209. Judge Praises Alternative Dispute Resolution, GHANA NEWS AGENCY (July 23, 2014), <http://www.ghananewsagency.org/human-interest/judge-praises-alternative-dispute-resolution—77558>.

210. *Judicial Service Opens ADR Week With Media Briefing*, REPUBLIC OF GHANA JUDICIARY (Jan. 14, 2014), <http://www.judicial.gov.gh/index.php/2013-01-28-08-11-41/adr-week>.

211. *ADR Makes Strides in Resolving Cases*, GHANA NEWS AGENCY (July 17, 2012), <http://www.ghananewsagency.org/social/adr-makes-strides-in-resolving-cases-46326>.

212. There have been major outreach efforts to sensitize parties to ADR. In order to give disputing parties the opportunity to have their cases mediated and to increase public knowledge of the ADR Programme, the ADR Directorate has held ADR Settlement Programs. Parties had the opportunity to learn more about mediation and have their cases mediated. <http://www.judicial.gov.gh/index.php/component/content/category/22-alternative-disputes-resolution> Radio and TV stations helped to publicize the event. See e.g., *Statement: Judicial Service Adopts Alternative Dispute Resolution*, MYJOYONLINE.COM (Aug. 19, 2012, 11:43 AM), <http://edition.myjoyonline.com/pages/news/201206/88606.php>.

213. The author was involved with two training programs in Ghana in 2011 and 2012. See *supra* note 18.

214. Dieng, *supra* note 6, at 616.

215. See, e.g., GHANA ASSOCIATION OF CERTIFIED MEDIATORS AND ARBITRATORS, <http://www.ghacma.org> (last visited July 14, 2014), Commercial Conciliation Centre, American Chamber of Commerce, <http://www.amchamghana.org/chamber/profile.html>.

216. Another impetus for increased use of ADR was the perception of judicial corruption in Ghana where litigants may be required to give bribes before courts will pay attention to their cases. See Senyo M. Adjabeng, USING ADR TO REDUCE JUDICIAL CORRUPTION AND THE COST OF ACCESSING JUSTICE IN GHANA, EFFECTIUS (2010), [http://effectius.com/yahoo\\_site\\_admin/assets/docs/Using\\_ADR\\_to\\_reduce\\_judicial\\_corruption\\_and\\_the\\_cost\\_of\\_accessing\\_justice\\_in\\_Ghana7020052.16763145.pdf](http://effectius.com/yahoo_site_admin/assets/docs/Using_ADR_to_reduce_judicial_corruption_and_the_cost_of_accessing_justice_in_Ghana7020052.16763145.pdf).

cases.<sup>217</sup> Labor legislation was enacted in 2003 to facilitate the resolution of labor disputes through ADR processes,<sup>218</sup> and community mediation centers were introduced into legal aid offices to work at the grassroots level and relieve the pressure on court dockets that were described as “choked” with cases.<sup>219</sup> Throughout this evolving process, there were cross-cultural exchanges with donor countries coming to Ghana to conduct mediation training,<sup>220</sup> and the United Nations Development Program trained traditional chiefs in mediation skills. At the same time, leading members of Ghana’s legal profession visited the United States to study ADR processes.<sup>221</sup>

There were parallel developments in extending mediation practice to encompass peacemaking efforts in political conflicts. Ghana established a National Peace Council in 2006 to develop mechanisms for conflict prevention and resolution.<sup>222</sup> The Council became particularly significant in 2008 as the country anticipated national elections. Chieftaincy-related conflicts in parts of the country and the discovery of oil added to the level of tensions, increasing the opportunities for violence. It was the National Peace Council that helped to mediate a

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217. *About GAC*, THE GHANA ARBITRATION CENTRE, <http://www.ghanaarbitration.org/about-us/background.html> (last visited on January 13, 2016).

218. Labour Act, 2003, Act 651 §§ 153–67 (2003) (Ghana).

219. *Community Mediation Centres Launched*, GHANA WEB (Aug. 8, 2007), <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=128662>; see also George Amoh, *The Introduction of the Community Mediation Centres in the Legal Aid Scheme, Ghana*, MEDIATIONWORLD (Dec. 19, 2008), <http://www.mediationworld.net/ghana/articles/full/232.html>.

220. American mediation trainers came to Ghana to train people in community mediation. See Crampton, *supra* note 104; see also *Peace & Reconciliation Report*, MEDIATORS BEYOND BORDERS (Apr. 2, 2008), [http://mediatorsbeyondborders.org/reports/PR\\_Report.4.12.2008.pdf?2d036e](http://mediatorsbeyondborders.org/reports/PR_Report.4.12.2008.pdf?2d036e) (describing members visit to Ghana and Liberia to conduct mediation training).

221. For example, the current Chief Justice Georgina Wood, and the current president of the Ghanaian Bar Association, Nene Amagecher, came to the United States in the 1990s and studied ADR development and techniques. Interview with Georgina Wood, Chief Justice of Ghana, in N.Y.C., N.Y. (Mar. 6, 2014).

222. Emmanuel Kotia & Festus Kofi Aubyn, *Building National Infrastructures for Peace in Africa: Understanding the Role of the National Peace Council in Ghana* 3 (2013), [http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=emmanuel\\_kotia](http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=emmanuel_kotia).



peaceful political transition,<sup>223</sup> and in 2011, Ghana passed legislation formalizing the council.<sup>224</sup>

### B. *Litigants' Experiences with Mediation as a Vehicle for Access to Justice*

According to a 2013 report on access to justice in Ghana, the main sources of civil litigation in Ghana are commercial, land, and property disputes.<sup>225</sup> Settlement rates in mediation are somewhat low, a finding that is consistent with what one scholar describes as a “well-entrenched culture of resistance to amicable settlement.”<sup>226</sup> To date, 57 district and circuit courts have been involved with the Court Connected ADR program and there are plans for mediation to be mainstreamed into all courts in the country by 2017. The available data for the year 2013–2014 shows that of the 5,789 cases that were mediated in various court-mediation programs throughout the country, only 2,355 cases were successfully resolved.<sup>227</sup> This represents a 41% settlement rate<sup>228</sup> which is lower than the settlement rate of 46% for cases mediated for the year 2012–2013,<sup>229</sup> and even lower

223. The UN had previously been involved in peace efforts during the 2004 elections in Northern Ghana. Kumar, *supra* note 25 at 389. The World Bank Development Report for 2011 mentions Ghana as an example of a country that successfully created infrastructures for peace that could support the political will for reform. See Chetan Kumar & Jos De la Haye, *Hybrid Peacemaking: Building National “Infrastructures for Peace,”* 18 GLOBAL GOVERNANCE 13, 15 (2011).

224. National Peace Council Act, Act 818 (2011) (Ghana), available at <http://www.i4pinternational.org/files/191/7.+ghana.pdf>.

225. See Appiah, *supra* note 173, at 3. The report also indicates that economically disadvantaged parties do not access the courts: “The poor rarely appear in court except as defendants in civil suits and criminal prosecutions.” Appiah, *supra* note 173, at 3.

226. Crook, *Magistrate’s Courts*, *supra* note 19, at 16. *But see* “ADR System of Adjudication Catching is Successful,” available at <http://www.ghananewsagency.org/social/adr-system-of-adjudication-catching-is-successful-42090> “One regional ADR coordinator from the Volta area said that ADR had been particularly helpful in settling family land disputes ‘devoid of the hassles associated with the courts.’” (last visited on November 19, 2015).

227. 2013–2014 JUD. SERV. OF GHANA ANN. REP. 47.

228. See *id.* By way of comparison with court mediation programs of general civil cases in the United States, settlement rates range from 18% to 80% across programs with most falling between roughly 30% and 60%. GOLDBERG ET AL., *supra* note 1, at 193.

229. National ADR Programme: Inputs for annual report for May 2012–May, 2013, THE REPUBLIC OF GHANA JUDICIARY (July 8, 2013), <http://www.judicial.gov.gh/index.php/2013-01-28-08-11-41/strategic-plan>.

than the settlement rate of 52.3% for cases mediated between 2007 and 2012.<sup>230</sup>

### 1. *Parties' Resistance to Settlement*<sup>231</sup>

Studies by U.K. researcher Professor Richard Crook reveal a persistent resistance to the notion of compromise<sup>232</sup> and show that a notable feature of the Ghanaian legal system is the scarcity of out-of-court settlements.<sup>233</sup> This is particularly true in the case of land disputes,<sup>234</sup> which have increased exponentially alongside the rapid pace of urban development in Ghana.<sup>235</sup> Land has enormous importance in West Africa both for its economic significance and territorial value that give power to those who control the land.<sup>236</sup> Litigants who file a lawsuit over land, prefer going to trial and receiving a court judgment instead of a settlement,<sup>237</sup> though this attitude does not necessarily hold true with contract or commercial cases. In trying to understand the discrepancy between land and non-land cases, Crook explains that land is considered “. . . a more fundamental, non-negotiable issue; it is not substitutable, has symbolic value and of course increasing economic value both in the growing urban areas and as a security for retirement where there is no social security system.”<sup>238</sup>

230. *Judicial Service expands Alternative Dispute Resolution*, MODERN GHANA NEWS (Mar. 13, 2013), <http://www.modernghana.com/news/453363/1/judicial-service-expands-alternative-dispute-resol.html>.

231. Crook, *Magistrate's Courts*, *supra* note 19, at 15–16. (reporting that “[M]ediators faced considerable difficulties and resistance in achieving agreements between parties who had come to court because they were already in a state of mind which was hostile to an amicable settlement, even the prospect of saving money and time did not alter the determination of over half of disputants to get what they saw as their due through a legal remedy”).

232. Crook also notes that “the emphasis of ADR on compromise at the expense of legal rights did not fully correspond with either the specific concerns of a considerable proportion of the litigants, or with popular beliefs more generally about the need to accept fault.” *Id.* at 11.

233. Crook, *Land Disputes*, *supra* note 206, at 17.

234. *Id.* Land is considered to be Ghana's most valuable asset. See Blocher, *supra* note 4, at 169.

235. See *Contesting Land and Custom in Ghana: State, Chief and the Citizen* (Janine M. Ubink & Kojo S. Amanor eds., Leiden University Press, 2008).

236. Sara Berry, *Ancestral property: Land, Politics and ‘the deeds of the ancestors’ in Ghana and Cote d'Ivoire* in Ubink & Amanor, *supra* note 235 at 27. (arguing that struggles over land have figured prominently in West Africa in part because land represents both an economic resource and territory, giving those who control the land power over other people.

237. Crook, *Land Disputes*, *supra* note 206, at 17.

238. *Id.*; Crook, *Magistrate's Courts*, *supra* note 19, at 8 (noting that the rate of out of court settlement in Ghana is much lower than that of other common law systems).

Ghanaians' resistance to settlement is again evidenced in Crook's later study of mediation in the Magistrate's Courts.<sup>239</sup> The study showed that while ADR fulfilled the promise of providing speedier and less expensive justice than that available with a trial in court, it failed to have any meaningful influence on the backlog of cases in the formal court system.<sup>240</sup> Given parties' resistance to making compromise agreements,<sup>241</sup> he concluded that the real challenge facing ADR was its effectiveness in achieving settlement.<sup>242</sup>

More recently, litigants' resistance to settlement was described in a 2013 report on access to justice in Ghana.<sup>243</sup> Despite the Judicial Service's broad claims that court connected ADR achieved its efficiency related goals of reducing caseloads and costs to litigants, this study reports otherwise, finding that ". . .the wide powers of litigants to reject ADR as an option and to use the court processes to intervene in ADR processes or annul them when they are completed hang over ADR like a dangling sword."<sup>244</sup>

One explanation for the resistance problem is the integration of mediation into the court system as a compulsory requirement. This has contributed to the formalization of ADR making it seem similar to the adversarial features of litigation.<sup>245</sup> When mediation is no longer an informal process based on voluntariness, it can lose its attraction for litigants who are accustomed to consensual decision-making.

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239. *Id.* at 13–14; The Magistrate's court's jurisdiction covers both criminal and civil matters in the first instance. Court-connected ADR programs began on a pilot basis in 2005 in these courts. The process begins when parties are referred to mediation by the Magistrate after they have appeared before him or her and after they consent. In some of the observed cases, court mediators referenced traditional cultural norms such as respect for elders and an apology in family cases. *Id.* at 6, 7, 12–13.

240. *Id.* at 13–14; Crook has also observed that in addition to parties' reluctance to settle, financial and staffing problems have challenged the long term durability of court mediation programs. *Id.* at 14.

241. According to Crook, part of litigants' resistance to compromise is due to the type of high stake cases—"In modern urban Ghana, the stakes involved in commercial transactions, land and property relations and even family affairs are often too high for people to accept compromise easily; conflicts are too intense and the consequences of losing legal rights too serious." *Id.* at 15.

242. *Id.* at 13.

243. See Appiah, *supra* note 173. This report also observed that to the extent that ADR becomes formalized, there are minimal differences from court proceedings. *Id.*

244. *Id.* at 11.

245. Appiah, *supra* note 173, at 11.

## 2. Mediators' Attempts to Enforce Compromise

Litigants' pushback may also be due in part to some highly directive mediator practices.<sup>246</sup> Crook's study of mediation in the Magistrate's Courts reports a concern with some coercive behavior towards the parties.<sup>247</sup> Observational studies of mediators' behaviors illustrate a definite effort to push for compromise agreements.<sup>248</sup> In explaining how the mediation process is conducted in the Magistrate's Courts, Crook describes the mediator as beginning with an explanation of how mediation differs from a court trial and then continuing to inform the parties that mediation is about compromise or "for the sake of peace between the parties."<sup>249</sup> Mediators drew on a basic message of making peace and achieving reconciliation between the parties, making frequent use of religious references<sup>250</sup> and urging compromise. According to Crook, parties resisted this approach.<sup>251</sup>

A study of the mediation services offered by the Commission on Human Rights and Administrative Justice ("CHRAJ")<sup>252</sup> showed that mediators generally did not rely on customary or legal principles but focused instead on reaching compromise agreements that were often

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246. The Ghana ADR Act appears to sanction directive behavior as it gives mediators the power to "formulate the terms of a possible settlement and submit them to the parties for their consideration." Alternative Dispute Resolution Act, Act 798, § 81(1) (2010) (Ghana); The Act also gives mediators power to control the process: "A mediator may conduct the mediation proceedings in a manner that the mediator considers appropriate, but shall take into account the wishes of the parties." *Id.* at § 74(6).

247. Crook, *Magistrate's Courts*, *supra* note 19, at 6.

248. Crook writes that "the moral codes or principles of settlement which mediators tended to draw on during the sessions were quite varied and certainly did not exclude the citation of legal rights or duties. But the basic message of ADR was the appeal to 'make peace' and achieve reconciliation between the parties which would reduce the hostility and tensions which existed between them." *Id.* at 12.

249. *Id.* at 6.

250. For a discussion of the power of the chiefs see Davies & Dagbanja, *supra* note 166, at 322-23.

251. Crook, *Magistrate's Courts*, *supra* note 19, at 9.

252. The CHRAJ was established in 1993 under Article 216 of the Constitution. It is charged with the task of investigating complaints of violations of rights, complaints regarding the functioning of administrative agencies, complaints concerning practices by private individuals and to educate the public regarding human rights. Two problems facing the CHRAJ are its inability to meet the demands made upon it and its inability to enforce decisions. Appiah, *supra* note 173, at 9. In a more recent study of CHRAJ mediations, Crook focused from the perspectives of legitimacy, accessibility and effectiveness. He concluded that its relative success is due to its hybrid character that blends popular values and local culture with state institutional culture. Crook & Asante, *supra* note 15, at 8, 9.

based on monetary amounts.<sup>253</sup> In some cases, the focus on compromise was sufficiently strong to trump the legal and customary rights of the parties.<sup>254</sup> Crook observes that the emphasis on compromise and agreement may pressure vulnerable parties to accept settlements that were not in their best interest.<sup>255</sup>

Other concerns with the mediators' emphasis on compromise and agreement arise from power differentials and a lack of transparency, as these processes are conducted outside of the public view. Professor Kwadwo Appiagyei Atua has argued that this lack of transparency is harmful to women who are often "coaxed" into agreements that do not support their interests.<sup>256</sup>

While the parties are accustomed to a directive approach in customary African dispute resolution, it is somewhat paradoxical that they resist this behavior when mediating in the court system. One explanation is that official compulsion in the form of mandatory mediation has a negative effect on consensual decision-making. While mandatory mediation has proven successful in reducing case dockets in Ghana,<sup>257</sup> it represents a form of state coercion, which parties resist. Moreover, to the extent that mediators strongly advance a particular view or outcome, parties likewise resist. Making peace is something they will do on their own terms.

The implications of Crook's and other studies for the future development of mediation are significant. Where mediation operates in court as an official, formal and compulsory process, it contributes to creating a climate of coercion and is unlikely to be favored by litigants who are accustomed to consensual decision-making. When mediators' behaviors within such a climate include coaching or pressuring parties to compromise and reconcile, resistance is likely to continue.

Concerns with mediators' attempts to enforce compromise in Ghana resonate with views held in the United States and in other

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253. It should be noted however, that as an institution the CHRAJ had congruence with popular values about procedure and impartiality. Crook et al., *Popular Concepts of Justice*, *supra* note 5, at 27.

254. *Id.* at 22.

255. *Id.* at 23.

256. Appiagyei-Atua, *supra* note 143, at 52.

257. See Sandra Cofie, *Ghana-Establishment of the Commercial Court*, SMARTLESSONS (Dec. 2007), <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Reforms/Case-Studies/Smart-Lessons/DB07-SL-Ghana-Commercial-Court.pdf> (last visited on Aug. 28, 2015).

Western countries. Scholars and policymakers have expressed fairness concerns when pro se parties participate in court-related mediation and negotiation programs.<sup>258</sup> When pressured by mediators to reach an agreement, they may accept less than their fair share. In some cases, informed consent is lacking and this increases fairness concerns. Several scholars have argued that vulnerable populations such as the poor, or victims of domestic abuse, may not experience justice in ADR and should not be required to mediate.<sup>259</sup>

### 3. *Ghanaians' Experiences of Procedural Justice in Mediation*

Procedural justice refers to concepts of fairness in decision-making processes. In a survey of popular opinion regarding perceptions of fairness in settling disputes, Ghanaians primarily valued an impartial and competent judge who could produce the "truth" of what happened, and the opportunity to present their own views.<sup>260</sup> The interest in having an opportunity to express one's views is consistent with the characteristics of procedural justice. Procedural justice research has found that the degree to which parties experience fairness in decision-making depends upon several factors: (a) whether they had an opportunity to express their feelings and explain their view of the situation; (b) whether they believe they were treated respectfully; (c) whether they believe that they were treated even-handedly; and (d) whether the decision-maker acted fairly.<sup>261</sup>

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258. See e.g., Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 775 (1999); Russell Engler, *And Justice for All—Including the Underrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks* 67 FORDHAM L. REV. 1987, 1987–89 (1999); Michael T. Colatrella, *Informed Consent in Mediation: Promoting Pro Se Parties' Informed Settlement Choice While Honoring the Mediator's Ethical Duties*, 15 CARDOZO J. CONFLICT RESOL. 705 (2013–2014); Craig A. McEwen et al, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995).

259. See e.g., Bernard, *supra* note 47 at 329, 344; Phyllis E. Bernard, *Minorities, Mediation and Method: The View from One Court-Connected Mediation Program*, 35 FORDHAM URB. L. J. 1, 33–35 (2008); Richard Delgado et al, *Fairness and Formality, Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

260. Crook et al., *Popular Concepts of Justice*, *supra* note 5, at 7. A minority of respondents identified the need for both parties to publicly accept the truth once established, especially where one party was shown to be at fault. *Id.* at 8. Ghanaians interest in having an impartial judge suggests a possible dislike of the qualified neutrality and counseling role that some mediators take on. See *supra* notes 128–29 and accompanying text.

261. Nancy Welsh, Bobbi McAdoo & Donna Stienstra, *The Application of Procedural Justice Research and Techniques in Settlement Sessions*, in THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin & Archie Zariski

Procedural justice research is important for its fairness findings. If parties believe that they have been treated fairly both in third-party decision-making processes as well as in negotiation and mediation, research shows that they view the outcome of those processes as fair even if the outcome is not in their favor.<sup>262</sup> This advances the perception of legitimacy, results in party satisfaction, and enhances compliance with agreements.

#### 4. *Parties' Experiences of Procedural Justice in Mediation Since the Passage of Act 798*

As part of my research on access to justice through mediation in Ghana, I conducted a preliminary empirical study of parties' experiences of procedural justice in mediation since the passage of Act 798. The study grew out of mediation skills training programs in which I participated with faculty from Fordham Law School, St. Johns University Law School, and the Ghana School of Law during the summers of 2011 and 2012 at the Marian Conflict Resolution Center, Catholic University of Ghana. Training focused on non-directive, non-evaluative, facilitative approaches to mediation. Participants in the training included members of the clergy, legal aid mediators, judges, attorneys, tribal chiefs, physicians, teachers, and college students.

As a follow up to the mediation skills training, I conducted a preliminary study of parties' attitudes towards procedural justice in mediation with Rev. James Kwasi Annor-Ohene during the summer of 2013.<sup>263</sup> Our hypothesis was that participation in a facilitative mediation process would increase the likelihood that parties would have favorable views toward the fairness of mediation. We drafted a survey instrument that included twenty-one questions related to the elements of procedural justice: whether parties believed that their mediation experiences were fair, whether they had an opportunity to express themselves during the process, whether they felt that they were treated with respect, whether overall, they felt that the process was fair, and whether they were satisfied with the outcome. We distributed the survey to parties who had participated in mediations

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eds., 2013); Nancy Welsh, *Disputants Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISPUTE RESOL. 179 (2002).

262. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 491 (2008); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L. QUARTERLY 787 (2001).

263. See Jacqueline Nolan-Haley & James Kwasi Annor-Oene, *Procedural Justice Beyond Borders: Mediation in Ghana*, HARV. NEG. L. REV. (Mar. 10, 2014), <http://www.hnlr.org/2014/03/procedural-justice-beyond-borders/>.

under the Legal Aid scheme conducted by mediators trained in facilitative mediation. The results are based on responses from 54 individuals and while the sample is relatively small, it showed that parties considered mediation to be fair and that they were generally satisfied with it.<sup>264</sup> It gave high marks to mediation's autonomy values, one respondent noting satisfaction with "our power to determine the outcome."<sup>265</sup> Given Ghanaians' resistance to settlement established in prior studies, it is noteworthy that parties had favorable reactions when they actually participated in a facilitated mediation process. Parties reported experiencing high degrees of procedural justice in mediation on the issues of voice,<sup>266</sup> respect and fairness,<sup>267</sup> but lesser degrees of procedural justice on the issue of satisfaction with the outcome of their mediations.<sup>268</sup>

Some of the expressed reasons that parties favored mediation were its differences from customary mediation,<sup>269</sup> the neutrality of the mediator, and the notion that the mediation agreement could be enforced as a consent judgment similar to a court outcome. However, the majority of respondents' reasons for favoring mediation were based on the common characteristics of procedural justice, namely, the opportunity to be heard, and to be treated respectfully, and fairly. Negative perceptions of mediation reflect in part a misunderstanding of the modern mediation process and how it differs from customary mediation and arbitration. When asked what they did not like about mediation, some parties responded that "they wanted the mediator to pronounce judgment "and "the respondent was not punished enough." With respect to caucuses, the parties were unhappy with the fact that

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264. Only 9% of the parties were represented by counsel in the mediation. *Id.* at 8.

265. This has been confirmed by other observers. See Adjabeng, *supra* note 154 (stating that "[p]arties who have gone through some ADR processes like mediation acknowledge their satisfaction and trust with the process").

266. In describing things that they liked about mediation, parties said: "I was given the opportunity to express myself. Everyone was given the opportunity to express himself." *Id.* at 13.

267. Parties' responses in the survey in describing what they liked about mediation- "The mediators gave much respect to me and allowed me to express myself freely." "That mediators treated parties with respect." *Id.* at 13.

268. *Id.*

269. This reaction may be attributed to the perceived lack of fairness in some traditional dispute resolution processes. It is interesting to consider here the comments of the Chief Justice of Ghana when discussing ADR's added value to customary African dispute resolution processes, particularly her reference to fairness which she states, "sometimes for the sake of peace, in traditional informal hearings, we tend to gloss over." See *supra* note 142 and accompanying text.



mediators treated information from the caucus as confidential.<sup>270</sup> Again, this criticism reflects a failure to understand the role of confidentiality in modern mediation practice.

### C. Challenges Facing Mediation Programs in Ghana

Despite its relative success, sustainable implementation of mediation, particularly in court-connected programs, must address several challenges. First, modern mediation must gain credibility and legitimacy from the perspective of chiefs who have long been the traditional dispute resolution officials. Some chiefs felt excluded from consultations regarding passage of Act 798 and thus resisted its implementation.<sup>271</sup> A second challenge is to develop appropriate responses to the culture of resistance to settlement, especially in land cases, that has made mediation ineffective in reducing court dockets in these cases.<sup>272</sup> Finally, in order to ensure the long term durability of court mediation programs, the state must improve the financial infrastructure insuring that mediators are paid for their services and other necessary staffing is provided.<sup>273</sup>

## V. ACCESS TO JUSTICE AND MEDIATION IN AFRICA: LESSONS FROM GHANA

Ghana's experience offers a useful example for the further development of mediation programs aimed at providing access to justice in African countries. The study of modern ADR development in Ghana suggests eager receptivity to the attractive rhetoric that promised access to justice through mediation and other ADR processes. Ghana welcomed modern ADR processes, with its leaders vowing to bring ADR to the doorsteps of all Ghanaians and to make it a household name.<sup>274</sup> The state embraced mediation in particular and the refinements of traditional dispute resolution that it offered—the added value of greater fairness, party self-determination, and the ability of all parties to be heard. But, Ghana went further than enthusiastic

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270. Negative comments regarding the caucus were consistent with some empirical evidence that parties may object to the lack of transparency that results from private conversations in mediation. See Nancy Welsh, *Stepping Back through the Looking Glass: Real Conversations with Disputants About Institutionalization and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 647–49 (2004).

271. See Kirgis, *supra* note 26, at 123.

272. See *supra* note 234–43 and accompanying text.

273. Crook, *Magistrate's Courts*, *supra* note 19, at 14.

274. Memorandum from Attorney General and Minister for Justice Betty Mould-Iddrisu, *supra* note 157.

support, and made mediation compulsory in some circumstances.<sup>275</sup> Litigants responded by resisting settlement, particularly where culturally non-negotiable issues such as land were involved.<sup>276</sup>

As Ghana's experience has shown, policymakers should not presume that all stakeholders will buy into new forms of dispute resolution that devalue consensual decision-making. While legislatures and courts viewed ADR as an enrichment of customary dispute resolution, litigants in some cases, said "no thanks" to the state's official push towards settlement and peacemaking through mandatory court-connected mediation programs. They considered these ends to represent what they considered to be the compromise values of modern ADR, and rejected them.<sup>277</sup> Settlement and peacemaking would be their own decision, not that of state-appointed mediators.

#### A. *Constructing Programs that do not Conflict with Traditional Dispute Resolution*

In designing and implementing mediation systems in African countries as a means of providing access to justice, what is the way forward when parties resist the institutional push towards settlement? Where the African mediation project goes from here depends upon the goals that policymakers seek to achieve. If the end-game is simply to get mediation up and running, one course of action would be to follow the lead of Western countries and move away from gently persuasive strategies to more coercive ones.<sup>278</sup> If parties do not voluntarily participate in mediation, they would be compelled to do so. Changing the emphasis from persuasion to coercion is the approach currently proposed by the European Union in light of disappointing mediation usage following the issuance of the EU Mediation Directive.<sup>279</sup> The Directive, adopted in 2008, required that over a three-year period member countries establish mediation programs for

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275. Dieng, *supra* note 6, at 616. See High Court Civil Procedure Rules C.1.47 of the Commercial Division of the High Court of Ghana (mediation is a compulsory pre-trial procedure); see also Cofie, *supra* note 257.

276. See Crook, *Land Disputes*, *supra* note 206, at 17.

277. See *supra* notes 231–56 and accompanying text.

278. See Constantin-Adi Gavrilă, *What Went Wrong with Mediation?*, KLUWER MEDIATION BLOG (Feb. 6, 2014), <http://kluwermediationblog.com/2014/02/06/what-went-wrong-with-mediation/> (talking about switching the tone from persuasion to coercion in describing the EU proposal to make mediation mandatory).

279. See Directive 2008/52/EC, *supra* note 36; Jacqueline M. Nolan-Haley, *Is Europe Headed Down the Primrose Path with Mandatory Mediation?* 37 N. C. J. OF INT'L L. & COM. REG. 981 (2012).

cross-border commercial disputes.<sup>280</sup> A study conducted by the European Parliament showed that five years after its adoption, mediation had been used in less than 1% of civil and commercial cases.<sup>281</sup> Responding to low usage, efforts are underway to “re-boot” the Directive through compulsory measures, or what the EU Parliament labels a mitigated form of mandatory mediation.<sup>282</sup>

Compulsory mediation programs are also part of the ADR landscape in the United States where many jurisdictions make mediation a pre-requisite to trial.<sup>283</sup> The standard explanation to justify this approach relies on distinguishing between coercion *into* the mediation process and coercion *in* the process, holding that while the former is permissible, the latter type of coercion is not.<sup>284</sup> Yet, the high percentage of litigation over the enforceability of mediated agreements suggests that moving from persuasion to coercion is not an optimal solution to advance the legitimacy of mediation.<sup>285</sup> There is a greater likelihood that parties will honor the agreements they make in mediation, if they give informed consent to participate in the mediation process.<sup>286</sup>

In addition to Ghana, several African countries have followed the West’s lead in implementing compulsory mediation programs. But

280. The purpose of the Directive as stated in Article 1 is “to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.” See Directive 2008/52/EC, *supra* note 36.

281. The country with the most frequent mediation usage was Italy, reporting over 200,000 mediations annually. See ‘Rebooting’ the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, at 6 (Jan. 2014), available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI\\_ET\(2014\)493042\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf) [hereinafter ‘Rebooting’ the Mediation Directive].

282. *Id.* The author of the study, Giuseppe De Palo concluded that unless “elements of mandatory mediation” are introduced by law, mediation will not thrive in the EU. ‘Rebooting’ the Mediation Directive at 8. Giuseppe de Palo, Christian Radu Chereji, Constantine-Adi Gavrilla, Voluntary Mediation Being the True Oxymoron of Dispute Resoluton Policy, available at <http://www.mediate.com/articles/PaoloGavrila.cfm>.

283. NANCY ROGERS, CRAIG McEWEN, PETER THOMPSON, SARAH COLE & JAMES COBEN, MEDIATION: LAW, POLICY & PRACTICE § 9, “Court Compelled Mediation, Sanctions and Costs” (2014) available at Westlaw; INT’L MEDIATION INST. *IMI International Corporate Users ADR Survey, January-March 2013*, (Apr. 4, 2013), <http://imimediation.org/imi-international-corporate-users-adr-survey-summary> (noting that 48% of respondents were in favor of making mediation a compulsory procedural step in both litigation and arbitration).

284. GOLDBERG ET AL., *supra* note 1, at 490.

285. James Coben & Peter Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

286. See Nolan-Haley, *supra* note 258.

countries should be cautious before jumping on the mandatory bandwagon. While various forms of compulsory mediation have been adopted in many countries, it remains very much a debatable topic.<sup>287</sup> Mediation design systems with compulsory features have the potential to impinge on parties' exercise of self-determination and can undermine their access to justice. Some might argue that once parties had the opportunity to participate in mediation, they would then be educated about the process and would participate thereafter voluntarily. Given the findings of procedural justice in mediation, discussed earlier,<sup>288</sup> where parties had favorable reactions when they participated in mediation, one might ask what's wrong with making parties at least try mediation? If they do not reach an agreement, nothing is lost.

But, forcing parties to engage in mediation has the potential to be coercive, particularly where mediators act in a directive manner, coax, give opinions, and counsel parties about what courses of action to follow.<sup>289</sup> While mandatory programs cannot require parties to reach an agreement, parties can be pressured into compromise and settlement once they are involved in the mediation process.<sup>290</sup> The upshot is that weaker parties, usually those unrepresented by attorneys, are vulnerable to undue influence, sometimes by mediators<sup>291</sup>

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287. See Brian Speers, *Should Mediation be the Gateway to the Court?*, Commonwealth Lawyers' Association and Contributors 29–33 (2013) (article based on a presentation made at the 18th Commonwealth Law Conference, Cape Town, April 14–18 (2013); see also Lord Dyson, *Keynote Address at the Commonwealth Lawyer's Association* (May 2014) (establishing that mediation could not be compelled). Fourteen years after the Halsey decision, Mr. Lord Dyson remains in the voluntary mediation camp saying "It is not the role of the law to force compromise upon people who do not want it by forcing them to engage in a mediation process." Dyson, *supra* at 12. See Roselle Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271 (2011); ROGERS ET AL. *supra* note 283. Roselle Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565 (1997). See Giuseppe De Palo, *A False 'Prince Charming' Keeps 'Sleeping Beauty' in a Coma: On Voluntary Mediation Being the True Oxymoron of Dispute Resolution Policy*, KLUWER MEDIATION BLOG (Apr. 15, 2014), <http://kluwermediationblog.com/2014/04/15/a-false-prince-charming-keeps-sleeping-beauty-in-a-coma-on-voluntary-mediation-being-the-true-oxymoron-of-dispute-resolution-policy/>.

288. See *supra* notes 260–73 and accompanying text.

289. See *supra* notes 246–51 and accompanying text.

290. For a discussion of how this has happened in the Philippines see Eduardo R. C. Capulong, *Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines*, 27 OHIO ST. J. ON DISP. RESOL. 641 (2012) (discussing the exportation of U.S. style mediation to develop community mediation programs in a former U.S. colony).

291. Crook, *Land Disputes*, *supra* note 206, at 18. See James R. Coben, *Mediation's Dirty Little Secret, Straight Talk about Mediation Manipulation and Deception*,

who favor compromise. The result is that they settle without truly consenting to the outcome. As Crook warns, mediators should be cautious about over-valuing compromise without giving clear guidance on what principles are being implemented.<sup>292</sup> At the very least, before deciding to impose mandatory mediation structures in African countries, policymakers should listen to mediation users and proceed cautiously.<sup>293</sup> While modern ADR models offer multiple benefits to Ghana's legal system, they should not be accompanied by any forms of coercion.

### B. *Building upon Traditional Dispute Resolution Systems and Understanding Local Values*

Traditional systems of justice with their inquisitorial and restorative methods of dispute resolution are often more appropriate for parties in local communities than methods that employ the adversarial approach of litigation.<sup>294</sup> Legal system reform efforts should build on the success of traditional systems. The African mediation access to justice project should be clear about its objectives. If it has as its goal to establish mediation as a legitimate process of resolving disputes in and out of court, policymakers must honor the longstanding values that underlie customary African dispute resolution. This avoids the danger of coercion creep that can occur when mediation is first promoted as a voluntary process and then made compulsory under the banner of access to justice. This is what occurred in the United States and what is now being considered by the European Union with respect to cross-border commercial disputes.

When traditional and foundational values, such as consent and respect for elders, are not respected, resistance is hardly surprising.<sup>295</sup> This is true whether pushback comes from elders who object to youthful mediators or parties in civil litigation who object to being driven towards a settlement that forces them to compromise on what they consider to be non-negotiable issues. Mediation systems that build upon pre-existing dispute resolution systems and connect to local customs and values, offer the most promise in providing access to justice.

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2 J. ALT. DISP. RESOL. EMP'T 4 (2000) (discussing how mediators engage in deception and manipulation in order to produce settlements).

292. Crook et al., *Popular Concepts of Justice*, *supra* note 5, at 27.

293. Gavrilu, *supra* note 278.

294. Appiah, *supra* note 173 at 13.

295. Consider the example of Uganda where parties resisted mediation in a court-connected program that used young law students as mediators because it failed to recognize of the value of respect for elders. *See supra* note 104 and accompanying text.

The access to justice that ADR processes, such as mediation, promised to bring to African states must be rooted in the value of consent. This is not because consent will necessarily result in just outcomes. That may not happen.<sup>296</sup> Rather, it is to acknowledge the primacy of consent at two levels—first, as a highly honored value in many traditional African dispute resolution systems and equally important, as the support mechanism for self-determination, which is the controlling principle of mediation.<sup>297</sup> Consent of the parties is an important source of legitimization,<sup>298</sup> not just in Ghana,<sup>299</sup> but in other parts of Africa as well.<sup>300</sup>

## VI. CONCLUSION

Over the last few decades, ADR and in particular, modern mediation, has arrived in many African countries under the banner of access to justice. Beginning with outside peacekeeping efforts and rule of law programs, modern dispute resolution processes, such as mediation, have been integrated in some form or fashion into the formal legal systems of several African countries offering accessibility, flexibility, and cost effectiveness to improve overburdened courts.<sup>301</sup> Beyond these efficiency benefits, modern mediation is perceived by some to be an added value to traditional African dispute resolution because of its overall fairness. But, in some cases, this transition has conflicted with African dispute resolution, which has a longstanding tradition of providing access to justice for its people. The failure to account for context and culture in mediation program design has proved problematic in some countries, as there are competing values between Western and African approaches to mediation. This is demonstrated in the tensions between the principles of neutrality and directiveness, self-determination and communitarianism, and confidentiality and public participation.

In this Article, I have suggested that the emerging democratic country of Ghana offers a promising model for the development of

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296. See Jennifer W. Reynolds, *Luck v. Justice: Consent Intervenes, but for Whom?*, 14 PEPP. J. DISP. RESOL. 101 (2014).

297. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 132 (requires the mediator to conduct mediation based on the principle of party self-determination).

298. See Galanter & Krishnan, *supra* note 17, at 831 (discussing Indian lawyers concern that parties' cases were transferred from regular state courts to the ADR process of Lok Adalat without their consent).

299. Grande, *supra* note 30, at 64.

300. ZARTMAN, *supra* note at 56; Ury, Track Two, *supra* note 8, at 24 (describing consensual dispute resolution practices among the Kalahari Bushman).

301. Appiah, *supra* note 173 at 11.

mediation in Africa and that there are lessons to be drawn from its experience in implementing mediation into its formal legal system. Ghana has incorporated elements of both modern and traditional dispute resolution in the formal legal system. Following the lead of Western countries, it has made mediation mandatory in some cases. In taking this approach, Ghana has the strong support of the state, the judiciary, and policymakers. But it has been less successful in achieving universal buy-in from stakeholders as evidenced by resistance from the traditional chiefs who still reign over customary arbitration and mediation proceedings, and from litigants who resist settlement in certain types of cases, particularly those related to property rights.

This Article has offered two arguments. The first is that mediation as implemented in African legal systems should take into account local traditions and customs in order to be a vehicle for access to justice. The second argument, which flows from the first, is that consensual decision-making, the most important of local traditions, should find space in modern African dispute resolution. Western mediation models such as the compulsory regime, proposed by the European Union for cross-border commercial disputes,<sup>302</sup> or mandatory mediation programs used in the United States courts, have the potential to undermine authentic access to justice and cut against the grain of voluntariness found in traditional African dispute resolution. As a practical matter, there is a greater likelihood of settlement if parties enter the mediation process voluntarily.<sup>303</sup> Moreover, when there is strong pressure to mediate,<sup>304</sup> the agreement that results from that process is vulnerable.

Policy makers who seek to promote ADR processes, particularly mediation, as an access to justice vehicle, should reflect on mediation's potential for furthering the values of democratic participation in emerging African democracies,<sup>305</sup> and then carefully design and implement mediation programs in civil justice systems. How litigant

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302. See *supra* notes 279-82 and accompanying text.

303. See Genn, *supra* note 42 (discussing observations based on evaluation research in the U.K).

304. See Crook, *Magistrate's Courts*, *supra* note 19 (describing pressure to compromise).

305. See Martha Weinstein, *Mediation: Fulfilling the Promise of Democracy*, 74 FLA. B.J. 35 (2000); Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. DISP. RESOL. 93 (2002) (noting that mediation democratized our institutions). The results could be problematic if mediation development does not adhere to democratic values. See Nancy Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. OF CONFLICT RESOL. 117, 136 (2004) (discussing ways in which court-connected mediation has

resistance is accounted for may determine whether and to what extent mediation gains legitimacy and retains traction as an access to justice vehicle. It may even determine mediation's potential beyond the realm of providing access to justice to furthering democratic values.<sup>306</sup> A voluntary mediation regime that takes into account traditional values offers a greater likelihood that party participation will be authentic rather than a "going through the motions" exercise where parties may not be acting in good faith. Thus, instead of requiring reluctant parties to participate in mediation, policymakers should retain the consensual features of mediation. This honors the rich tradition of consensual decision-making in African customary law,<sup>307</sup> as well as party self-determination, the core value of modern mediation,<sup>308</sup> and it is the best means of providing authentic access to justice. Mediation is more likely to emerge as a vibrant force in the justice systems of African countries if it acknowledges local traditions and customs and has the breathing space to grow within its own consensual culture.

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stayed true to the democratic spirit as well as ways in which mediation is not bringing democracy to the courts).

306. See Marianna Hernandez Crespo, *A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law through Citizen Participation*, 10 CARDOZO J. CONFLICT RESOL. 91 (2008) (arguing that enhancing the shadow of the law through citizen participation is essential to optimize dispute resolution systems in Latin America); Marianna Hernandez Crespo, *From Noise to Music: The Potential of the Multi-Door Courthouse (Casas de Justicia) Model to Advance Systemic Inclusion and Participation as a Foundation for Sustainable Rule of Law in Latin America*, 2012 J. DISP. RESOL. 335 (arguing that citizen participation is an essential ingredient of civil society).

307. See *supra* notes 51–64 and accompanying text.

308. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 132; Robert A. Baruch Bush & Joseph P. Folger, *Reclaiming Mediation's Future: Getting Over the Intoxication of Expertise, Re-Focusing on Party Self-Determination*, (Nov. 2014), <http://www.mediate.com/articles/BushFolgerFuture.cfm>.