ALTERNATIVE DISPUTE RESOLUTION AS A TOOL FOR CONFLICT RESOLUTION IN AFRICA – GHANA AS A CASE STUDY

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THIS DISSERTATION IS SUBMITTED TO THE UNIVERSITY OF GHANA, LEGON, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE MASTER OF ARTS DEGREE IN INTERNATIONAL AFFAIRS

LEGON MARCH 2015
DECLARATION

I hereby declare that except for the references to other people’s work, which have been duly acknowledged, the study presented here was written by me, under the supervision of Dr. Ken Ahorsu. It is a record of my own research work and has not been previously presented in any form whatsoever in any application for a Degree elsewhere. All sources of information collected and materials used have been duly acknowledged by means of references and bibliography.

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DATE:..............................

DATE:..............................
DEDICATION

I dedicate this work primarily to the Almighty God for His Guidance and Mercy throughout my studies. I also dedicate this work to my dear wife Naa Kai for the support, love and care you have given me all this time.
ACKNOWLEDGMENTS

I wish to thank the Almighty God for giving me the strength and courage to pursue this programme. Let me also acknowledge the immense support and assistance rendered by my supervisor, Dr. Ken Ahorsu who was available at all times to guide me through this research.

I also wish to express my sincere gratitude to the Ghana Armed Forces for giving me the opportunity to attend the Ghana Armed Forces Command and Staff College (Senior Division) where I had this opportunity to pursue this programme. I will forever remain indebted to the Ghana Armed Forces.

Previous works and ongoing practices were great sources of information. To this end I wish to acknowledge the contributions of the Judicial Service of Ghana, Ghana Arbitration Centre, Central Alternative Dispute Resolution Centre - Ashaiman, Ghana Association of Certified Mediators and Arbitrators among others. Special mention is made of Lieutenant General Arnold Quainoo of the Centre for Conflict Resolution and Mr. Charles Turkson, Alternative Dispute Resolution Coordinator of the Greater Accra Region for granting me audience at all times. May the Almighty God bless you.

Finally to my dear wife Naa Kai, thanks for your encouragement especially during the times of uncertainty. Thanks for being there for me all the time.
ABBREVIATIONS

ADR    - Alternative Dispute Resolution
AU     - African Union
CRS    - Community Relations Services
ECOWAS - Economic Community of West African States
GHACMA - Ghana Association of Chartered Mediators and Arbitrators
HIV/AIDS - Human Immunodeficiency Virus Infection and Acquired Immune Deficiency Syndrome
LECIAD - Legon Centre for International Affairs and Diplomacy
NADRAC - National Alternative Dispute Resolution Advisory Council
UN     - United Nations
UNDP   - United Nations Development Programme
USAID  - United States Agency for International Development
WADREC - West Africa Dispute Resolution Centre
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ABSTRACT

Africa has been plagued by numerous conflicts. These were mainly dysfunctional civil strife and communal conflicts. The post-colonial states of Africa have been proverbially described as weak states with weak institutions, and inadequate human and financial resources to prevent, manage, resolve, and transform the behavioural and structural sources of the conflicts. Given these structural and agency weaknesses, the study proffers Alternative Dispute Resolution (ADR) as an appropriate civil, cost effective, mutual and less time consuming mechanism for resolving conflicts in Africa with the view to reconcile and unite its people to jumpstart its development. The prescription and adoption of ADR by African countries such as Ghana is part of a comprehensive reform programme of the judicial service since 2005. The 2010 ADR Act was to enhance access to relatively cheaper and quicker justice to help reduce the clogging associated with the orthodox court system; and afford a more amicable and reconciliatory peace and justice. The study has shown that under the ADR regime, individual disputes were contextualised; parties exercise greater control over the issues and processes through joint problem solving approaches and often arrived at cheaper and quicker solutions they can call their own. However, ADR though popular and desirable was limited in application because of limited resources, public awareness, and constitutional limitations that rendered some cases non-judicable under the ADR regime. Given the immense advantages and benefits of the ADR system, the study recommended more investment in advocacy, training and infrastructure to further enhance ADR best practices.
CHAPTER ONE

RESEARCH DESIGN

1.1 Background to the Study

In contemporary times, Alternative Dispute Resolution (ADR) mechanisms have been forcefully prescribed to African states as remedy for their governance, business, and judicial crises administration. The ADR advocacy comes on the back of the destructive conflicts that sub-Saharan Africa suffered at the end of the Cold War. Most of the countries that experienced violent civil war have not fully recovered from the throes of the violence. The locales of the wars were regions of security complexes, where the formal structures of law and order had collapsed before the onset of the civil strife or as a result of the violence that ensued. Many of them are rebuilding their societies, communities, and institutions. Most of the citizens continue to suffer from the traumatic psychological effects of the wars. And some communities and even societies remain divided along conflict fault-lines. The case is that the infrastructure and institutions for fair, effective and efficient delivery of justice through the orthodox judicial process is often not feasible under such adverse conditions. Besides, societies and communities that have not suffered from civil wars are bedevilled by communal conflicts of one kind or the other. As such, the advocates argue, more creative, affordable, and environment specific or ‘contextualised’ forms of grievance resolution mechanisms such as ADR is *sine qua non* to restore post-conflict societies to their good health. They further argue that in the absence of such creative, accessible, and affordable conflict resolution mechanisms aggrieved persons may feel “the need to take justice into their own hands, often with violent consequences.”

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The justifications for promotion and institution of ADR mechanisms in Africa are, however, wide- ranging. Some argue that African societies are somehow unique in the constitution of their societies and communities especially in terms of socio-cultural relations. They argue that socio-culturally, African societies are dual societies of formal and informal divide. Large segments of its people live traditionally and are not conversant with the formal laws and judicial processes. Traditional communities are intriguing social and political systems. Chiefs are the embodiments of the *esprit de corps*. Society is bonded by blood relations, common history, and reciprocity, gods, ancestral spirits, the living and future generations. Before orthodox national laws were established during colonial rule, African customary legal systems mainly relied on mediation and conciliation. In many African countries, these traditional mechanisms have been integrated into the official legal system. They have well-articulated institution and normative mechanisms and discourses for their prevention, management, and resolution that share common philosophical and procedural similarities with ADR.²

Ahorsu and Ame, further, argue that although, traditional communities have undergone change as ‘modern’ social formations and relations have emerged; a large part of the daily lives of Africans are still influenced by traditional norms and institutions making these societies dual. It, thus, stands to reason that approaches to addressing community conflicts must equally embrace elements of both the modern and traditional societies. As such, they advocate for ADR, arguing that an essential conflict management pre-requisite for feasible and durable settlements of conflicts are best ensured by those processes that parties can identify with as their own. Therefore, the understanding of the socio-cultural locales within which conflicts unfold should constitute the primary unit of analysis, and also the appropriate source of models for preventing, managing and resolving conflicts and facilitating of new
relationships. This school of thought, however, stresses the need for an orientation of culturally attuned conflict resolution imbued essentially with ethnographic practices that uses indigenous techniques and resources as foundation for mediation work. Since local African communities are in perspectives such as development, rationality, and individualism different from Western communities. Nevertheless, they argue that the principles, and normative values of Western mediation should be incorporated, when necessary, to enhance efficiency and effectiveness.\(^3\)

Even though conflicts cannot be totally avoided, it is important to ensure that they are speedily resolved when they occur. The most common method of resolving conflicts in Africa today is the use of the Law Courts. However, a number of concerns have been expressed about the traditional or orthodox court system. Ahorsu \textit{et al} argue that although the orthodox system seeks to promote universal standards of fairness, justice, objectivity and procedural clarity, it is essentially ‘foreign’ to the Africans. They also point out that the orthodox system is limited in reach to many Africans in terms of location, affordability, and consciousness. Only a few privileged Africans have the necessary resources to afford very experienced and expensive lawyers to defend them. Besides, the court-systems are cumbersome and its processes are beyond the comprehension of ordinary Africans. Furthermore, the Court system has been overburdened to the extent that cases drag on for long periods and there are back logs of cases.

Over reliance on the Court system, its inaccessibility to majority of the people who cannot afford legal fees, the formal nature of the system that often denies individuals the ability to express themselves as they wish in order to avoid breach of procedure, in some cases end up denying individuals the justice that they seek. The perception of the ordinary African, often,
is that the court system is for the educated and the rich. The Police, Bench and the Bar are perceived as corrupt and a pestilence that must be avoided. The greater danger is that when the rule of law and its institutions, especially its processes loses its legitimacy as a result of inefficiency, the result is lawlessness that breeds insecurity and instability.

Besides, the orthodox prosecution-oriented court system, it is argued, embodies an inherent weakness in its pursuit of promoting justice, fairness and peace. While the courts’ prosecution principles and processes are verifiable and provide for the process redress through appeals; the logic of the winner takes all upon which it is premised may promote justice but often not peace and reconciliation. The argument is that while the victor celebrates his victory the vanquished laments. In essence, conflict between the two might have been resolved but peace and reconciliation are missing in such a victory. In other words, behavioural changes and underlying structural conditions that serve as antecedents to conflicts are often not transformed under the courts prosecution and arbitration systems. This breeds unhealthy social relations, especially when the disputing parties continue to live together after the court ruling.

The need and quest for speedy business and commercial arbitration was another factor that called for and prompted the introduction of ADR in Africa. The orthodox courts are not only choked, inaccessible, expensive and lethargically slow but often perceived to be corrupt. With the introduction of neo-liberal deregulating economic policies, Western governments and economic interests called for ADR arbitration mechanism as conditionalities for Foreign Direct Investment in Africa. The leitmotifs undergirding their demands were that business deals and their exigencies need very speedy resolution when conflicts occur. Ahorsu et al further argued that transparent and conciliatory conflict resolution mechanism that ADR
affords both business counterparts and rivals offers the best avenue for redressing business grievances since businesses often continue to depend on each other even after the experience and resolution of conflicts.

The greatest and most plausible argument for ADR, perhaps, lies in its advantages over the orthodox court system. The ADR is more nuanced in its approach as it seeks to transform interests, relationships, discourses and structures that undergird and ignite violence. According to its advocates, ADR has proved efficient in cost and time saving, lowering litigation rates, and allowed factions to work for greater joint solutions. In sum, ADR is considered more effective in promoting peace, reconciliation, and stability through the creation of win-win solutions that in turn promotes healthy relations after the mediation of conflicts.

ADR mechanisms have been prescribed for commercial, juvenile, family and conjugal relational, communal, political, and religious disputes with the exception of criminal offences. The leitmotif that runs through the adoption of ADR is that relations and interdependence continue between disputants after the resolution of conflicts. As such, the surest mode of guaranteeing a continued peaceful co-existence between factions is the resolution of conflicts not only through peaceful means but through one that promotes reconciliation and ensures that parties continue to co-exist symbiotically through win-win situations rather through zero-sum situations.

As stated earlier, since the early 1990s, regional, sub-regional, national, communal and other forms of organizations, (however defined), have instituted policies and programmes that seek to promote the institution of ADR concepts as a panacea to the developmental and
governance crisis. The African Union (AU) and the Economic Community of West Africa (ECOWAS) have made very laudable provisions for peaceful resolutions of conflicts within their remits and have highlighted the ideals of ADR, in particular. Many countries in sub-Saharan Africa, especially, West Africa have instituted very elaborate and progressive pro-ADR policies and legislations in their efforts to overhaul their lethargic (economic, political, communal and family) judicial systems at the regional, national and sub-national levels.

Ghana has been praised for being a relatively peaceful country since the 1980s; while a large number of African countries have experienced very destructive civil and regional wars. Ghana, nevertheless, suffers from communal conflicts that often work to undermine national unity, social cohesion and sustainable development. Given the ills and challenges of the orthodox court system, traditionalists, the business fraternity, government and even the judiciary felt something must give to fix Ghana’s conflict resolution regimes. Professor Ernest Ewuazie of the Centre for African Peace and Conflict Resolution of the California State University, Sacramento, often referred to as the father of ADR in West Africa, played a pioneering role in promoting a more complementary and more progressive conflict resolution regime in Ghana. He identified the needs for the institution of ADR in West Africa and chose Ghana as the fulcrum for his launch pad.

With support from United States Agency for International Development (USAID) and later the European Union, Ewuazie trained a number of trainer trainees from the academia, Judiciary, Government, traditional rulers and the Bar from Ghana. This core of Ghanaian trainers in collaboration with Ghana’s development partners and other international organizations played the pioneering role in exploring and introducing the extensive use of ADR in settling such as domestic, land, chieftaincy, business and workplace conflicts. They
trained mediators at the various levels of dispute mediation in Ghana since the mid-1990s. Over the years, the Judicial Council in conjunction with the Ghana Law School, Faculty of Law, the Ghana Bar Association and the Legon Centre for International Affairs and Diplomacy (LECIAD), among others, have collaborated and trained and sensitized traditional, academia, legal fraternity, and administrators, and the rest of the Ghanaian public in the technicalities of ADR with the view to making ADR an integral part of Ghana’s judicial system and freeing the traditional court system of some of its burden. Today, mediation organisations such as Centre for Mediation and Conflict Resolution, Gamey & Gamey Academy of Mediation, the Ghana Arbitration Centre, Ghana Association of Chartered Mediators and Arbitrators (GHACMA) and West Africa Dispute Resolution Centre (WADREC) mediate civil cases across the length and breadth of Ghana with the support of United Nations Development Programme (UNDP). This will enable parties in dispute to locate and contact appropriate ADR practitioners in and around their various localities.

After having tried and tested the ADR system under various legislations over the years with tremendous dividends, particularly at the District Courts with progressive improvement in the turnover of cases, the ADR Act of 2010 Act (798) was passed. The 2010 ADR Act replaced the Arbitration Act (38) of 1961 that had regulated the settlement of disputes by arbitration. The new Act has integrated ADR fully into the Ghana’s justice administration by bringing even the traditional mediation system into its fold. This study throws the searchlight on the introduction of ADR into the Ghanaian judicial system with the aim of finding out what m have been put in place to replace the litigation culture with mediation culture. ADR is to save time, money, and give procedural satisfaction devoid of the unfriendly court atmosphere, guarantee confidentiality as well as improve communication and preservation of relationships but what are the conditions under which such laudable fruits be gained?
1.2 Statement of the Problem

As stated earlier, mediation and arbitration have been with African societies, for that matter Ghanaians, since the pre-colonial times. Besides, the concept of modern litigation at the law courts came with colonialism. However, contemporary ADR mechanisms are wholly Western perspectives transferred to African settings with little regard for the development gaps, consciousness, rationality, and socio-cultural differences between the developed nations and the developing ones. This has become the subject of growing debate in the conflict resolution fraternity, especially among African scholars, who argue that traditional African societies practice these so-called Western ‘alternative measures’ for centuries before their recent adoption in Western developed societies. Besides, conceptually and in practice ADR has its fair share of problems and critics. For example successful mediation is one thing, rate of compliance is another. Mediation is sometimes challenged as changing victims’ ‘rights’ that needs to be enforced into ‘needs’ often in relational cases that are mediated. In such cases, other forms of morality that competes with the morality of mediation are erased. Besides, the effectiveness and efficiency of ADR depends on the level of consciousness of parties, education, and the quality of mediators. The research seeks to find out what structures, education and policies have been put in place to ensure that the litigation culture of the Ghanaian is replaced by the ADR culture? And, what measures have been taken to guarantee the development of human capacity in the form of qualified arbitrators and mediators for the successful implementation of the provisions of the Act. Since the institution of ADR what has been the score card? What are the challenges and if any how have or are they being addressed?
1.3 Scope
This study will seek to examine the extent to which ADR has been employed as a tool for conflict resolution in Ghana with particular reference to issues related to domestic, chieftaincy, religious, land and workplace disputes. A review of its success, challenges and prospects will be conducted as well. The study will cover the period from the year 2000 to 2011.

1.4 Objectives
The objectives will be as follows:

- Overview the need for ADR in Africa and Ghana;
- Overview the profile of Conflicts in Ghana;
- Review the institution and practice of ADR in Ghana
- Highlight the successes and challenges.

1.5 Hypothesis
The use of ADR offers quicker, cheaper and amicable solutions to conflict resolution in Africa.

1.6 Rationale
There is a seeming perception that the use of the formal court system, in which judgment is passed to settle conflicts among belligerent parties is by far the best means to conflict resolution. In most cases where court judgments are passed, there is always the existence of “winner takes all” situation or total loss among the belligerents. This may bring peace but not necessarily a lasting solution to the problem. In ADR however, there is full participation of all parties in settling the dispute and are all involved in the final agreements. This therefore
gives all parties some amount of satisfaction as against that of court rulings in which judgment is reached without the consent of the feuding parties. This research therefore seeks to bring to the fore, the advantages of applying ADR more extensively in the settlement of conflicts within our society.

1.7 Conceptual Framework

The study employs the concept of ADR as its framework. The ADR shares the same philosophy with the concept of peaceful resolution of conflicts. It is built upon the premise that conflicts are inevitable aspects of human interdependence however constituted or aspired. It has a settled position that dysfunctional aspects of social conflicts are destructive and retrogressive. As such conflicts should be analysed, prevented, managed and resolved amicably through methods and processes that facilitate creative, peaceful and progressive outcomes of conflicts. Among others, it champions facilitation of communication, non-violence, justice, trust, cooperation, problem-solving, absolute gains, empathy, reconciliation, avoidance policies, tolerance, multi-culturalism, and alternative lifestyles.\(^5\)

ADR is a combined term used for the processes such as mediation, negotiation, arbitration, collaborative law and conciliation that parties can resolve disputes, with (or without) the help of an intermediary. However, often, the breadth and depth of ADR are collapsed into mediation as a generic process. ADR is increasingly prescribed for conjugal, business, industrial, workplace, religious and other forms of communal disputes, as well as used in tandem with other forms of legal systems. ADR traditions and practices vary from place to place, country to country and circumstance to circumstance. ADR mediations may take the form of informal tribunals, informal mediative processes, formal tribunals and formal mediative processes.\(^6\) The outcomes or settlements through ADR may be both binding and
advisory or non-binding and individual judges or panel of judges may oversee mediation processes. Cases and or parties to mediation may choose the medium by themselves, through intercessors or be formally referred through or as part of contractual agreements, laid down process or judicial requirements. The classic formal mediative process is referral for mediation before a court appointed mediator or mediation panel. The key dissimilarities involving formal and informal processes are deferment to a court practice and the tenure or lack of a formal structure for the purpose of the procedure. As such, natural and spontaneous negotiation is merely the use of the mechanism of mediation without any formalized process; however in labour arbitration settings formal tools of negotiation within a highly formalized and controlled setting are used.

The main characteristics of ADR are that participation in the negotiation process is voluntary and there may be a third party or no third party to facilitate the settlement process. In an ordinary mediation process, the mediator cannot impose a solution. A skilled mediator’s dexterity may help shape the outcome of the process but at every stage of the process, the parties are the most important actors and have veto power that they may employ. Furthermore at the end of the mediation process, the settlements are essentially those of the parties who negotiated the outcomes. The mediator is assumed to be help disputants help themselves. In places such as Great Britain, intermediaries may suggest ‘mediators’ proposal as a solution, nevertheless they cannot impose resolutions on the parties. In the case of collaborative law, parties often have legal representatives who guide and facilitate the settlement process within specifically contracted terms. Though the parties often reach a settlement with the aid of their advocates, resolutions are not imposed on parties; yet the process is constitutive of the institutionlised court litigation structure. It must be acknowledged though the collaborative
law procedure is litigation variant that uses ADR practices and processes rather than collaborative being ADR methodology.\textsuperscript{7}

Likewise in arbitration ADR processes, equally, participation is typically voluntary; although there is an intermediary who acts as a judge and imposes binding resolutions. Arbitration processes are often employed because parties have (binding) agreements to contracts that disputes arise thereof. In formal cases parties often agree that disputes arising out of their contracts will be settled via arbitration. In formal arbitration ADR parties are allowed to appeal against arbitrated outcomes in law courts.\textsuperscript{8}

Apart from the above mainstream categories of ADR there are other types. For example, ‘case evaluation’ and ‘early neutral valuation’ processes afford parties a non-binding mechanism through which they can present their cases have them evaluated by a neutral evaluator. The evaluator advises the parties on the strengths and weaknesses, how they will fare under litigation and the evaluator may help influence the party or parties to have their case or cases mediated or arbitrated. There is also the third party ‘neutral fact-finding’ process, whereby a court or parties select an intermediary to investigate issues and reports or testifies in court to help solve a puzzle that is often very technical. The ombudsman is often a third party selected by an institution to settle disputes or complaints often bordering on civil liberties and rights by employees, clients or constituents. The ombudsman practices are often guided by the principles of neutrality, fairness, transparency, etc.

ADR has been more and more used globally, both independently and as part and parcel of the formal legal systems. Primarily ADR promotes non-violence and avoids zero-sum perception of issues in disputes. It is feasible, less complex and flexible mechanism for parties in conflict
to mutually manage and resolve their differences at very low costs compared to the law courts and in relatively short time. Since parties negotiate their own settlements in confidentiality, the outcomes are often practical solutions designed to their needs, interests, and choices. These make ADR related settlements more enduring. Most importantly, ADR processes guarantee preservation and continuation of relationships and reputations, especially when the process of reconciliation is integrated into the process.9

Conflict resolution is an important and major goal of all the ADR processes. It advocates for non-violent resolution of conflicts and reconciliation among antagonists. Africa is the least developed continent in the world. However, most of its energies, time and scarce resources are often used to fight internecine war further drawing back the clock of progress. Forms of ADR have long traditions worldwide across race, geography and issues. However the leitmotif running through the diverse regions and cases that ADR has been prescribed for, is that litigation at the law courts may offer putative justice but often fails to restore feuding parties to peace and reconciliation.

The relevance of ADR to the study is obvious. In sub-Saharan Africa, ADR has gained widespread acceptance and practice among governments, traditional institutions, clergy, general public, and the legal profession in contemporary times. For many Africans, today’s mainstreaming of ADR in conflict resolution mechanisms is a back-to-the-future or a déjà-vu phenomenon. African values, norms and practices are imbued with variant forms of ADR time immemorial. Before modern state law was introduced under colonialism, African customary legal systems mainly relied on mediation and conciliation. In many countries, these traditional mechanisms have been integrated into the official legal system. Today, however, it is the sheer congestion at the orthodox courts, costs of litigation, the
psychological and conflict exacerbation syndromes that litigation cannot solve, and the non-
availability or adequacy of modern judicial services, as well as inter-governmental and
foreign investors that are the driving force behind the removal of bottlenecks in doing
business in African societies. Besides, conflicts in Africa are communal conflicts and the
wisdom is that ADR stands the best in re-integrating communities albeit the recurrence of
conflicts.

1.8 Literature Review

Conflicts and the Need for ADR

Marc Howard Ross writes that it is difficult to conceive a human community where there is
no conflict among members or between persons in the community and outsiders. He further
states that the degree to which conflict is overt varies. In so far as conflict continues to be
part of societies there is the need to seek amicable solutions quickly and in a manner
acceptable to all. With Africa being no exception it behoves on all to ensure that conflicts are
resolved not necessarily through formal court rulings or judgments but also through ADR.

Dysfunctional conflict is destructive and is said to be one of the greatest threat to the
economic health of the modern industrial civilization. Norman Angell, in his work “War as
an Anachronism,” shortly before World War I said warfare in the Industrial Age had become
an unprofitable anachronism. He is of the view that in war, even when victory is perceived at
the first glance as promising substantial economic gains, this turns out to be misleading and
illusive. At a time that Africa is seeking sustainable development, it is necessary to draw on
the lessons of Angell and not to resort to the use of violence in resolving conflicts. Angell’s
work is however short of recommending non-violent means of resolving issues since conflicts
will definitely occur in societies.
Conflict permeates all aspects of social behaviour and is thus very essential to reduce it to the
barest minimum or resolve it amicably and quickly before it wreaks havoc in society.
According to Michel Nicholson, conflicts abound in all forms of social behaviour. In industry
there are strikes, in international politics there are wars and threats, in marriages there are
quarrels.\textsuperscript{12} This emphasizes the fact that, conflicts are endemic and therefore requires prudent
management to avoid escalation into violence which is not only destructive but retards
development: this is the last thing needed in Africa’s quest to achieve prosperity. It is
therefore necessary to seek other means of managing conflicts and ADR offers options.

During the 1980s and 1990s violent conflicts engulfed the West Africa sub-region and
destabilized many of the hitherto stable countries such as Liberia, Cote d’Ivoire which is
ongoing, Guinea and Senegal. Irrespective of the initial causes and motives of these conflicts,
according to Steve Tanoh, ethnicity eventually played a major part in the conflicts.\textsuperscript{13} He
further states that even in instances where the ethnic factor was not relevant to a particular
conflict, it eventually became a dominant factor as the conflict and internecine war
progressed. Ghana for instance has experienced ethnic conflicts with some prominent ones
being clashes between the people of Akropong-Akwapem and Abiriw of Southern Ghana
which initially started as land litigation, Konkomba-Nanumba war over chieftaincy reforms
in 1981 and Konkomba-Dagomba war conflict of 1994 which is believed to be the most
extensive communal conflict in Ghana.\textsuperscript{14} In so far as ethnic groups remain prominent in
Africa and Ghana, conflict cannot be ruled out and require management of some sort. What is
not investigated further is why ethnicity is prominent in conflicts that have engulfed Africa. It
is probably a case of ethnic groups being manipulated easily by seemingly selfish persons,
ethnic groups not ready to compromise where their beliefs are concerned or appropriate
conflict resolution techniques are not applied.
Anthony Connerty examines the usefulness of ADR and acknowledges that its practice in developed and developing countries is necessary given its benefits. Connerty argues an effective and efficient ADR system must be guided by benchmarks including: the type of ADR to use, how ADR should be guarded, and who qualifies to be a mediator. In the setting of these benchmarks for well-functioning of ADR systems in small countries, he also discusses issues bordering on the desirability and extent of judicial control. He asserts that ADR systems must be insulated from political interference and control, else the very ideals and advantages will be defeated.

**Principles of Mediation**

Roger Fisher and William Ury in *Getting to Yes - Negotiating Agreement Without Giving In* offer an alternative to the widely held ‘fixed-pie’ mentality which dominates much of the negotiating fraternity. They argue that too often mediators become entangled in awkward struggle over fixed positions; and thereby, fail to be imaginative to work towards of a mutually beneficial deal. By the help of the acronym BATNA, Best Alternative to a Negotiated Agreement, they stress the need for creativity and alternative approaches when there is a stalemate. From this perspective, they encourage mediators to detach the people and positions from issues and interests and centre on conceiving alternatives for common outcomes.

*Negotiation* provides excellent number of well-designed exercises that help mediators develop and apply the concepts and principles of mediation and negotiation. It anticipates the fundamental challenges mediators run into in bargaining, and integrative negotiation. It emphasizes preparation prior to a negotiation, and furnishes the mediator with various tactics that can be employed from getting parties to the table, and how to work towards a successful
negotiation. Mediators face many barriers that hinder their success in negotiation. It highlights problems of die-hard bargainers, gender differences, cultural differences, difficulty with gaining trust, and the limitation of time as some of the difficulties mediators face and furnishes them with the necessary skills for circumventing such barriers. It also deals with mental errors; the gap in a party’s presentation; the mediator’s own mental lapses; and rules and regulations (legislations) that often influences the outcomes of mediations. It cautions the mediator to be alert and proactive in addressing such challenges to avoid deals being lost or turning out as bad deals in the future. The book is, however, mainly concerned with business disputes and it is overly academic biased and one wonders if it can be very useful for African communal conflicts where rationality is limited.

Leigh Thompson, *Heart and Mind of the Negotiator*, writes on the opposing forces that are often at work in negotiation and admonishes the negotiator to recognize and prevail over the perennial contest between emotions and logical thinking. First, he painstakingly offers a detailed examination of various emotional and mind-boggling processes negotiators go through. The book provides a number of learning aids and self tests for the negotiator to actively participate in the learning process to further gauge how their attitudes and thought processes are enhanced. It also furnishes the negotiator with real life experiences and case studies with psychological insights of motivation for human behaviour of human interaction, and interplay of emotion and thought to illustrate with prescriptive and practical principles on how to achieve mediation goals. From a more critical perspective, the book suffers from information overload and one may be overwhelmed as there is too much detail to absorb.
Mediation in Africa

Ken Ahorsu and Robert Ame in “Mediation with a Traditional Flavour,” wades into the debate on whether wholly Western conflict resolution mechanism imported to African settings without due consideration for differences in developmental gaps, consciousness, rationality and socio-cultural differences will promote efficiency in resolving conflicts in Africa. They argue that for ADR to become an efficient mainstream conflict management mechanism in Africa, what is essential is a blend of Western and African mediation and arbitration processes to reflect socio-cultural differences and relevance. They advocate blending ADR with culturally tuned indigenous values, norms and ethnographic practices as foundations for conflict resolution. They argue that an essential requirement for durable conflict resolution hinges on the ownership of the mediation processes and deals that parties can call their own. Therefore understanding the socio-cultural settings of conflict locales should form the basis of the analysis of conflicts, and sources for models in the management of conflicts. African communities have undergone change as ‘modern’ social formations and relations have emerged; a large part of the people’s daily lives are still influenced by traditional norms, institutions and practices. As such, approaches to addressing community conflicts must equally embrace elements of both the modern and traditional societies.

Mediation with Traditional Flavour framework is built around the Ewe philosophy of peace and conflict, its discourses, symbolic orders, values and decorum. The traditional philosophy conceptualises conflicts as abnormal states of affairs that are harmful to the well-being of the parties involved, the land, ancestors, gods, God and future generations. And there are explicit norms and practices of settling or healing the parties, pacifying the land, gods, God and communities. From this holistic conception of conflict and peace, they argue that the use of ethnography is essential for effectiveness and efficiency. Values, norms and practices are
used as openings for mediation, building trust among the parties, ‘healing’ and bonding, and reconciliation. The framework, nevertheless incorporates Western mediation principles into the process to ensure objectivity such that it may be described as an interface between traditional African mediation, the imported Westminster Judicial system, and today’s ADR.

Another novelty of the framework is the use of symbolic figures, given the case and the experience and relevance of the symbolic intermediaries, to chair the mediation and arbitration process; while the technocrat mediator acts behind the screen as a consultant and a director. The advantage is that chiefs may identify more easily with a prominent chief than an ordinary mediator. The framework was used in mediating communal conflicts in the Hohoe Municipality and the approach facilitated easy commitment of factions to negotiate; trust was easily built; the parties identify easily with the settlement as their own; and the process was more amenable to mitigating conflict attitudes.

1.9 Methods and Sources of Data Collection

The research is a qualitative one and even in instances that data and graphs are used their analysis will only be descriptive. The data for the research was collected from both primary and secondary sources. The primary data was collected from luminaries of ADR, the Judiciary, Members of Parliament, ADR centres and the Academia. The interviews were conducted through purposive sampling of interviewees. The Judicial Services of Ghana Secretariat and some barristers at Law were consulted as well. Information was also gathered on the internet using Google, JSTOR and other search engines extensively.
1.10 Arrangement of Chapters

Chapter One consists of the background to the research conducted. This includes the background, statement of the problem, scope, hypothesis, rationale and literature review. The others are theoretical framework as well as methods and sources of data collection. Chapter Two covers the Overview of ADR in Africa. Chapter Three examines the role ADR has played in conflict resolution in Ghana and its prospects. Chapter Four summarizes the research and presents conclusions and recommendations for the extensive use of ADR in conflict resolution in Africa.
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CHAPTER TWO

OVERVIEW OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN AFRICA

2.0 Introduction

Conflict is an intrinsic aspect of human nature. In some instances it serves as an agent of development but in most instances they come about with destruction to lives and property. Africa has not been spared the brunt of these conflicts. In that, the African continent had suffered severely from all manner of conflicts to the point that Africa is lagging behind the other continents in every facet of development. Furthermore conflict, diseases and huge numbers of “people of concern” have been created that the international community especially the UN has been grappling with over several decades. Hence, there is clearly a need for new ways of managing these conflicts in Africa so as to forestall the devastating impact of conflicts. This chapter examines an overview of conflicts in Africa and their consequences thereof. The Second part looks at the customary or traditional means of conflict resolution in Africa and then the international development of Alternative Dispute Resolution (ADR).

2.1 Conflicts and their Consequences in Africa

The African continent has been at the forefront when it comes to the issue of conflict and as a result has earned the unenviable reputation of theatre of conflicts. A number of countries on the continent countries are presently experiencing violent conflict several of them also face the threat of violent conflict with many more having just emerged from conflict. As stated earlier, the violent conflicts range from regional, civil and communal wars, as well as organisations and family conflicts. The extant literature has ethnocentrism, religious intolerance, cultural differences, political exclusion, migration, environmental change, natural resources, and
proliferation of small arms and light weapons as some of the factors that trigger off violent conflicts, however defined. The literature cites war, poverty, instability, internally displaced persons, refugees, disease, underdevelopment, fear, mistrust, destruction of life and properties, and the intersubjective meaning therein as some of the end results of conflicts in Africa.¹

Some of these conflicts that have plagued the African continent were as a result of inherited dysfunctional colonial policies and their ramifications for political state building, and post-independence elite and group political conflicts. The never ending conflict of the DR Congo, and the post-independence Angola elite violence over disagreements of leadership of the countries led to bloody civil wars that were largely influenced by the erstwhile Cold War politics. The conflicts lasted for decades and in the process claimed thousands of lives and colossal loss of resources that turned back the clock of sustainable development. Today, the DRC civil strife lingers on and often manifests in communal conflicts, natural resources, and ethnocentrism without end. It equally manifests in a never ending regional conflict, often called the Great Lakes Region conflict, involving Rwanda, Burundi, Uganda, and DR Congo. The Great Lakes Region is one of the volatile regions of Africa where colonial economic and migration policies, natural resources and national and regional politics is marked in turbid mix with individual and group identities at stake and portend great suffering for the masses. Outrageous and inhuman crimes were commitment against the vulnerable.

In West Africa, the civil wars of the early post-Cold War years (Liberia and Sierra Leone) that brought untold atrocities, destruction, and hardship upon the masses have ended; however, the permissive conditions that gave rise to the violence remain. Integrating the various factions and
groups that fought against each other remains intractable in most cases. Peace is still born in most post-conflict situations. With unemployment very high in most parts of Africa, people are falling back on sub-national identities for succour. Common poverty and scarce resources has precipitated most communities in Africa towards communal conflicts with chieftaincy, land, cultural differences, fight over administrative capitals, and proliferation of small arms and light weapons being the driving forces. This is exemplified by the civil wars of Liberia which lasted for more than a decade from 1989 to 2003, and led to the death of two hundred thousand people with several thousand being displaced. The point being made here is that the administration of ADR is not necessarily designed for civil wars, though facets of the resolution adopt ADR mechanisms. The emphasis is on communal, religious and relational conflicts. As it was to fashion a bottom up approach in the faith that societies are at or will be at peace when the building blocks are at peace.

Africa is not only a continent of instabilities but equally of opportunities. The region is emerging as natural resources geostrategic region, especially in the area of petroleum. A lot of companies have been investing in Africa especially in the oil sector. However, the incidence of natural resources causing border conflicts is one that is becoming rampant and threatens to blight the putative gains to be earned from exploiting natural resources. Wherever one looks there is natural resource border conflict. The panorama of natural resource border conflicts covers Nigeria-Cameroon Bakassi, Ghana-Côte d’Ivoire, Malawi-Tanzania, D. R. Congo-Uganda disputes. Most transnational corporations were concerned about investing huge moneys in troubled regions. They were equally wary of litigations at the law courts, especially when some African courts are perceived corrupt. As stated earlier, governments from the West, international
financial institutions, and transnational corporations made the adoption of ADR conditionality for investment in certain regions and businesses of Africa.

Environmental conflict is one of the emerging salient fault lines threatening to transform long-time neighbours in to mortal enemies based on nationalities, communities, ethnicity, professions and even religion. The swelling confirmation for climate change, in the form of drought, decrease arable land, diminishing water availability, crop failures, desertification, has security implications. Increased climate variability increases the risk of armed conflict, instead of outright civil war; it is likely to amplify the threat of communal conflict. The Nile River and the management of its waters is the source of centuries old conflict among the states from Egypt down to Uganda. Drought has created incentives for violent attacks against other communities by the Fulani in West Africa and the Masai in Kenya to secure access to scarce pasture. The risk of communal conflict has been amplified in regions inhabited by politically excluded ethno-political groups. African countries lack the technological expertise to tame nature thereby making mediation a *sine qua non* of environmentally induced communal conflicts to be mitigated.

Governance crisis continue to endanger lives in Chad, intense fighting between rebels and government forces in and around the capital, N’Djamena, claimed several hundred lives in April 2008. Again, in 2008 and 2010, disputed presidential elections led to the deaths and displacements of several thousands of people in Kenya and the Ivory Coast respectively. Furthermore, conflicts in Somalia, Mali as well as minority uprisings in Nigeria, and separatist agitation in Cameroon and Senegal among others constitute points of reference for conflicts in Africa.³
2.2 The Social and Economic Consequences of Conflict

Countries suffer from many different consequences of violent conflict. Violent conflict kills people in many different ways: Civilians and soldiers are killed in combat; and people die because of diseases, malnutrition, and violent crime. Wars force mass migration. Dealing with the consequences of violent conflict is not only a humanitarian imperative; it is also important because it decreases the risk of the conflict recurring. In the African context, conflict has undeniably exacted a heavy toll with regards to lost development opportunities as well as human suffering. According to the African Development Bank Report of 2008/9, Africa accounted for about half of the world’s battle deaths between 1990 and 2005.\(^4\) Moreover, in situations of conflict far more people die from disease, starvation, malnutrition, and breakdown of health services than from battle. Hence, a combination of battle deaths and conflict related deaths are often very high.

Besides conflict related mortality, conflict affects people long after the fighting has stopped. As experienced in the conflicts of Angola, Liberia and Sierra Leone, conflict is a major cause of disability especially in Africa where combatants have made a habit of amputating the arms and limbs of people. Also, conflicts create conducive environment for the spread of diseases such as cholera, HIV/AIDS, and by so doing creating a public health problem. It is not surprising that HIV/AIDS is more prevalent in Africa than anywhere else in the world.

Further violent conflicts lead to civilians being subjected to human rights abuses, such as sexual violence, and displacement during war weakens social cohesion and relationships, which may lead to promiscuity. Violent conflicts traumatize people. Most of the victims of civil war are
civilians, who are subjected to, or witness, killings, rape, torture and of family members.\textsuperscript{5} As stated earlier, violent conflict also come along with massive destruction to infrastructure and social amenities and existing systems of service delivery.

Quite related to the above is the devastating impact of violent conflict on children and girls in particular. During violent conflicts as was witnessed in Liberia and Sierra Leone most especially, children are captured and forced into child soldiering. These child soldiers themselves victims, become perpetrators of violence.\textsuperscript{6} When the conflict is finally over, boys and girls face different reintegration problems. Girls who are more often than not used as providers of sex for rebels would end up with babies of their own, hence making it difficult for them to catch up on education and job training. High male mortality during conflict leads to a high proportion of female-headed households, leaving women with a much heavier burden of caring for the household in post-conflict societies. Moreover, women face more difficulties than men in integrating into the labour market even under normal circumstances. In the post-conflict period, the shrinking of job opportunities increases competition for jobs, further constricting women’s access to the labour market.\textsuperscript{7} Undeniably, post-conflict countries have a low revenue base, high expenditure needs, and weak institutional capacity. In this regard, it is even more likely that the factors that led to the conflict may persist or may even have been aggravated during the conflict, with new issues possibly emerging. It is not surprising that most post conflict states slip back into conflict.
2.2.1 Regional Spill Over Effects due to Diseases and Displacement

The cost of violent conflict at the regional level is very high in Africa, in that, violent conflicts result in massive refugee movement across national borders. Africa is home to about 1.033 billion people making about 12 percent of the world’s population. Nevertheless, about 31 percent of the world’s refugees come from and seek asylum in Africa.\(^8\)

2.2.2 The Economic Legacy of Conflict

Many African countries, particularly those in sub-Saharan Africa, suffer from low growth rates. The incidence for violent conflicts further worsens this plight. This is so because; violent conflict leads to a decline in socio-economic activities in the country. In most instances governments are forced to increase military spending which consequently results in a contraction of spending in areas such as: public investment. The high rate of military spending sometimes becomes difficult to reduce as it is often seen by governments to be a sine qua non to the sustenance of peace. In violent conflict situations, fear and reduced opportunities lead to human and financial capital flight, which results in a shortage of skills, investment. Governments also often pursue a wide range of other unsustainable policies that sacrifice the future for the present. The short-sighted policies adopted during war inflict lasting costs on the economic growth and development.\(^9\)

Irrespective of the several international attempts at reducing the impact of conflict in Africa these attempts have not been able to reduce the debilitating impact of conflict on Africa. The resultant failure of these attempts further demonstrates the need for more creative approaches to conflict resolution. Hence, the renewed interest in traditional techniques for settling conflicts can be seen in this light.
ADR programs can serve as tools for the effective conflict resolution in Africa. It is worthy to note that for the most part, these conflicts have arisen as a result of inability of the formal litigation or court system to deliver justice in a timely, efficient and just manner. As a result there is a clear lack of faith in the judicial system and as a result the slightest of disputes has the potential of turning violent and in such situations they always have dire consequences for the state or region involved. For instance, during Kenya’s post-election crisis, Raila Odinga the losing candidate claimed that he could not trust the courts to deliver justice and as a result, called on his supporters to embark on street protests.

2.2.3 Challenges of the Formal Court System

The advent of colonialism in the in the late 19th century led to the introduction of western styled institutions such as the bureaucracy, legislature and the judiciary and the executive among others. Since then, the formal courts all across Africa have played an important role in the delivery of justice. In spite of this, the experience has been characterized by challenges and as a result necessitating a more workable system of justice delivery that would not only provide a rapid, efficient and an effective resolution to disputes. Such justice system would also consequently lead to a reduction of the huge backlogs and overcrowding of cases at the courts. Some of these challenges are discussed below. Most African courts are plagued with problems of overcrowding. Hence, judges and magistrates are faced with several hundreds of cases on daily basis. Since judges are unable to deliver judgments or rulings on all of these cases they are forced to adjourn several hundreds of cases the result is the huge backlog of cases which in some instances last for decades on end.10
The formal court system process, by its nature, is adversarial particularly with its attributes of “winner takes all” and “loser losses all” that is often associated with it. This is not conducive for the continuation of business or social relationships. In most instances then, the day a judgment is given on a particular case marks the beginning of a new dispute. As the vanquished party might feel humiliated and might harbour some resentment towards the victorious party. A consequence is that the parties are locked in perpetual conflict that has no end in sight. In some cases, a losing party might resort to violent means to in a bid to achieve the justice they feel they had been denied. Related to this is the fact that the formal court system deals with the legal issues involved in the dispute it is often the case that though a legal solution may be provided, the underlying circumstances would not really be resolved and as such leave the parties still aggrieved.

Secondly, many courts in Africa are bedevilled with systemic problems, such as antiquated structures inherited from colonialism. Hence, it is common to find that court sessions in most parts of Africa are either held under trees or in dilapidated or temporary structures. Besides, courts are poorly equipped. For instance, Judges still take notes by hand, records of court proceedings are done manually and even with the advancement of technology the use of a computer in an African court room is very rare especially at the magistrates’ level where most cases are heard.

Furthermore, most courts are characterised by overcrowding or backlog of the caseloads. According to Uwazie, many judges or magistrates have to deal with more than 100 cases per day. In Kenya for instance, it is quite common for a high court to have over 200,000 cases unresolved. This makes it impossible to effectively adjudicate even if these cases are normal everyday
disputes. It takes several years to get to trial and months to have a motion heard.\textsuperscript{11} A resultant effect of the overcrowded courts is the frequent adjournments which have become a common practice in the formal court system.\textsuperscript{12} This often leads to frustrations on the part of disputants. Hence, the expression that it is easier to enter the mouth of a lion than enter the court.

Moreover, there is also the issue of mounting legal fees for professional representation with each futile court appearance. It is not uncommon in African countries for a dispute to take a decade or more to reach resolution. With a majority of African citizens being barely able to afford the filing fees let alone going for professional representation in terms of a lawyer. Frequent adjournments of cases does not only delay the cases but more often leads to a huge financial burden on the disputant a majority of whom are poor rural folk. As a consequence a majority of the people might opt not to go to the courts to seek justice but would rather take the law into their own hands. Sometimes they do so through violent means.\textsuperscript{13}

Again, the issues of lengthy delays and overcrowded courts, opens the court system to manipulation and high incidence of corruption. Uwazie observes for instance that, that “our courts have been overburdened and sometimes overwhelmed,” enabling litigants to exploit the system’s dysfunction to “delay or frustrate the course of justice.”\textsuperscript{14} In many cases, this ineffectiveness reflects the “in-between” state of African justice structures. The formal legal system is overloaded and cannot provide timely and effective closure. It is also more costly in time and money for disputants. Meanwhile, the sphere of influence of the customary justice system has been greatly diminished with the inception of colonialism and the introduction of the formal court system as part of the administrative structures. As a result of these challenges, the
formal judicial system has not been able to provide justice to not only business entities but particularly the poor and vulnerable in the society.

It is therefore laudable that in the face of these mounting challenges associated with formal court system in Africa, most judicial systems across the continent have embarked on comprehensive reform programmes which are aimed at enhancing access to justice, providing timely and less costly justice to the ordinary people while at the same time reducing the huge backlogs and demystifying the formal court system as we have them today.

2.3 Traditional Methods of Conflict Resolution in Pre-Colonial Africa

Traditionally, Africans have always had customary means of resolving conflicts and disputes through means other than formal litigation. In pre-colonial Africa, dispute resolutions were based on the indigenous or customary laws of the various ethnic groups and their sub divisions. These were home grown in Africa and different from the Western inspired laws that were introduced in the advent of colonialism.\(^{15}\) During this period, communal peace and harmony was of prime importance as such disputes were rapidly resolved as quickly as they arose. Although ADR may not have been legally laid down in traditional African societies resolving disputes by amicable means was generally the preferred option. In most instances it was the Chief, Elders and Family Heads confer with the relevant parties in seeking peaceful settlements to disputes.\(^ {16}\) By dint of their position and experience, they commanded enormous respect and were trusted to be neutral to mediate between disputing parties for an amicable solution. It is not surprising then that some adherents of ADR often refer to ADR as *African Dispute Resolution*.\(^ {17}\) Like ADR, these
mechanisms in most cases seek to restore relationships rather than worsening or maintaining the statuesque.

In most cultures of the Africa continent, parties in dispute more often than not prefer to resolve disputes through the intervention of a third party usually an elder or a respected member of the society. This is because direct confrontation may hurt or impede the relationship. Some parties may prefer to talk to a third party who will give suggestions and may act as intermediaries. Whereas in some other cultures, dealing directly with the other party to a conflict is ideal; talking to others may be seen as gossip or increasing the conflict unnecessarily. A third party may be asked to intervene if it feels like they will help ease the already tense situation. These customary/ traditional mechanisms are found all across Africa especially sub-Saharan Africa with little or no variations.

One such example is the **Luba Basa and Harma Hodha** which is a traditional conflict management mechanisms practiced mainly in Southern Ethiopia by the predominantly pastoral people of the Oromo. The Oromo have relied on these mechanisms to address various inter and intra ethnic conflicts that come about as a result of disputes over scarce resources particularly pasture and water.\(^{18}\)

The **Luba Basa**, means “setting free” while the **Harma Hodha** means “licking breast”. The Luba Basa is a mechanism that seeks to integrate ethnic groups through adoption. According to Daniel Ogbaharya, it involves accommodating and embracing outside groups, who are traditionally seen in contempt by members of the **Oromo**.\(^{19}\) This is a preemptive conflict
resolution mechanism that seeks to avoid potential conflicts with outsiders through restorative and reconciliatory gestures to those groups that are held in contempt. Thus, the *Luba Basa* can be seen as a preventative conflict management that upholds peaceful co-existence of the Oromo with neighbouring groups.²⁰

In practice the Luba Basa often involves the intervention of trusted and respected elders who are seen as legitimate mediators of conflicts. Using the elders and respected members of the society is key to preventing disputes regarding the usage and allocation of the available resources. As a result, these conflicts are prevented from escalating to full blown violent conflict. This is quite common among the pastoralists of Eastern Africa where elders command a degree of traditional legitimacy to mediate, arbitrate and render a ruling even though at times they lack the authority to enforce their decisions.

Again, among the pastoral groups of Kenya such as the Luo and the Maassai, these traditional mechanisms are resorted to in a bid to resolve inter and intra-group conflicts. Organized in the form of conferences the elders and the community as whole gather to find solutions to disputes in the community. As traditional mediators, the elders are charged with the responsibility to make sure that the entire community has representation in the negotiations and the reconciliation process. According to Daniel Ogbaharya, their decisions are expected to be in line with the customs, virtues and principles of fairness as well as behaviour deemed acceptable within the society.
Similarly, in Sudan, a community-based customary mediation known as Juddiyya is preferred to the traditional court system. This is because the traditional court system consumes more time than the Juddiyya, poorly staffed and often than not inefficient. As a result of the huge backlog of unresolved cases that the courts have to deal with, customary mediation provides a more attractive, cheaper and restorative resolution of dispute.21 Once a dispute is mediated and a settlement is agreed, the agreement becomes mandatory and if a party fails to honour it, then that party subjected to social and communal sanctions for unacceptable behaviour by the community.22 Depending on the severity of the conflict and the place (Southern or Western Sudan), traditional mediators may be replaced by “professional interceders” and “ordinary citizens” that have certain clout within the community. Daniel Ogbaharya states that, this method of customary mediation relies on the services of five main mediators within the community and these are; the traditional priests, elders, members of customary courts, the “rephraser” of storytelling in mediation meetings and cattle camp Leaders.23

Besides these mechanisms enumerated above traditional or customary conflict resolution mechanisms are prevalent on the continent. In countries such as Ghana, Nigeria, Senegal, Benin, Mali among others, Elders or respected members of the society are often engaged in conflict resolution. Again, the extended family system which comprises of the nuclear family, Uncles and aunties, and cousins and the grandparents is pervasive on the continent and it stands as the first point of call when dispute arises within the family. Attempts are made to resolve whatever dispute there is within the family. If these attempts fail then people outside the family but within the same clan are engaged to attempt a resolution. This is done until a mutually beneficial resolution is found. It might get to the chief but the dispute might be resolved in the end. With
the main aim of restoring the peace of the society these mechanisms unless in extreme cases involve the offending party offering an apology to the offended party and a promise not to repeat such an offence. As a sign of their reconciliation disputants are made to shake hands in the clear view of the elders and members of the community at large. In most communities, reconciliation is urged particularly before the celebration of annual festivals in the community and this is greatly adhered to. Dieng and Oghara have noted that the nature of the African society which was strongly founded on communal living in part explains the prevalence and acceptability of these mechanisms.

Again, in the Kalahari Desert in Botswana and Namibia the Bushmen have lived traditional lives for several centuries. They have lived without courts and a formal state system. As hunting and gathering society disputes do occur over food, land and mates. Disputants, call on other members of the tribe together to hear out both sides.24 In instances where tensions rise senior members of the group would hide the disputants’ poisoned hunting arrows to prevent resort to violence. Furthermore, if a resolution is not reached in the small group then the larger community is brought together where everyone is able to talk through every aspect of the dispute over a number of days until the dispute has been peacefully settled.25 While these practices enumerated above cannot be referred to as ‘ADR’ they have obvious analogies with mediation, conciliation and peace-making practices in non-traditional societies.

However, the advent of colonialism consequently led to the introduction of formal governance structures such as the legislature, the judiciary and a bureaucracy. These resulted in a drastic change in the African traditional society. Very soon offences that were not punished or would
easily go with a reprimand were now punished with jail terms after court litigation. These structures still remain even with the end of colonialism. After about 50 years of practice there has been the consequent realization of the inability of the formal court system to deliver justice in an effective and efficient manner. This has led to the clamour for efficient mechanisms of justice delivery in a rapid and efficient manner and far less costly.

2.4 The Development of ADR: An Overview

The idea of ADR is as old as time. Informal dispute settlement has long been in existence in many parts of the world. In the Bible as well as the Quran there are instances where disputes have been resolved through intermediaries. In fact, archaeologists have found evidence of the use of ADR methods in the ancient civilizations of Egypt, Mesopotamia, and Assyria. The court system itself was once an alternative dispute resolution process, in the sense that it replaced former processes of dispute resolution, such as trial by battle and trial by ordeal. In the view of the Law reform commission, one of the earliest recorded mediations took place over 4,000 years ago in ancient Mesopotamian society when a Sumerian ruler helped to prevent a war and developed an accord over a dispute on land. In the Western world, the development of ADR could be traced to Ancient Greece who established the position of public arbitrator in 400 BC upon the realization that Greek courts had become overcrowded. India and China have long histories of the practice of ADR. As we have it now, the idea of ADR was developed and popularized in the US as a means of resolving issues pertaining to inter-racial disputes that had arisen as a result of the civil rights movements in the 1960s and the loss of faith in the ability of the court system. The promulgation of the Civil Rights Act in 1964 led to the creation of the Community Relations Services (CRS). The CRS relied on the methods of mediation and
negotiation to assist in preventing violence and resolving community-wide racial and ethnic disputes. This consequently, helped to resolve various disputes involving schools, police, prisons and other government entities throughout the 1960’s.\textsuperscript{31} It has since the civil rights programs assumed importance in areas of equal opportunity, anti-discrimination and the environment, to the point where it has become institutionalized and legalized in the US. To an extent it is losing its alternative tag as it has become an integral part of the justice system.\textsuperscript{32} Similarly, ADR has gained popularity in Europe, Asia, and in Africa.

In the African context, ADR was introduced in the 1990s as part of reforms in the judicial sector particularly with the recognition of the need for improvements in the access to justice by the vulnerable and the poor. Many countries have since then adopted ADR or some of its methods and implemented them as part of their judicial reform programs. The Multi-door approach in Nigeria, is one such example. Introduced in 2002 it stands as the first of its kind in Africa. The Multi-door approach is one where disputing parties are offered a choice between the formal court litigation and court-connected ADR mechanisms. Uwazie, observes for instance that, on the average 200 cases are mediated daily with a settlement rate of between 60 to 85 percent. This has as a result led to drastic reductions of caseloads on the formal court system in a country where judges admit not less done 50 cases to their dockets on daily basis.\textsuperscript{33} At the heart of the modern idea of ADR, as developed by its European and North American advocates, is the idea that a better form of justice can be obtained by focusing on mediation or the search for a mutually agreed settlement, rather than on binding adjudication by a state authority. Mediators based on both state and non-state institutions can offer ADR; what makes it different from the practice in formal courts is the procedure, an informal search for an agreed and just solution, as opposed to
deciding who has won or lost. This emphasis on ‘better’ and ‘non-compulsory’ justice distinguishes the recent ADR movement from the already well-established contractual forms of commercial ADR, which rely on binding arbitration and may exclude the right to go to court. ADR enjoys enormous support at the international, regional and domestic levels. At the international level, the United Nations (UN) General Assembly recommended the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order adopted by the 7th Congress on the Prevention of Crime and the Treatment of Offenders. These principles enjoin judicial systems to adopt ‘less costly and non-cumbersome procedures for the peaceful settlement of disputes. Similarly, the African Commission in 2006 urged State Parties to consider formulating policies and domestic legislation based on the principles of the Lilongwe Declaration On Accessing Legal Aid In The Criminal Justice System In Africa adopted by the participants of the Conference on Legal Aid in Criminal Justice. This declaration reiterated the right to legal aid, which is defined broadly to include ADR mechanisms, and recognized the role of traditional and community-based alternatives to formal conflict resolution.

ADR is defined in several ways. According to the National Alternative Dispute Resolution Advisory Council (NADRAC), ADR is an ‘umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them’. Some methods, such as mediation, involve seeking resolution by agreement reached between the parties. Other methods for resolving disputes, such as arbitration, may involve binding determination by a third party. There are also a variety of ‘alternative’ means by
which judicial officers may involve independent third parties to assist in the resolution of cases that are being litigated.  

2.4.1 Key Features of ADR Approaches

Although the characteristics of negotiated settlement, conciliation, mediation, arbitration, and other forms of community justice vary, all share a few common elements of distinction from the formal judicial structure. These elements permit them to address development objectives in a manner different from judicial systems.

2.4.2 Informality

Most fundamentally, ADR processes are less formal than judicial processes. In most cases, the rules of procedure are flexible, without formal pleadings, extensive written documentation, or rules of evidence. This informality is appealing and important for increasing access to dispute resolution for parts of the population who may be intimidated by or unable to participate in more formal systems. It is also important for reducing the delay and cost of dispute resolution. Most systems operate without formal representation.

2.4.3 Application of Equity

Equally important, ADR programmes are instruments for the application of equity rather than the rule of law. Each case is decided by a third party or negotiated between disputants themselves, based on principles and that seems equitable in the particular case, rather than on uniformly applied legal standards. ADR systems cannot be expected to establish legal precedent or
implement changes in legal and social norms. ADR systems tend to achieve efficient settlements at the expense of consistent and uniform justice.

In societies where large parts of the population do not receive any real measure of justice under the formal legal system, the drawbacks of an informal approach to justice may not cause significant concern. Furthermore, the overall system of justice can mitigate the problems by ensuring that disputants have recourse to formal legal protections if the result of the informal system is unfair, and by monitoring the outcomes of the informal system to test for consistency and fairness.

2.4.4 Direct Participation of Disputants

Other characteristics of ADR systems include more direct participation by the disputants in the process and in designing settlements, more direct dialogue and opportunity for reconciliation between disputants, potentially higher levels of confidentiality since public records are not typically kept, more flexibility in designing creative settlements, less power to subpoena information, and less direct power of enforcement.
Endnotes

3 Ibid.
4 Ibid.
5 Ibid.
6 Ibid.
7 Ibid.
12 Mwenda, W. S., op. cit., p. 4.
13 Ibid.
14 Ibid.
15 Ibid.
19 Ibid.
20 Ibid.
21 Ibid.
22 Ibid.
23 Ibid.
24 Mwenda, W. S., op. cit., p. 6.
27 Ibid.
28 Ibid.
29 Ibid.
30 Ibid.
31 Ibid.
32 Ibid.
33 Uwazie, E. E., op. cit.
36 Crook, C. R., op. cit.
37 Ibid.
CHAPTER THREE

THE OPERATIONALISATION OF ADR IN GHANA

3.0 Introduction

Ghana is seen as one of the very few islands of peace on a continent that has gained the unenviable accolade of a theatre of violence. It is bordered by the Ivory Coast to the west, Burkina Faso to the north, Togo to the east and the Gulf of Guinea to the south. According to the census of 2010, Ghana has a population of about 24 million. There are several ethnic groups but the major ones include: the Akan, Ewe, Mole-Dagbani, Guan and Ga-Adangbe. Each of these groups has several sub-divisions. Additionally, there are several other linguistic and cultural groups in Ghana. With regards to religion, the major religions include Christianity, Islam, and African Traditional Religion. Christianity is the country’s largest religion, and predominates in areas of south Ghana and parts of north Ghana, while Islam is more widespread in parts of the northern regions. Christianity is practiced by 71.2% of the population, according to the 2010 census. 17.6% of the population practices Islamic Religion. According to the 2010 census, about 5.3% of Ghana’s population has no religious affiliation. The heterogeneous nature of Ghana makes conflict an inevitable fact. And in spite of Ghana’s reputation as an island of peace, there have been several instances where conflicts have occurred. Some of these have been associated with widespread violence and destruction of lives and property. A case in point is the Kokomba and Nanumba conflict of 1994. This conflict led to the death of about 1000 people and the displacement of several thousands. Besides this are the recurrent Bawku conflict as well as the Dagbon chieftaincy dispute which started 2002 in northern Ghana. Moreover, there is an abundance of both chieftaincy related conflicts as well as religious conflicts particularly the
conflict between the Christian community and the Ga traditional council which arises out of the ban on drumming and noise making.

With all these conflicts and the absence of appropriate mechanisms to resolve them as well as the high costs and long delays associated with the formal litigation, the introduction of ADR in Ghana is especially welcome. In that most of these conflicts have been associated with some form of violence and holds the potential to explode into full blown conflicts if not properly managed. This is made more dangerous with the ethnically divided nature of the electorates and the practice of winner takes all elections in Ghana. This chapter examines the operationalisation of ADR in Ghana. In so doing the chapter looks at ADR in Ghana, the legal framework behind ADR in Ghana and then considers the various methods available under the court connected ADR in Ghana. Moreover, the chapter considers the accessibility of ADR in Ghana and further looks at how effective it has been in fulfilling its mandate. Finally some challenges are looked at.

### 3.1 ADR in Ghana

As part of a comprehensive reform programme to reduce caseloads and enhance the efficiency of the court system and the associated long delays, the Judicial Service of Ghana through the instrumentation of the then Chief Justice, His Lordship Justice George Kingsley Acquah set up a task force to look into alternative dispute resolution particularly how it can be made an integral part of Ghana’s justice system. Of more importance was the fact that these ADR mechanisms by their nature were seen as less expensive and more conducive as they provide flexibility not only to the disputants but to all involved in the search for an amicable solution.
Ghana formally introduced ADR through the institution of what is christened ‘Media Week’ in 2003. This was a week set out to settle cases that had been pending before the courts for several years. These were to be settled through the use of ADR Mechanisms. The decision to introduce ADR into the formal court system was mainly motivated by a strong commitment to ADR championed by the former Chief Justice, George Kingsley Acquah and continued with equal vigour under Chief Justice Her ladyship Justice Mrs. Georgina Wood.¹ Crooks notes that the policy was clearly motivated by two main considerations the first of which was tackling the crisis caused by the inability of the judicial system to cope with the large numbers of new cases filed every year. Secondly, it was motivated by an acceptance of ADR as a method of dispute resolution which can improve access to justice for the poor and vulnerable.² About 300 cases pending in select courts in Accra were mediated over 5 days. The effort was a major success, with 90 percent of disputants expressing satisfaction with the mediation process and stating that they would recommend it to others.

As a result of the successes chalked with the initial programme, a follow-up was done in 2007. And like in the previous instance, 155 commercial and family cases from 10 district courts in Accra were mediated over 4 days with about a 100 cases fully mediated or concluded in settlement agreements.³ A further 18 cases reached partial agreement and were adjourned for a later mediation attempt. About 37 of the cases were returned to court unresolved.⁴ The 2007 program was expanded through 2008, and over 2,500 cases in seven district courts in Accra were mediated, with over 50 percent of the cases completely settled. The successful implementation of the pilot programmes demonstrated the huge potential of ADR especially as regards reduction of backlogs of cases at the courts. After the piloting of ADR in a few of the Accra Magistrates Courts, ADR was rolled out across all ten Regions of Ghana and is now offered in 47 courts.
According to the national coordinator of the ADR directorate, by the year 2015 all Magistrate courts would offer ADR services across the country.⁵

3.2 The Legal Framework behind Ghana’s ADR Programme

The legal mandate for Court Connected ADR practice in Ghana is found in Sections 72 and 73 of the Courts’ Act 1993 (Act 459) as amended and Order 58 Rule 4 of the High Court Civil Procedure Rules 2004 C.1 47, as well as in the various enactments listed in 2.1.3.⁶ Court-connected ADR is provided for under section 73 of the Courts Act 1993 (Act 459) and requires any Ghanaian courts exercising criminal jurisdiction ‘to promote reconciliation, encourage and facilitate a settlement in an amicable manner’ but only in the case of misdemeanours.⁷ The dispute in question is required first to be filed at the court, after which the disputing parties may consent to refer their matter to ADR to attempt a resolution. Where an agreement is reached, the terms of the agreement become an order of the court.⁸ However, if a solution is not found, the dispute goes to trial.⁹

Besides, the Courts Act, the ADR concept in Ghana was given a further boost by the passage of an ADR Act by Ghana’s Parliament in 2010 after more than a decade of deliberations and consultations with the various stakeholders. Uwazie notes that, ‘the ADR Act 798 is the most comprehensive ADR legislation of its kind in Africa.’¹⁰ This Act sets out a comprehensive legal framework for ADR practice. According to Emilia Onyema, the provisions in the Act on arbitration and the other methods of ADR are based on internationally recognized principles such as autonomy of the arbitration agreement and the supremacy of the arbitral agreement. It however pushes the boundaries of current standards of international arbitration by granting the appointing authority an enhanced role in the process. Significantly, the Act breaks new grounds
by first legislating on customary arbitration and secondly by granting the settlement from mediation proceedings an enhanced status equal to an arbitral award. In her view then, the new Act is a comprehensive, modern and forward looking and it is worthy of emulation within the sub-Saharan Africa.\textsuperscript{11} Essentially the Act also makes provision for an ADR Fund and a national ADR Centre.\textsuperscript{12}

Again, the Act empowers the Magistrate’s Courts to handle and minor criminal matters covering the following kinds of cases: monetary claims for recovery, minor assault, family maintenance claims, offensive conduct, landlord/tenant disputes, defamation, threat of harm or damage to property, unlawful entry and minor land disputes.\textsuperscript{13} Furthermore, Section 1 of the Act, sets out the applicability of the Act, and states clearly that the Act applies to all matters with the exception of issues relating to:

- the national or public interest;
- the environment;
- the enforcement and interpretation of the Constitution; and
- any other matter that by law cannot be settled by an alternative dispute resolution method.\textsuperscript{14}

Accordingly, there are potentially wide categories of dispute which might be deemed to fall outside the scope and application of the Act. According to Section 82 of the ADR Act 2010, mediation agreements are recognized as binding and enforceable as court judgments.\textsuperscript{15}
3.3 Types of ADR Methods Available

There are several methods/mechanisms available under ADR which can be utilized in the search for a solution to a particular dispute unlike the traditional court system. The particular method to be used would mostly be determined first by the dispute in question and the parties involved in the dispute.

3.3.1 Negotiation

Negotiation is a process by which the parties to a dispute or their representatives discuss the issues in dispute with the intention to settle the dispute without the intervention of a third party. The most widely-used form of ADR is negotiation, which is simply “the process of refining and agreeing to the issues and establishing a range of compromise options.” Although attorneys are often retained to assist parties with the negotiation process, negotiations take place every day without legal representation, making them a very attractive form of ADR to disputing parties. Negotiations vary in level of formality, with some taking place over the course of a few informal meetings or phone conversations, and others through a series of written settlement offers issued pursuant to a pending lawsuit. Whatever the formality, by far the biggest advantage of negotiation is that the parties completely control the process in this form of ADR.

In addition to controlling the level of formality, parties to a negotiation also control the tempo of their discussions, the settlement options they entertain, and the ultimate outcome of their dispute. Although the level of preparation necessary for negotiation will vary depending upon the complexity of the issues at stake, the first step in any successful negotiation must be an in-depth review of the relevant facts. Parties should take care to not only review the facts relevant to their side of the argument, but also to those of all other parties, to ensure that they are fully aware of
all possible issues. Next, the parties should determine who should be their main negotiator: the parties themselves, their attorneys, or some other representative. The primary negotiator should be experienced in negotiation, very familiar with the dispute, and/or very familiar with the opposing party. Once selected, the parties should work with the negotiator to determine a varied range of settlement options, while keeping in mind the best and worst alternatives and the parties’ ultimate goals. The parties should also evaluate what their next step will be in the event negotiations prove unsuccessful.

3.3.2 Mediation

In mediation, a neutral third party helps the parties come to an agreement about how to resolve the case. The mediator has no authority to impose a solution on the parties. Instead, he goes back and forth between sides to help them come to an understanding about how the case could be resolved to their mutual satisfaction. A mediator can be helpful in helping parties evaluate their case realistically, as the mediator can point out which facts or arguments he believes or rejects. When courts order parties to try ADR, they most often order mediation. Although it still allows disputing parties considerable flexibility in reaching a resolution, mediation is quite a bit more structured and formalized than general negotiation because it employs a neutral, third-party mediator to assist the parties with reaching a consensual agreement.

However, the mediator’s role is not to unilaterally decide on the appropriate resolution to the parties’ dispute. Instead, the mediator acts as a facilitator who guides disputing parties’ discussions in order to assist them with “understanding the nature of the problem, the underlying interests of all parties, and the various options that may exist which can help resolve all, or part, of the problem.” By doing so, the mediator is often able to help the parties uncover the interests
underlying each party’s positions, and thereby assist the parties with formulating a collective settlement agreement that satisfies each of the parties to the fullest extent possible.

3.3.3 Arbitration

Arbitration is one of the most popular methods of ADR worldwide. It involves a neutral third party known as the arbitrator who is responsible for running the process and making the decisions necessary to resolve the dispute. Unlike a judge, the arbitrator is a private person chosen by the parties. The person chosen to arbitrate the dispute often has specialized expertise in the subject matter of the dispute; legal training is required only if the parties so specify. In this sense, arbitration is a creature of contract, and the terms of the parties’ particular arbitration agreement are generally controlling. Before any dispute arises, parties often contract to arbitration. An agreement to arbitrate can also be made after a dispute has arisen, as the result of a negotiation between parties already in conflict. Binding arbitration in lieu of judicial adjudication is voluntary in the sense that it is only by agreement that one is required to arbitrate; but once there is an agreement it is involuntary in the sense that courts will enforce it against a reluctant party by refusing to adjudicate disputes which are within the scope of the arbitration agreement and thus require arbitration. In an arbitration proceeding, the procedural rules may be set by the parties in their arbitration agreement. Pre-trial discovery is typically limited or eliminated, and each party is given an opportunity to present proofs and arguments at a hearing where the procedures are typically much less formal than those found in court. Depending upon the parties’ agreement, the arbitrator may or may not be asked to render a principled decision supported by a reasoned opinion. Often the arbitrator is free simply to announce the award without any explanation. In “final-offer” arbitration, by agreement of the parties the arbitrator is
required to resolve the dispute by choosing one or the other of the “final-offers” submitted by the disputants the arbitrator lacks all power to impose any other result.

3.3.4 Customary Arbitration

Arbitration is said to be customary under the following conditions

a. When the parties in dispute voluntarily submit their dispute to an arbitrator(s) acting under customary law or according to customary traditional norms.

b. The submission to customary arbitration is demonstrated by the performance of the requirements necessary for the process.

c. There must be prior agreements to accept the award

d. The award must be published or announced to the disputing parties.

3.3.5 Conciliation

Conciliation is a process by which the parties to a dispute, with the assistance of a third party, identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement.\textsuperscript{16} The conciliator may advise on the content of the dispute or the outcome of its resolution, but not determine the dispute.\textsuperscript{17} “The conciliator may advise on or determine the process of conciliation may make suggestions for terms of settlement, give expert advice on likely settlement terms and actively encourage the participants to reach an agreement.\textsuperscript{18}

3.3.6 Neutral Case Evaluation

Neutral Case Evaluation is a process by which the parties, their lawyers or both the parties and their lawyers appear before a neutral person/body to present their arguments and evidence in
support of their cases. The neutral person/body then makes a non-binding evaluation of their propositions and gives an opinion concerning the likely outcome if the dispute is tried in court. Based on the outcome of the evaluation, the parties may decide on which dispute mechanism to opt for in a bid to reach a mutually acceptable solution. In an interview with Mr Alex Nartey, the National Coordinator of the court-connected ADR in Ghana, he states clearly that: “the parties seek a specialist advice on the likely outcome of the case should they go to court.” The recommendation is not binding on the parties. Again, he notes that the major disadvantage of this mechanism is that once the evaluation has been done and the likely outcome is known, the party who is likely to win might drag the process for a long time. However he notes that, unlike mediation, negotiation and arbitration, the neutral case evaluation is rarely asked for, a situation he attributes to the lack of trust among people.

3.3.7 Med-Arb

One of the significant developments of the use of ADR is the flexibility that is associated with it. In this way various hybrid mechanisms for dispute resolution can be developed depending on the choice or consent of disputants. The major aim of ADR is promote the peaceful/amicable settlement of disputes. In some instances, depending on the peculiarities of the dispute in question, more than one method of dispute resolution would be needed in the search for an acceptable solution. One of such hybrid mechanisms is Med-Arb.

Like the name suggests it is a combination of the methods of mediation and arbitration. Because it is a blend of mediation with its persuasive force and arbitration with its guarantee of an assured outcome it is seen as getting the best of both worlds. Once an agreement is reached the parties sign and becomes binding on the parties. If the parties however fail to reach an agreement the
mediator will then act as an arbitrator and give a binding or non-binding award. Med-Arb has the advantage of ensuring that at the end of the day there would be an acceptable solution to both parties. Disputants also feel the sense of having had their day in court. However, should the same person act as a mediator and an arbitrator it might result in a bias if care is not taken. Again, Mr. Nartey argues cogently that in some instances, the parties will be reluctant to speak freely in private to mediators who will decide the case should the mediation fail. In his view, this undermines the principal objective of opting for ADR process, namely, free communication with the neutral third party.\textsuperscript{22}

3.4 ADR and the Magistrate Courts in Ghana

Ghana has a total of 153 Magistrate courts distributed across the ten administrative regions of Ghana. The Magistrate courts constitute the lowest courts of adjudication in Ghana. The jurisdiction of the Magistrate’s Court covers both civil and criminal matters.\textsuperscript{23} The civil matters are limited to personal actions under contract example which include commercial debts and damage to property, nuisance and ‘defamation up to a value of Ghc 5000, landlord-tenant relations, matrimonial matters and land cases where the value of the land does not exceed Ghc 5000.\textsuperscript{24} On the other hand, the criminal jurisdiction of the magistrate’s court is limited to summary offences such as assault, offensive or threatening conduct and theft, where the maximum fine is 500 penalty points or a prison term not exceeding two years.\textsuperscript{25} Since 2005 the Magistrate’s Courts have become the venue for an important experiment in ‘Court-connected ADR’. Currently, 47 of the 153 Magistrate’s courts offer ADR services in Ghana. This year about 10 more courts would be added to the ADR programme and it is hoped that by 2017 all magistrate courts would offer ADR.
Under Ghana’s court connected ADR, litigants are referred to ADR by the Magistrate or Judge only after they have filed their case at the court and made an appearance before him or her, and with their consent. With the view to making ADR attractive to disputants, no fee is charged beyond the filling fee. According to Mr. Alex Narrey, cases that have not been filed at the courts cannot be dealt with under the court connected ADR. In such instances, the parties in dispute can go to a private practitioner to have their case heard. He goes further to note that, in a bid to encourage the usage of ADR, Magistrates or Judges regularly put the availability of amicable settlement of dispute through the use of ADR to the parties involved. This is normally done when disputants show up for the first time in court. Once the parties opt for ADR, the court ADR coordinator explains the system to them in more detail emphasizing the voluntary nature of the whole process but that once an agreement has been reached it will be ratified by the Magistrate as a judgement of the court, and that there is no appeal. To reduce tensions, various styles are used by the mediator. A common practice is the mediator urging the disputants to address each other by their names, to show respect and not interrupt each other. This helps the mediator guide the discussion in the direction which is most likely to result in a mutual settlement. According to Mr. Narrey, once a case is settled under the ADR procedure, the parties return to court for the Magistrate to enter the agreement as a ‘consent judgement’. This gives it the status of a legal judgement which can be enforced by the court. Hence if a party fails to honour the agreement they can be compelled to do so. In instances where the mediator is unable to resolve the dispute the case is sent back to the courts for the normal litigation to begin.

3.5 The Accessibility of ADR in Ghana

ADR was introduced to enhance access to justice in Ghana whereby as a result of high costs associated with the formal court system as well as long delays the poor and the vulnerable were
unable to access the courts to seek justice. Accessibility of ADR in Ghana particularly since its introduction has been on the high side especially by the poor and vulnerable in society. This according to Mr. Alex Narre has been influenced by the following factors:

3.5.1 The Language of ADR

ADR at the magistrate’s courts in Ghana is conducted in whatever language that is suitable and acceptable to both parties in dispute. Hence the poorly educated members of society can be heard in the languages they understand. This gives the parties the opportunity to say whatever they want to say exactly as they want.\textsuperscript{32} This is quite unlike the traditional court where the services of an interpreter would be required and the delays that come about as a result of translation. In some cases however English language is used.\textsuperscript{33}

3.5.2 Cost Saving

A major reason that often influences the decision to opt for ADR settlement instead of the formal litigation is the cost. The traditional litigation process is often fraught with court fees, documentation fees, and lawyer’s fees among others. These fees most often hinder the poor and the vulnerable who make up a huge chunk of the population from seeking justice, particularly in Africa where a majority of the people can hardly afford a lawyer.\textsuperscript{34} Moreover, if corruption exists, the cost may rise even higher. Under Ghana’s Court connected ADR, no fees are charged beyond the filling fees. It does not involve expert fees or courts costs. This is because, as indicated earlier, the parties are not charged any further fees after paying their basic ‘filing fee’, usually around Ghc 15.\textsuperscript{35} ADR also saves the money of government. ADR therefore enhances the ease of access to justice by eliminating the cost content associated with formal litigation.
3.5.3  **Speed**

Secondly, the traditional adjudicative processes for resolving disputes are characterized by very lengthy delays since there are court decisions upon which the hearing is dependent. Again there are huge backlog of cases which can take over a year to resolve because of different timing and dates involved. Matters that are being solved using the ADR method may take months or even just weeks to be resolved. According to Mr Nartey, ADR can be arranged by the parties and the panellist as soon as they are able to meet. Compared to the court process, where cases may take up to 10 years or more to resolve, ADR on the other hand is as fast as the parties want it to be. For instance each mediator is given 30 days to settle each case and if a case is still pending after that then the mediator would have to refer the case back to the court but in most instances, the cases are resolved after two sessions. As observed by Miss Sandra Thompson, “several thousands of cases that had been backlogged for about three to four years had been resolved within a single ADR week while the longest instances of ADR processes lasted for just months a far cry from the traditional/ formal litigation which often lasts for years on end.”

3.5.4  **Control**

A key attraction of the ADR mechanism is the fact that, the disputing parties have control over the process. Decisions regarding the choice of a particular mechanism, the choice of the neutral/third party and even the outcome among a host of others are usually controlled and maintained by the parties involved in dispute. As a result and much unlike the formal litigation, the parties can opt out of the process if they are not comfortable with the mechanism being applied or the choice of the neutral or third party. In the law court it is only the court which has supreme authority and possesses total control. Opposed to the court system, where the legal system and the judge control every aspect, ADR is much more flexible. Furthermore, in the case
of arbitration the parties have far more flexibility in choosing the application of relevant industry standards, domestic law, the law of a foreign country, a unique set of rules used by the arbitration service, or even religious law, in some cases.  

3.5.5 Confidentiality

ADR is designed to ensure privacy of the whole process unlike as pertains in the formal courts. ADR is conducted in private, therefore avoiding publicity from the media. The public are also unable to attend. On the other hand disputes resolved in court are public and the judgments awarded are also in public. ADR provides certain resolution processes such as, Mediation, arbitration, and mini trials that are conducted in private maintain strict confidentiality.

3.5.6 Experienced Neutral Panellists

The panellists are professional mediators and arbitrators with training and expertise in dispute resolution. Disputing parties are able to select their panellist from a list of qualified individuals who are specialized in specific aspects of environments. In the court system, binding decisions are made by judges who may lack expertise in different practices.

3.5.7 Cooperative Approach

All ADR services take place in a more informal, less confrontational atmosphere. This is more conducive to maintain a positive business relationship between the two parties. With mediation, specifically, the result is collaboration between the two parties. Therefore ADR is a process that looks into the best interest of both parties in order to conclude a compromised mutual decision.
3.5.8 Flexibility

Legal and non-legal disputes can be addressed during this process proving it to be more flexible. Some may think this is a suitable package in the sense that it takes into account fundamental concerns of the parties and offers remedies not available when at court. Furthermore, because ADR is able to contextualize the dispute, practitioners are often able to design an appropriate mechanism that would be mutually beneficial and in the interest of the parties in dispute. Hence ADR can be more satisfying.\textsuperscript{40}

3.5.9 Restorative Nature

The aim of ADR is to find a compromise solution which is satisfactory to both parties. Court proceedings create a winner and a loser. Using ADR to settle a dispute means businesses can remain on good terms and continue to trade with each other once their dispute is resolved. Moreover, the parties may have more chances to tell their side of the story than in court and may have more control over the outcome. The parties may work together with the dispute resolution practitioner to resolve the dispute and agree to a settlement that makes sense to them, rather than work against each other in an adversarial manner. This can help preserve relationships.

3.6 Effectiveness of ADR in Ghana

The key objective for the introduction of court-connected ADR by the Judicial Service of Ghana was the belief that the ADR option would be more rapid and lead to a reduction of the long delays and huge backlog of cases clogging up the formal court system some cases having been pending for years.\textsuperscript{41}
In this regard, the introduction of ADR has led to reductions in the number of cases pending at the courts. Given that ADR is still less than a decade old since it was formally piloted in Accra and Tema, and it is still indeed in the piloting stage, the programme has chalked a lot of successes. There is no doubt that ADR was quicker than persisting with the action in court. The official target given to mediators was that they should settle cases within 30 days, and remit the case back to court if it was not possible to deal with it within that time frame, although it was possible to ask for an extension. In practice, most of the cases were dealt with in one or two mediation sessions.

Since it was first piloted, ADR programme adjudicated 853 cases in 2006-7 out of which 466 of the cases were successfully settled. In 2007-8, a total of 1,723 were submitted of which 807 of the cases were successfully dealt with. In 2008-9, a total of 5358 cases were adjudicated with 3871 being successful. As observed by Justice Mills, 11,524 cases out of the 22,004 presented for mediation between 2007 and 2012 and this represents 52.3 percent settlement rate. According to him, the concept had also served as a compliment to the court system by making access to justice cheaper, easier, expeditious, non-adversarial and faster particularly to the poor and vulnerable. He noted that, currently the programme had been extended to 52 District and Circuit Courts with at least three mediators assigned to each of these courts’. A Regional ADR Secretariat staffed with a Regional ADR coordinator and two other supporting staff is established in all the 10 Regions. It is expected that when ADR is functional in all Magistrate courts across the country by 2017 it would lead to very huge reductions in the caseloads clogging up the court system.
Table 1: ADR in the Magistrate’s Courts, 2006-2010

<table>
<thead>
<tr>
<th></th>
<th>2006-7</th>
<th>2007-8</th>
<th>2008-9</th>
<th>2009-10</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases Mediated</td>
<td>853</td>
<td>1723</td>
<td>5358</td>
<td>3764</td>
</tr>
<tr>
<td>Cases settled</td>
<td>466</td>
<td>807</td>
<td>3871</td>
<td>1633</td>
</tr>
<tr>
<td>Settlement Rate</td>
<td>55%</td>
<td>47%</td>
<td>72%</td>
<td>43%</td>
</tr>
<tr>
<td>Settlement rate in Courts: civil</td>
<td>N/A</td>
<td>38%</td>
<td>42%</td>
<td>53%</td>
</tr>
<tr>
<td>Settlement rate in Courts: criminal</td>
<td>N/A</td>
<td>30%</td>
<td>38%</td>
<td>56%</td>
</tr>
<tr>
<td>ADR cases settled as % total pending</td>
<td>0.47%</td>
<td>0.68%</td>
<td>3.5%</td>
<td>2.0%</td>
</tr>
<tr>
<td>ADR cases settled as % civil pending</td>
<td>0.8%</td>
<td>1.0%</td>
<td>6.0%</td>
<td>3.3%</td>
</tr>
</tbody>
</table>

Source: Judicial Service of Ghana

3.7 Challenges of ADR in Ghana

3.7.1 Funding

Funding is a major challenge with Ghana’s ADR. In its initial stages, the programme was fully funded by DANIDA with some support by the MiDA, GTZ and UNDP. However, since 2010, funding from DANIDA has ceased and the judicial service has taken charge of funding the programme. However, the budget of the judicial service is unfortunately not enough to cater for
the needs of the programme. This has led to a crisis in the recruitment and payment of mediators. Again, it has resulted in a cap being placed on the number of cases for each month per mediator. Mediators have also experienced frequent delays in payments. This would pose a huge challenge to the sustainability of Ghana’s ADR programme. This is so because, without the needed funding, the need to expand the programme to all Magistrate courts by 2017 would not materialize.

3.7.2 Training

A key challenge associated with Ghana’s court connected ADR is training of practitioners especially mediators. By international standards each neutral/third party is expected to undergo 40 hours of training to be qualified as a mediator. This is even more important as the successful outcomes of the sessions are dependent on their qualification, knowledge and skills. The training should therefore be in tune with the internationally accepted standard to ensure effectiveness and standardized practice of ADR in Ghana.

3.7.3 Infrastructure

For any effective ADR system there must be a flexible design structure that is rooted in satisfying the interests of disputants and professionally administers fair justice in a dynamic yet culturally appropriate manner. However, inadequate funding is a hindrance to the provision of the needed infrastructure for the effective functioning of ADR in Ghana. To effectively implement ADR in all the district courts, mediators and the other para-legal staff would have to be provided with the needed structures in all districts so as to make them fully functional.
Furthermore, some lawyers view ADR as a threat to their income, especially among those without any ADR exposure. Some judges may also resist ADR for fear of losing “control” over non-litigation processes of resolution or out-of-court settlements. Besides, the lack of national or local government support constrains institution-building that will in turn spur the development of personnel and create an enabling legal framework.
Endnotes

1 Interview with Sandra Thompson of Judicial Service, Accra on 14/03/2013.
4 Uwazie, E. E., Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability
5 Interview with Mr Alex Narney, National Coordinator ADR Directorate Ghana, Accra on 14th March, 2013.
6 Judicial Service of Ghana, Uniform Practice Manual on Court-Connected ADR Practice.
8 Ibid
9 Interview with Sandra Thompson, 22/03/2014.
10 Uwazie, E., op. cit.
12 Alternative Dispute Resolution Act 2010
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16 Judicial Service of Ghana, op. cit.
17 Ibid
18 Ibid
19 Interview with Mr Alex Narrey, op. cit.
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21 Interview with Prof Quashigah, Dean of Faculty of Law, University of Ghana, 20 March 2013
22 Interview with Mr Alex Narrey, op. cit.
23 Crook, C. R., op. cit.
24 Ibid.
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27 Interview with Mr Alex Narrey, op. cit.
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31 Interview with Sandra Thompson, op. cit.
32 Interview with Mr Alex Narrey, op. cit.
33 Crook, C. R., op. cit.
34 Interview with Sandra Thompson, op. cit.
35 Ibid.
36 Interview with Mr Alex Narrey, op. cit.
37 Interview with Sandra Thompson, op. cit.
38 Interview with Mr Alex Narrey, op. cit.
39 Ibid
40 Ibid
41 Ibid
42 Interview with Mr Charles Turkson, Regional ADR Coordinator for Greater Accra Region 14 March 2013
43 Ibid
44 Interview with Mr Alex Narrey, op. cit.
45 Crook, C. R., op. cit.
CHAPTER FOUR
SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

4.0 Introduction
This chapter concludes with a summary of the findings, conclusion and recommendations for further studies and implementation.

4.1 Summary of Findings
The African continent has been plagued by numerous conflicts most of them with devastating consequences for the continent particularly in terms of death and destruction. There is the need for an appropriate mechanism to deal with these conflicts if Africa is to make any headway with its developmental prospects.

Alternative Dispute resolution deals with any method or methods used in the settlement of disputes outside the formal courts. Since its introduction the world over, ADR has seen an exponential increase particularly as an integral part of justice sector reform.

As part of a comprehensive reform programme of the judicial service of Ghana, the idea of ADR has been introduced into the justice delivery system of Ghana under the label court-connected ADR. It has since seen the institution of a Media Week thus a week set aside in each legal term to deal purposely with cases that have for long been pending before the law courts. These cases are mediated in a bid to rid the courts of the clogging and the consequent delays.
Since 2005, Magistrate courts in Ghana have piloted ADR and the concept is functional in 52 of the 153 magistrate courts all over the country. Ghana’s experience has culminated in the ADR Act of 2010 passed by the parliament of Ghana. It stands as the single most comprehensive piece of legislation in Africa. With regards to enhancing access to justice and reducing the clogging associated with the formal court system, Ghana’s experience has led to drastic reductions and it is further expected to reduce if the programme is implemented in all district courts in the country by 2017.

4.2 Conclusion

The study has amply demonstrated the role of ADR as a tool for conflict resolution in Africa using Ghana’s experience with ADR as a case study. The hypothesis of this study posits that, the use of ADR will offer quicker, cheaper and amicable solutions to conflict resolution in Africa. In line with this the study looked at the challenges of the formal court system such as huge caseload backlogs which often occasion long delays in delivering justice as well as the high cost associated with prosecuting cases at the formal courts particularly in a situation where the mass of the people can barely afford the filing fee let alone acquiring a lawyer.

The availability of the various mechanisms under ADR enables practitioners to contextualize each individual dispute so as to design an appropriate mechanism for that. ADR allows parties’ greater control over resolving the issues between them, encourages problem-solving approaches, and provides for more effective settlements covering substance and nuance. It also tends to enhance co-operation and to be conducive to the preservation of relationships. Effective neutral third party intercession can help to overcome blocks to settlement, and by expediting and facilitating resolution it can save costs and avoid delays and risks of litigation.
ADR processes, like adjudicatory procedures, have advantages and disadvantages which make them suitable for some cases but not for others.

Indeed, ADR is not and cannot be a complete substitute for formal court litigation. This is clearly illustrated by Ghana’s ADR Act in the following instances where ADR is not applicable. These are cases involving enforcement and interpretation of constitutional provisions, the environment, any issue that bothers on national or public interest and any other matter that cannot be settled with the use of ADR. It is apparent from then that the concept is to supplement the formal court litigation and enhance the quality of justice delivery.

4.3 Recommendations

Admittedly, the findings of this study have not been exhaustive on Alternative Dispute Resolution as a tool for conflict resolution in Africa with Ghana as a case study. However, the following are emphasized.

- African governments should invest in training and infrastructure in order to provide the needed support for ADR networks. This is to support mediators and advocates to continually advance best practices. Further, capacity-building efforts should also be channelled towards the training of local and religious leaders, traditional authorities, election officials, police and security personnel, human rights organizations, public complaints bureaus or offices of ombudsmen, and women and youth leaders. This would increase the country’s conflict management and prevention potential especially knowing that conflict is in evitable.
Moreover, emphasis should be placed on supporting ADR networks in Africa’s conflict-prone and post-conflict countries and communities. Given the high levels of community participation and legitimacy achieved in ADR experiences thus far, ADR could also play a vital healing and trust-building role in transitional justice contexts.

To maximize the efficiencies and complementarities of ADR, monitoring and evaluation mechanisms should be put in place so as to enhance periodic review. These mechanisms may include but not limited to measuring key qualitative and quantitative data that would then lead to adjustments in the scope and focus of ADR efforts. Some of these may include the usage of ADR, number of cases filed and processed through ADR as against court litigation, the average time spent on a case, the number of successful ADR settlements with agreements reached, the number of qualified ADR practitioners and trainers, among several others. The key issue of an ADR system will be how much ADR can lead to the detection and prevention of conflict.

To develop and broaden adoption of ADR mechanisms, their benefits and contributions to legal professionals must be clear. For lawyers, strategic use or inclusion of ADR should offer an additional tool to enhance the efficiency of their practice, potentially increase revenue, and achieve greater satisfaction for both the lawyer and client. Awards and recognitions by the legal profession, including reviews for senior advocates and national merit honors, would also elevate the support and use of ADR among members of the bar and bench.

Regional and sub-regional mechanisms should be implemented at the level of the AU and the level of the regional Economic communities.
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