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Status and Contract in an Emerging Democracy: The Evolution of Dispute Resolution in Ghana

Paul F. Kirgis

Alexander Blewett III School of Law at the University of Montana, paul.kirgis@umontana.edu

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**STATUS AND CONTRACT IN AN EMERGING
DEMOCRACY: THE EVOLUTION OF DISPUTE
RESOLUTION IN GHANA**

©Paul F. Kirgis*

Abstract

Ghana is one of the developing world's success stories. The first sub-Saharan colony to gain independence, it is a stable democracy experiencing sustained economic growth. Yet as Ghana reaches for the material gains of participation in modern commercial life, its dual legal systems—the system of customary adjudication by traditional authorities and the formal court system—have come under increasing pressure. New legal developments have truncated the authority of traditional decision-makers, while an overburdened court system lacks the resources to fill the resulting adjudicative gaps. To solve the problem, Ghana is now experimenting with a system of quasi-public dispute resolution, including contractual arbitration and court-connected mediation. If successful, this experiment could provide a model for other emerging democracies seeking to promote greater access to justice while integrating traditional and national adjudicative structures.

“[T]he movement of progressive societies has hitherto been a movement from Status to Contract.”

-Henry Sumner Maine¹

*Professor of Law and Faculty Chair of the Hugh L. Carey Center for Dispute Resolution, St. John's School of Law. I am grateful to Jacqueline Nolan-Haley and Rev. James Kwasi Annor-Ohene for sharing their research, and to Dennis Lynch and the Giving to Ghana Foundation for supporting the trainings and research in Ghana. Janai Nelson, Jeff Walker, Jacqueline Nolan-Haley, Elayne Greenberg, Ran Kuttner, Robin Cooper, and the participants in a faculty workshop at St. John's University provided valuable comments on this article.

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I. INTRODUCTION

In declaring that progressive societies move from status to contract, Henry Maine meant that the societies of western Europe had transitioned from legal systems in which the parties' relationships to one another defined the scope of their rights and obligations to systems in which the parties defined their own rights and obligations, within broad parameters. Leaving aside the question of whether such a transition could take place in *any* society—let alone whether such a transition is inevitable in *every* society—Maine's famous dictum captures a fundamental distinction between traditional societies, which tend to be organized hierarchically based on family, clan and tribe relationships, and modern Western societies, which tend to be organized individually based on markets and legal rights. Those organizational structures reflect important differences in the values motivating social action. Traditional societies tend to emphasize the values of community and religious observance, while Western societies place more importance on personal autonomy and the rule of law.

Centuries of Western influence and interference have left few purely traditional societies intact. Colonial powers typically retained traditional structures as a means of local control, while superimposing formal governing institutions on the Western model to protect colonial interests. The result was the development of dual legal systems, with traditional structures remaining rooted in community and religious values and national courts promoting autonomy through the application of positive law.² As the comparatively young nations of the developing world strive for the material benefits of participation in the modern global economy, these dual legal systems have come under increasing pressure, buffeted by a range of disruptive social forces, including migration, urbanization, and demands for recognition from women, ethnic minorities, and other outsider groups. The integration of these dual systems poses one of the most important challenges developing countries face.

¹ HENRY SUMNER MAINE, *ANCIENT LAW* 164-165 (10th ed. 1884).

² See John Griffiths, What Is Legal Pluralism, *J. LEGAL PLURALISM & UNOFFICIAL L.* 1, 6 (1986)

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Among the emerging nations, Ghana stands out as model worth watching. The first sub-Saharan African colony to achieve independence, Ghana has a history of relative stability. It has largely avoided the wrenching ethnic conflicts that have enveloped other African countries in the post-colonial period. Breaking the pattern of autocratic rule punctuated by military coups-d'etat, Ghana has seen two decades of peaceful democratic government, leading to impressive economic growth and development.

Now, as it looks to take the next steps in its development, Ghana is embarking on an experiment in the use of alternative dispute resolution to bridge the divide between the traditional and formal legal systems. It has instituted a regime of court-connected ADR that simultaneously incorporates the traditional authorities into the formal court structure and promotes Western-style arbitration and mediation as alternatives to both those traditional authorities and the courts. If the experiment succeeds, it could provide a model for other emerging nations to follow.

This article analyzes the Ghanaian ADR experiment. It grows out of a series of mediation trainings conducted at the Marian Conflict Resolution Center in Sunyani, Ghana, a city of approximately 250,000 and the capital of the Brong-Ahafo region in southwest Ghana, in 2011 and 2012. I participated as a member of a team consisting of Ghanaian law professors and faculty from St. John's University School of Law and Fordham University School of Law.³ Participants in the trainings included legal aid mediators, chiefs, priests, and professionals from academia and medicine. Inaugurated by Chief Justice Georgina Wood of the Supreme Court of Ghana, the trainings qualified graduates to serve as court-connected mediators under the Ghana ADR Act. The trainees, like others serving as court-connected mediators and arbitrators around the country, will be in the vanguard of a cadre of dispute resolution professionals offering a new, hybrid form of

³ The trainings were led by Professors Elayne Greenberg and Jacqueline Nolan-Haley, of St. John's and Fordham, respectively, and Professors Nene Amegatcher and Michael Owusu of the Ghana School of Law. Many contributed to the project, including Rev. James Kwasi Annor-Ohene, who coordinated our attendance at the trial described here, among many other things. Funding for the trainings was provided by the Giving to Ghana Foundation, the Hugh L. Carey Center for Dispute Resolution, and the Feerick Center for Social Justice.

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dispute resolution, blending elements of both the traditional system and Western processes.

To provide context for the analysis, I will begin by describing a traditional adjudication our group attended in the court of the Queen Mother of Sunyani, a small city in the mostly rural Brong-Ahafo region of Ghana, West Africa. My goal in this section is to show how customary adjudicators, while employing processes featuring many of the same mechanisms as Western adjudication, resolve disputes on the basis of values widely divergent from those seen in Western courts. I will then explain those different value systems using models developed by prominent contemporary social psychologists. Finally, I will describe the new ADR scheme and discuss some initial research into its practical implementation. Although it is too soon to evaluate the plan, the preliminary findings suggest that the new processes have the potential to address at least some of the demand for effective dispute resolution not being met by the courts and customary adjudicators.

II. A ROUTINE AFRICAN TRIAL

Nana Yaa Nyamaa II, the Paramount Queen Mother of Sunyani, holds court on Tuesday evenings. She is heir to a tradition of tribal chieftancy that goes back centuries in Ghana. Enstooled in 1972 at age 17, she is part of the extensive hierarchy of Ashanti traditional authorities. Members of the Akan people, the largest ethnic group in Ghana, the Ashanti are the traditional tribal power in Ghana. The Ashanti had unified most of the modern territory of Ghana in the nineteenth century under their king, the Asantehene, who ruled his dominions from the Golden Stool in the Ashanti capital of Kumasi.⁴ They remain the most influential cultural force in Ghana today.

The Queen Mother's court is held in a large, open-air gazebo at her "palace," a small compound centered around her ranch-style home. Chiefs and queen mothers sit atop the social structure in Ghana and are often well-off in relative terms.⁵ Most

⁴ WILLIAM BURNETT HARVEY, *LAW AND SOCIAL CHANGE IN GHANA* 67 (Princeton 1966).

⁵ Candidates for chief are nominated by a queen mother (who may or may not be the king's mother but is normally a relation) out of eligible candidates determined according to lines of matrilineal descent. The chief is

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real property in Ghana is held in a system of allodial and usufructory rights, with the land ultimately vested in the “stool” on behalf of the entire community, living and dead. Male chiefs hold legal title in a capacity similar to a trusteeship.⁶ They are entitled to rents from the land, now collected in the form of taxes.⁷ Although they have lost much of their governing power, they remain essential adjudicators, hearing disputes involving Ghana’s still vibrant customary law.

Queen mothers function like male chiefs, with certain differences. Queen mothers customarily have not been able to hold property, so they depend on the chief in their locale for financial. In addition, queen mothers were not included in the regional councils created by the English colonial administration, so they are not part of the governing structure in the same way as the men.⁸ Despite these limitations on their power, queen mothers are widely-respected decisionmakers. Lacking customary jurisdiction

then elected by a council made up of the heads of the main lineages in an area. The highest chief in a particular area is called the paramount chief. See Ernest Kofi Abotsi & Paolo Galizzi, *Traditional Institutions and Governance in Modern African Democracies: History, Challenges, and Opportunities in Ghana*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* 268 (Fenrich, Galizzi, and Higgins, eds. Cambridge 2011).

⁶ See JANINE UBINK, *IN THE LAND OF THE CHIEFS: CUSTOMARY LAW, LAND CONFLICTS, AND THE ROLE OF THE STATE IN PERI-URBAN GHANA* 21-22 (Leiden Univ. Press 2008). Approximately 80% of land in Ghana is held by chiefs in this way.

⁷ Subject to this allodial title, freeholders have usufructory rights that are perpetual and inheritable and allow use and development subject only to certain restrictions imposed by the chief. Joseph Blocher, *Building on Custom: Land Tenure Policy and Economic Development in Ghana*, 9 *YALE H.R. & DEV. L.J.* 166, 179-180.

⁸ The English used pre-colonial rivalries among the various tribes to gain control over most of the area of modern Ghana without the use of violence. They promised smaller tribes protection from the Ashanti in exchange for the acceptance of colonial recognition of the tribes’ chiefs. They then required the chiefs to seek formal installment by the colonial authorities, a process that ultimately allowed the English to co-opt the chiefs as surrogate colonial administrators. In turn, by invoking their own duty of protection promised to the smaller tribes, the English justified military action to subdue the Ashanti, fighting a series of wars that finally resulted in the capture of the Golden Stool and the unification of the country under English rule in 1901. See Abotsi & Galizzi, *supra* note , at 273.

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to hear land disputes, they hear mostly disputes involving family and commerce—traditionally the bailiwicks of women in Ghana. Men tend to take their disputes to chiefs; women tend to take theirs to queen mothers.

On this particular Tuesday, Nana Yaa is hearing a case involving two women, a wholesaler of dried fish and a retailer who had been unable to pay for a quantity of fish bought on credit. The wholesaler has brought her suit to the Queen Mother and paid the customary “token,” a combination filing fee and consent to the Queen Mother’s jurisdiction. The retailer has similarly accepted the Queen Mother’s jurisdiction by paying her own token.

The Queen Mother sits on a slightly elevated chair with symbols representing her stool and a Catholic cross behind her, signifying her sources of authority. Six elders—five women and one man—surround her. Like all Akan chiefs and queen mothers, she has a linguist who serves as intermediary between her and the parties, required because in all formal settings chiefs and queen mothers do not communicate directly with an audience.⁹ The proceedings, conducted in the local language of Twi, open with the two parties taking an oath similar to the traditional Anglo-American courtroom oath.

The complainant speaks first. She explains that she sold about \$1000 worth of dried fish to the retailer on credit. The retailer repaid half the amount on schedule but then stopped making payments. Eventually, the retailer repaid an additional \$200, leaving a debt of about \$300. The wholesaler went with her son to the retailer’s home to demand payment of the remaining debt. When they got to the home, they found the retailer making a large pot of soup. This infuriated the wholesaler, who was being pursued by her own creditor (a fact the retailer didn’t know), and who did not have enough money to feed her own family. She picked up the pot of soup, took it off the stove, and threatened to take it with her. At her son’s urging, however, she relented and put the soup bowl down the floor. The retailer responded by calling the wholesaler a witch, a serious charge. At least as much as the unpaid debt, it is this insult that has provoked the wholesaler to bring her case to the Queen Mother.

⁹ See KWESI YANKAH, *SPEAKING FOR THE CHIEF: OKYEAME AND THE POLITICS OF AKAN ROYAL ORATORY* 8 (1995).

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As the complaining wholesaler states her case, the Queen Mother occasionally interjects, through her linguist, to ask questions. At one point, the Queen Mother disallows a part of the wholesaler's testimony as hearsay. The retailer is then given a chance to cross-examine her before stating her own case. She explains that she was unable to make sales for a time because her father had died, a fact the wholesaler did not know. She expresses her outrage at the wholesaler's conduct in threatening to remove the soup. Taking the food from another person's house is a gross breach of local custom and tradition—a breach that, in the retailer's telling, justified her charge that the wholesaler was a witch. After she finishes her statement, the wholesaler is given a chance to cross-examine.

The case turns, dramatically, on the testimony of the only non-party witness called to testify, the wholesaler's son. His testimony is devastating to the wholesaler. He says that he had advised her not to take the soup and that he was ashamed when she did. The two women stand stiffly while he delivers this indictment. When he finishes, he asks for permission to speak with the two women privately. The proceedings are temporarily adjourned while he and the two parties leave the court to converse. They return with a proposed settlement. The son has agreed to take out a loan to give to his mother so that she can afford to supply new fish to the retailer, which will allow the retailer to resume sales and repay the wholesaler from the future profits. The retailer promises to pay in installments.

But the parties' agreement does not end the matter. The Queen Mother retains jurisdiction, and must accept any settlement. She indicates that she would have found for the respondent because taking another person's food from her house is so contrary to customary law that the retailer was justified in calling the wholesaler a witch. The Queen Mother forces the wholesaler to kneel before her and apologize to the Queen Mother, as representative of the community, for that breach of customary law before accepting the proposed settlement.

III. NORMS, LAWS, AND PROCESSES IN A PLURALISTIC DISPUTE RESOLUTION SYSTEM

The proceedings before the Queen Mother had most of the features of formal adjudication. The Queen Mother's court, like all chiefs' courts in Ghana, is legally a part of Ghana's official system

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of justice. British colonizers coopted the chiefs in the former Gold Coast more than a century ago and incorporated them into the proto-national government.¹⁰ Lacking either the means or the desire to govern the local matters that affected the populace on a day-to-day basis,¹¹ the British left the indigenous legal system intact, but subordinate to a “formal” English legal system imposed from outside.¹²

When it gained independence in 1957, the nation of Ghana kept this basic structure intact.¹³ The exogenous, Anglo-American style court system the British created was retained. A Supreme Court with five appointed judges sits at the top, with mid-level appellate courts below and then a cluster of trial courts including high courts, circuit courts, and district courts, in descending order

¹⁰ HARVEY, *supra* note , at 196. Using recognition and installment as the fulcrum, they created regional councils, including chiefs, to collect the taxes that funded the stools and oversaw the native courts. When the Gold Coast became the first sub-Saharan colony to achieve independence in 1957, the new nation of Ghana retained this basic structure. The regional councils continue to be the link between the chieftancy and the state today. *See* Abotsi & Galizzi, *supra* note , at 275-76.

¹¹ This tension was not unique to African colonies; it percolated throughout the empires of the European powers, leading to a variety of strategies for reconciling the traditional and received legal systems. *See* Brynna Connolly, *Non-State Justice Systems and the State: Proposals for a Recognition Typology*, 38 CONN. L. REV. 239, 247-48 (2005). Some imperial powers simply abolished the traditional systems, by either statute or judicial decision invalidating traditional laws and customs. Others incorporated customary rules and/or procedures into the formal adjudicative system either in whole or in part. Still others allowed the traditional systems to continue to operate without any integration into the state system. *Id.*

¹² *See* WILLIAM BURNETT HARVEY, *LAW AND SOCIAL CHANGE IN GHANA* 69-70 (Princeton 1966). The policy of indirect rule in Africa was initially formulated by Sir Frederick Lugard in the northern region of Nigeria. *Id.*

¹³ The new government promulgated extensive rules for choosing between customary and common law, which was defined to include the same body of statutory law covered by the Courts Ordinance. *Id.* at 254, 266-67. In addition, the British requirement that customary law be pleaded and proved through witnesses when issues of customary law arose in the state courts was dropped and customary law instead treated as a matter of law for the court to determine. *Id.* at 267.

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of jurisdictional power.¹⁴ At the same time, Ghana's Constitution provided that "[t]he institution of chieftaincy, together with its traditional councils as established by customary law and usage, is hereby guaranteed."¹⁵ The chiefs' primary governing responsibility today is dispute resolution, through the process officially known as customary arbitration.¹⁶ The courts have the power to review customary awards on grounds that the award "was made in breach of the rules of natural justice, constitutes a miscarriage of justice, or is in contradiction with the known customs of the area concerned."¹⁷

The chiefs' courts have most of the formal trappings of adjudication, notwithstanding the appellation "customary arbitration." Given the power of compulsory process by the Chieftancy Act, chiefs can compel participation in arbitrations before them upon pain of both legal sanction and social retribution.¹⁸ Their awards are enforceable as judgments. Parties pay filing fees and take oaths, and basic standards of due process are enforced, including notice and the right to be heard and a right of confrontation. Basic rules of evidence are followed.

Despite the overlapping processes, however, customary arbitration differs from adjudication in the formal court system in

¹⁴ Richard C. Crook, *Access to Justice and Land Disputes in Ghana's State Courts: The Litigants' Perspective*, 50 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 5 (2004).

¹⁵ *Id.* Art. 270.

¹⁶ JANINE UBINK, *IN THE LAND OF THE CHIEFS: CUSTOMARY LAW, LAND CONFLICTS, AND THE ROLE OF THE STATE IN PERI-URBAN GHANA* 156 (Leiden Univ. Press 2008). The chiefs' formal judicial power has been nearly eliminated over the years, so that today, chiefs have judicial power only in chieftancy disputes. For other disputes, chiefs can act as arbitrators. *See* Abotsi & Galisi, *supra* note , at 278.

¹⁷ Ghana ADR Act § 112(1).

¹⁸ The Supreme Court of Ghana struck down the provision giving chiefs the power to impose criminal penalties on parties that fail to appear in July 2011. Nevertheless, chiefs still have substantial power to compel attendance at customary arbitrations. One legal aid mediator I met told of a lawyer who refused to submit to customary arbitration. When his grandmother later died, the chief refused to permit her to be buried in her home community. The lawyer swallowed his pride and went to the chief to ask forgiveness so that his grandmother could rest with her people.

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critical ways. Most importantly, the values and norms underlying both the process and the applicable legal rules rest on different foundations.

Social psychologists have posited that all human societies rest on a handful of bedrock moral norms that serve to justify and constrain action. In the liberal west, moral theorizing tends to focus on two sets of moral concerns: first, the obligation not to harm others; and second, the obligation to be fair to others. But Jonathan Haidt has shown that these are just two of five sets of moral concerns that animate societies around the world. In Haidt's words:

In addition to the harm and fairness foundations, there are also widespread intuitions about ingroup-outgroup dynamics and the importance of loyalty; there are intuitions about authority and the importance of respect and obedience; and there are intuitions about bodily and spiritual purity and the importance of living in a sanctified rather than a carnal way.¹⁹

Haidt was building on the work of Richard Shweder, who posited a threefold division of moral concerns. Steven Pinker summarizes Shweder's ethical categories as follows:

Autonomy, the ethic we recognize in the modern West, assumes that the social world is composed of individuals and that the purpose of morality is to allow them to exercise their choices and to protect them from harm. The ethic of Community, in contrast, sees the social world as a collection of tribes, clans, families, institutions, guilds, and other coalitions, and equates morality with duty, respect, loyalty, and interdependence. The ethic of Divinity posits that the world is composed of a divine essence, portions of which are housed in bodies, and that the purpose of morality is to protect this spirit from degradation and contamination.²⁰

¹⁹ Jonathan Haidt, *The New Synthesis in Moral Psychology*, SCIENCE, New Series, Vol. 316, No. 5827 (May 18, 2007), pp. 998-1002, at 1001.

²⁰ STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 625 (2011).

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Pinker melds Shweder’s ethics and Haidt’s moral foundations with the system of relational models proposed by Alan Fiske. Fiske argued that people understand their relationships—and in so doing justify their actions—according to four models: Communal Sharing, Authority Ranking, Equality Matching, and Market Pricing. Again, Pinker summarizes:

When people adopt the mindset of Communalism, they freely share resources within the group, keeping no tabs on who gives or takes how much . . . Authority Ranking [] is a linear hierarchy defined by dominance, status, age, gender, size, strength, wealth, or precedence. It entitles superiors to take what they want and to receive tribute from inferiors, and to command their obedience and loyalty. . . . Equality Matching embraces tit-for-tat reciprocity and other schemes to divide resources equitably. . . . Market Pricing [is the] system of currency, prices, rents, salaries, benefits, interest, credit, and derivatives that powers a modern economy.²¹

Combining these different approaches, Pinker creates a sort of map of moral concerns, with the goal of providing “a grammar for social norms”.²²

Shweder’s Ethics	Divinity	Community		Autonomy	
Haidt’s Moral Foundation	Purity/Sanctity	In-Group Loyalty	Authority/Respect	Harm/Care	Fairness/Reciprocity
Fiske’s Relational Models	Communal Sharing		Authority Ranking	Equality Matching	Market Pricing/Rational-Legal

Pinker argues that cultures differ from one another in the relative weight they assign these different moral values. Western liberalism

²¹ STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 627-28 (2011).

²² STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 626 (2011).

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emphasizes the values on the autonomy end of the spectrum, while most other cultures (including western conservatism) give at least as much weight to the values associated with divinity and community.²³

In Ghana, as in traditional societies generally, the values associated with sanctity and community predominate. Ghanaians tend to be highly religious, with Christianity the most prevalent religion. Reverence for ancestors is strong, as is respect for authority and for elders. Honor, hospitality, and gratitude underlie social interactions, with elaborate rituals for everything from greeting strangers to the rites of passage associated with birth, adulthood, marriage, and death.²⁴ While personal autonomy is important—no one wants to be violated, physically or otherwise—it is but one of many concerns, and often not the most important.

As the custodians of “customary law,”²⁵ the chiefs and queen mothers must concern themselves with the entire range of those values. Customary law has been defined as “the body of law deriving from the local customs and usages of the various traditional communities in Ghana” and as “a set of established norms, practices, and usages derived from the lives of people.”²⁶ In turn, customary law is incorporated into the positive law. Ghana’s

²³ STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 631-33 (2011).

²⁴ See ASIRIFI-DANQUAH, *GHANA’S CULTURAL HERITAGE IN RETROSPECTIVE* 96-120 (2008).

²⁵ The Courts Ordinance promulgated by the British in 1935 directed a law court faced with an issue of customary law to “call to its assistance Chiefs or other persons whom the Court considers to have special knowledge of native law and custom” and allowed courts to refer questions of customary law to a competent “Native Court.” See WILLIAM BURNETT HARVEY, *LAW AND SOCIAL CHANGE IN GHANA* 246 (1966). Customary law had to be pleaded and proved in the law courts as a question of fact until 1960, when law courts were give the power to decide matters of customary law

²⁶ Joseph B. Akamba & Isidore Kwadwo Tufuor, *The Future of Customary Law in Ghana*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* (Fennich et al. eds 2011). In practice, the system tended to be bifurcated along racial, ethnic, and religious lines. Disputes involving only members of the indigenous community were handled through traditional processes applying customary laws, while disputes involving members of the colonizing community were handled through the imported system of courts and laws. See HARVEY, *supra* note , at 201-02.

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current Constitution provides that “[t]he common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law,” the latter consisting of “the rules of law, which by custom are applicable to particular communities in Ghana.”²⁷ The traditional adjudicators link the underlying community values to the formal law.

The case in the Queen Mother’s court shows how, in the performance of that function, customary adjudicators consider values that western courts ignore. Consider how the dispute between the wholesaler and the retailer would be resolved in a western court. The dispute would likely end up in a small claims court. The court would focus on the retailer’s status as debtor, applying legal rules rooted in the values associated with fairness, equality matching, and market-pricing. The wholesaler’s threat to remove the soup would likely be ignored as irrelevant, while the wholesaler’s grievance about being called a witch would not rise to the level of actionable slander, because it would fail the legal requirement of financial damage associated with the value of harm/care.

In the Queen Mother’s court, liability for the debt played a decidedly secondary role, as both the disputants and the tribunal focused on the threatened removal of the soup. That action contravened social norms associated with communal sharing: entering another family’s home and taking their food violates the

²⁷ Constitution of the Republic of Ghana Art. 11(2)-(3) (1992). The courts have the power to reject a rule of customary law on grounds that it is counter to public policy as determined by reference to modern social conditions. Joseph B. Akamba & Isidore Kwadwo Tufuor, *The Future of Customary Law in Ghana*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* 217 (Fennich et al. eds 2011). In the words of Justice Taylor of Ghana’s Supreme Court, “If customary laws are to develop to meet the demands of a civilized populace and if they are to play any meaningful role in a concerted national effort to clean our country of corruption and unsavory practices, then we must endeavor to remove these artificial barriers that tend to block away and disable us from carrying out our functions.” *Sarkodie I v. Boateng II*, G.L.R.D. 73 (1982), *quoted in Akamba & Tufuor, supra* note , at 214. For example, in one case the Court of Appeals rejected a local custom allowing a landlord to remove valuable crops grown by a tenant, declaring that “the customary law . . . became outdated and ceased to be law as soon as conditions in society changed so as to make it unreasonable for persons to conduct themselves by it.” *Attah v. Esson*, 1G.L.R. 128, 133 (1976), *quoted in Akamba & Tufuor, supra* note , at 215.

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family group bond reinforced by rituals such as commensal meal-taking.²⁸ The “witch” epithet—which under other circumstances would transgress norms associated with divinity and sanctity—was then considered and justified as a legitimate response to the breach of customary norms.

Further, the disposition of the case required the Queen Mother to perform a social role far removed from the legal remedies available to a judge hearing a case raising similar contract and tort claims in a court of law. Despite the parties’ agreement on a settlement restoring the business relationship, the case was not resolved until the Queen Mother received an apology from the wholesaler, setting the stage for the reintegration of the wholesaler into the community. That is a function that judges in courts of law—whether in the U.S. or in Ghana—do not and cannot perform. Like western courts, the courts of law in Ghana enforce contract and tort remedies that resolve disputes through the retrospective application of rules of law to determined facts, with damages or the adjustment of legal rights the typical remedial measures.²⁹ In contrast, traditional dispute resolution emphasizes the goals of reconciliation and reintegration. Remedies tend to look forward, with the goal of reestablishing harmony within the community.³⁰ A chief or a queen mother is not merely a representative of the government tasked with applying rules of law, but the instantiation of the community, tasked with upholding community norms and standards.

The similarities in process between customary courts and courts of law can thus mask important differences in social role. Customary adjudicators publicly recognize and enforce social norms within defined communities. Those norms are rooted in a range of values, from community and sanctity to autonomy. Judges in the western-style courts of law make factual determinations and

²⁸ Pinker at 627.

²⁹ See Hon. Yaw Appau, *Assessment of Damages* (Paper Presented at Induction Course for Newly Appointed Circuit Court Judges at the Judicial Training Institute), available at <http://jtighana.org/new/links/papers/ASSESSMENT%20OF%20DAMAGES%20-Justice%20Yaw%20Appau.pdf>.

³⁰ VOLKER BOEGE, *TRADITIONAL APPROACHES TO CONFLICT TRANSFORMATION—POTENTIALS AND LIMITS 7* (Berghof Research Center for Constructive Conflict Management 2006).

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apply rules of positive law that have been imposed from above and that rest, to a much greater degree, on autonomy-based values such as fairness and market-pricing. Each regime has an important role to play in Ghana's dispute resolution structure. For reasons I will explain in the next section, both systems have come under pressure, necessitating Ghana's ADR experiment.

IV. A DISPUTE RESOLUTION SYSTEM UNDER PRESSURE

Customary adjudicators like the Queen Mother of Sunyani are essential cogs in Ghana's national machinery of dispute resolution. The trial courts are overwhelmed by the number of cases, particularly land cases, filed each year. Low settlement rates exacerbate the problem, leaving cases to languish for years in the resulting backlogs.³¹ As a result of the judicial backlog and the inaccessibility of the courts to much of the populace, in many cases, a chief or queen mother may be the only practical dispute resolution option. Chiefs and queen mothers are widely respected as decisionmakers.³² A recent survey found that 76.4% of surveyed people would go to the chief if they had a land problem, as long as the chief did not have a personal stake in the matter.³³

As Ghanaian society undergoes the rapid changes brought about by development and modernization, however, the traditional dispute resolution system is also coming under increasing pressure. Some of this pressure is the product of deliberate legislative change. One prominent example is the Intestate Succession Law of 1985, which was crafted to counteract the discriminatory effects of customary intestacy law on women. Under customary law, a widow of an intestate decedent had no claim to the marital property, which belonged exclusively to the husband's blood family. The family had a customary obligation to support the widow, but with the dislocations of modern life, that obligation was often ignored, leaving widows destitute.³⁴

³¹ *Id.* at 6-7.

³² JANINE UBINK, *IN THE LAND OF THE CHIEFS: CUSTOMARY LAW, LAND CONFLICTS, AND THE ROLE OF THE STATE IN PERI-URBAN GHANA* 156 (Leiden Univ. Press 2008).

³³ UBINK, *supra* note , at 156 (Leiden Univ. Press 2008).

³⁴ See Akua Kuenyehia, *Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa*, 40 U.C. DAVIS L. REV. 385, 391-92 (2006).

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Under the Intestate Succession Law, widows are entitled to keep a share of their “self-acquired” property, but not of the “lineage” property. Self-acquired property is “that which a person acquires through his own expertise, without any help or assistance from his [lineage] property, or by gift to himself personally.”³⁵ Lineage property is the property of the husband’s blood family, as determined among the Akan through matrilineal succession. Lineage property is “that which has been inherited and which from that point is managed by the lineage as a corporate body through the lineage head or representative.”³⁶ This alteration of customary principles contradicts traditional norms about the roles of women that have deep roots in Ghanaian life. It requires fact-finding and application of legal rules that fit uncomfortably with the customary legal regime.

Economic growth itself also serves to undermine traditional practices. For example, with the surging value of urban land, chiefs have increasingly attempted to sell stool lands for personal gain, even where those lands are under cultivation by community members who have been working them for generations.³⁷ And the influx of foreign investment puts added pressure on the social structures bonding local communities, as evidenced by the recent conflicts over alleged illegal gold mining by Chinese prospectors.³⁸

These disruptions are manifested in changing patterns of dispute resolution. As effective as customary arbitration can be in resolving local disputes like the one in the Queen Mother’s court in Sunyani, it is ill-suited to the resolution of disputes arising under positive law, to disputes in which chiefs are parties, and to disputes between local community members and outsiders. The result is an increasing resort to courts saddled with inadequate resources and inefficient processes.³⁹ The legal issues raised by the newly

³⁵ Jeanmarie Fenrich and Tracy E. Higgins, *Promise Unfulfilled: Law, Culture, and Women’s Inheritance Rights in Ghana* 25 *FORDHAM INT’L L.J.* 259, 288 (2001), quoting CHRISTINE OKALI, *COCOA AND KINSHIP IN GHANA: THE MATRILINEAL AKAN OF GHANA* 12, 15 (1983).

³⁶ See Fenrich & Higgins, *supra* note , at 314-20.

³⁷ See UBINK, *supra* note , at 86-87, 128.

³⁸ See Adam Nossiter & Bree Feng, *Ghana Arrests Chinese in Gold Mines*, *N.Y. TIMES*, June 7, 2013, at A11.

³⁹ See UBINK, *supra* note , at 176-77.

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available legal rights, such as the proof problems inherent in proving that marital property is “self-acquired,” serve to heighten the litigiousness.⁴⁰

The very values that undergird traditional Ghanaian life seem to contribute to the judicial morass. Litigation in Ghana is distinguished by its startlingly low rates of settlement. In contrast to the United States, where at least 40% of civil cases filed in federal court are settled,⁴¹ less than 10% of Ghanaian lawsuits are settled.⁴² While there is no definitive answer to the question of why the settlement rate is so low, the reason seems at least partly related to a desire for authoritative decisions and a fear of noncompliance with contractual settlements.⁴³

As it continues to develop and grow, Ghana faces an ongoing challenge in integrating its legal systems and providing access to justice. Greater mobility among the populace, immigration, and increased trade both within the country and across borders will test traditional systems of value, initiating conflicts not easily resolved by resort to traditional norms in traditional processes, and putting added pressure on a court system that is already overburdened.

These are challenges that all developing countries face. As one of Africa’s success stories, Ghana has the potential to emerge as a model for other developing countries, both in Africa and around the world. In 2012, Ghana experienced a third successive peaceful and democratic Presidential election, and it has seen average annual economic growth of 6.5% since 2000.⁴⁴ The discovery of oil has pushed that growth into double figures in recent years, though with the attendant risks of corruption that

⁴⁰ *Id.* at 316-20.

⁴¹ See Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudication, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUDIES 705, 732-33 (2004).

⁴² See Crook, *supra* note 14, at 17.

⁴³ See Crook, *supra* note 14, at 14.

⁴⁴ This figure is reported by the African Development Bank, available at <http://www.afdb.org/en/countries/west-africa/ghana/ghana-economic-outlook/>.

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come with the exploitation of natural resources in developing countries. The country has largely avoided the crippling ethnic and religious conflicts that have consumed other West African nations.⁴⁵ Significant problems remain, to be sure, with employment, public health, and environmental sustainability topping the list of concerns.⁴⁶ But Ghana has a head start on most countries in Africa in the construction of the stable and inclusive political and economic institutions that are the foundations of a successful modern state. For these reasons, Ghana's response to the challenges of legal integration merits attention.

V. AN EXPERIMENT IN QUASI-PUBLIC DISPUTE RESOLUTION

In recent years, Ghana has embarked on an experiment in the integration of traditional and state legal systems under the rubric of alternative dispute resolution. The primary vehicle for this experiment is the Alternative Dispute Resolution Act of 2010 (the "Ghana ADR Act"), an ambitious attempt to standardize the provision of commercial arbitration, mediation, and customary arbitration nationwide.⁴⁷ It has simultaneously limited and formalized the adjudicative power of the chiefs and created a system of quasi-public, Western-style ADR, with arbitration and mediation conducted under the auspices of the courts. The goal is

⁴⁵ Lawrence Juma, *Africa, Its Conflicts And Its Traditions: Debating A Suitable Role For Tradition In African Peace Initiatives*, 13 MICH. ST. J. INT'L L. 417, 421 (2005) (estimating that one quarter of African nations were experiencing civil strife in 2005). Despite its relative stability, Ghana has not entirely escaped civil strife. See Ulrike Schmid, *Legal Pluralism as a Source of Conflict in Multi-Ethnic Societies*, 46 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 5 (2001) (describing a series of ethnic conflicts in northern Ghana culminating in a civil war in 1994).

⁴⁶ *Id.*

⁴⁷ The ADR Act is the culmination of a multi-year process of increasing access to alternative dispute resolution, beginning with the Courts Act of 1993, which encouraged judges to promote settlement of civil lawsuits. See Courts of Act of 1993, Act 459 (Ghana), Sec. 73(1) available at <http://ghanalegal.com/?id=3&law=116&t=ghana-laws> ("Any court with civil jurisdiction and its officers shall promote reconciliation, encourage and facilitate the settlement of disputes in an amicable manner between and among persons over whom the court has jurisdiction."). For an overview of the development of the national ADR program, see Jacqueline Nolan-Haley & James Kwasi Annor-Ohene, *Procedural Justice Beyond Borders: Mediation in Ghana*, __ HARVARD NEGOTIATION LAW REVIEW (Online Article) __ (2014).

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to reduce the burden on courts by creating a regularized system of ADR encompassing both traditional norms and processes and norms derived from liberal, western legal systems.⁴⁸

In many ways, the commercial arbitration provisions of the Ghana ADR Act reflect western standards for commercial arbitration. For example, in language not unlike sections 2 and 3 of the Federal Arbitration Act, the Ghana ADR Act provides that arbitration agreements are irrevocable⁴⁹ and requires a court in which a suit has been brought to refer the matter to arbitration if it determines that the claim is covered by a valid arbitration agreement.⁵⁰ And the Ghana ADR Act codifies the separability principle of *Prima Paint*, declaring that “an arbitration agreement which forms or is intended to form part of another agreement, shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective and shall for that purpose be treated as a distinct agreement.”⁵¹ Like the UNCITRAL Model Law on International Commercial Arbitration,⁵² the Ghana ADR Act incorporates the *kompetenz-kompetenz* doctrine, giving the arbitrators the power to determine their own jurisdiction.⁵³

In other respects, however, the Ghana ADR Act envisions a different relationship between private arbitration and the courts than western arbitration law contemplates. The Act excludes certain classes of cases from arbitration, including matters

⁴⁸ See *CJ Asks Ghanaians to Patronise Alternative Dispute Resolution*, GhanaWeb, Oct. 6, 2010, available at <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=194762>.

⁴⁹ Ghana ADR Act § 3(2).

⁵⁰ Ghana ADR Act § 6.

⁵¹ Ghana ADR Act §3(1).

⁵² UNCITRAL Model Law on International Commercial Arbitration Art. 16(1)(2006).

⁵³ Ghana ADR Act § 24 (“Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction, particularly in respect of (a) the existence, scope or validity of the arbitration agreement; (b) the existence or validity of the agreement to which the arbitration agreement relates; (c) whether the matters submitted to arbitration are in accordance with the arbitration agreement.”).

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“involving the national or public interest” and environmental matters, in addition to “any other matter that by law cannot be settled by an alternative dispute resolution method.”⁵⁴ More significantly, the Act grants courts a greater supervisory role in the arbitration process than they have in the U.S. the power to review arbitral awards for errors of law.⁵⁵ Despite giving arbitrators the power to determine their own jurisdiction, the Act allows a party “dissatisfied with the arbitrator’s ruling on jurisdiction” to apply to the High Court “for a determination of the arbitrator’s jurisdiction.”⁵⁶ Parties may also apply to a court to “determine any question of law that arises in the course of the proceedings if the Court is satisfied that the question substantially affects the rights of the other party.”⁵⁷ In these ways, the arbitration process seems designed to function as a corollary to the public legal system rather than as a free-standing private alternative.⁵⁸

⁵⁴ See GHANA ALTERNATIVE DISPUTE RESOLUTION ACT, 2010 § 1. This provision limits application of the Act to those matters not involving:

- (a) the national or public interest;
- (b) the environment;
- (c) the enforcement and interpretation of the Constitution; or
- (d) any other matter that by law cannot be settled by an alternative dispute resolution method.

⁵⁵ See GHANA ALTERNATIVE DISPUTE RESOLUTION ACT, 2010 § 26(6)(a)(allowing judicial review of a question that “involves a point of law which is fundamental to the case”).

⁵⁶ Ghana ADR Act § 26(1).

⁵⁷ Ghana ADR Act § 40(1).

⁵⁸ The Ghana ADR Act limits the scope of judicial review of arbitral awards to a range of considerations similar to those provided in western statutes, allowing a court to set aside an award only where:

- (a) a party to the arbitration was under some disability or incapacity;
- (b) the law applicable to the arbitration agreement is not valid;
- (c) the applicant was not given notice of the appointment of the arbitrator or of the proceedings or was unable to present the applicant’s case;
- (d) the award deals with a dispute not within the scope of the arbitration agreement or outside the agreement except that the

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Like the arbitration provisions, the mediation provisions suggest a conception of mediation that diverges from American norms. In the U.S., mediation is largely unregulated. No federal law and very few state laws expressly govern the practice of mediation as a general matter. The Uniform Mediation Act promulgated by the National Conference of Commissioners on Uniform State Laws had been enacted by eleven states and the District of Columbia as of 2013,⁵⁹ but its overriding purpose is to establish an adjudicative privilege for mediation communications, providing almost no guidelines for the actual conduct of mediations.⁶⁰ In contrast, the Ghana ADR Act governs everything from the number of mediators⁶¹ to the type of pre-mediation submissions required⁶² to confidentiality, both within the mediation and with respect to third-parties.⁶³ It has very broad application, covering any and all “mediation,” defined as “a nonbinding process . . . in which the parties discuss their dispute with an impartial person who assists them to reach a resolution.”⁶⁴

In terms of methodology, there is an ongoing debate in the U.S. over the extent to which mediators should inject themselves into the process to guide the outcome. Professor Len Riskin captured the competing conceptions of the mediator’s role in his distinction between “evaluative” and “facilitative” mediation styles:

Court shall not set aside any part of the award that falls within the agreement;

(e) there has been failure to conform to the agreed procedure by the parties;

(f) the arbitrator has an interest in the subject matter of arbitration which the arbitrator failed to disclose.

Ghana ADR Act § 58(2).

⁵⁹ <http://uniformlaws.org/Act.aspx?title=Mediation%20Act>.

⁶⁰ UNIFORM MEDIATION ACT (2003).

⁶¹ See GHANA ALTERNATIVE DISPUTE RESOLUTION ACT, 2010 § 65.

⁶² See *id.* § 73.

⁶³ See *id.* §§ 78-79.

⁶⁴ *Id.* § 135.

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The mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement—based on law, industry practice or technology—and that she is qualified to give such guidance by virtue of her training, experience, and objectivity.

The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can create better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.⁶⁵

While a great deal of evaluative mediation undoubtedly takes place in the U.S., the weight of scholarly authority seems to favor the facilitative approach.⁶⁶ The Model Standards of Conduct for Mediators, a joint effort of the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution, admonish mediators to “conduct a mediation based on the principle of party self-determination,” and explain that “[s]elf-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as

⁶⁵ Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996).

⁶⁶ See, e.g., Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 938 (1997) (“[T]he role of mediators is to assist disputing parties in making their own decisions and evaluating their own situations.”); Joseph P. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985, 1001 (1997) (“Mediation is neither a process designed to marshal evidence leading to an advisory opinion by a third party, nor a rehearsal trial in front of judge or jury. Rather, mediation is a dialogue process designed to capture the parties' insights, imagination, and ideas that help them to participate in identifying and shaping their preferred outcomes.”).

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to process and outcome.”⁶⁷ The emphasis on “informed choices” implies that it is not the mediator’s job to inject any particular normative principles—whether of law, justice, morality, or something else—into the process. Indeed, the standards assume that mediators will not guide the parties on the substantive issues, advising mediators merely to “make the parties aware of the importance of consulting other professionals to help them make informed choices.”⁶⁸

The Ghana ADR Act seems to encourage a mediation style that, in American practice, would be considered highly directive and evaluative. It gives control of the process to the mediator: “A mediator may conduct the mediation proceedings in a manner that the mediator considers appropriate, but shall take into account the wishes of the parties”⁶⁹ It declares that mediators “shall be guided by principles of objectivity, fairness and justice, and shall give consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.”⁷⁰ To the American ear, that guidance sounds closer to a standard for arbitrators than for mediators. In suggesting normative factors a mediator should take into account, it implies that the mediator plays an active role in guiding the parties to a substantive outcome. The Act expressly gives mediators the power to “formulate the terms of a possible settlement and submit them to the parties for their considerations.”⁷¹

If the arbitration and mediation provisions offer somewhat different approaches and emphases from their American counterparts, the provisions governing customary arbitration have no corollary at all. They represent an attempt to bring customary

⁶⁷ MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I(A) (2005).

⁶⁸ MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I(A)(2) (2005).

⁶⁹ Ghana ADR Act § 74(6).

⁷⁰ *Id.* § 74(5).

⁷¹ Ghana ADR Act § 81(1).

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arbitration within the ambit of a national, judicially directed system of dispute resolution.

For the most part, the Act's procedural rules on customary arbitration incorporate traditional practice. For example, the Act codifies the submission of disputes to customary arbitration, including the payment of "a fee or token."⁷² It requires customary adjudicators "to apply the rules of natural justice and fairness" and not "to apply any legal rules of procedure in the arbitration."⁷³ But it also adds procedural requirements that reflect concerns about efficiency found in court rules, such as a requirement that customary arbitrators issue an award within twenty-one days of the first hearing absent a contrary agreement among the parties and the arbitrator.⁷⁴

Beyond regulating the process of customary arbitration, the Act brings customary arbitration formally under the auspices of the courts in two main ways. First, it incorporates rules for courts to refer matters before them to customary arbitration with the consent of the parties.⁷⁵ In this way, it effectively deputizes traditional adjudicators to serve as judicial surrogates in appropriate cases. Second, both for cases delegated to customary arbitration from the courts as well as for cases initiated in the chiefs' courts, it confers a right of judicial review, empowering a party "aggrieved by an award" to apply to a court to set it aside upon a showing that the award "(a) was made in breach of the rules of natural justice, (b) constitutes a miscarriage of justice, or (c) is in contradiction with the known customs of the area concerned."

Taken together, the rules for commercial arbitration, mediation, and customary arbitration in the Ghana ADR Act entail a convergence of three dispute resolution models into a unified, quasi-public system of alternative dispute resolution. The traditional adjudicators—the chiefs and queen mothers—retain their authority to hear matters involving customary law. In that forum, the moral considerations that underlie traditional Ghanaian society remain paramount, reflected both in the nature of the

⁷² Ghana ADR Act § 90.

⁷³ Ghana ADR Act § 93(1).

⁷⁴ Ghana ADR Act § 107.

⁷⁵ Ghana ADR Act § 91.

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process and in the substantive norms that guide decisions. But the traditional courts have been formally integrated into the court system, much like courts of limited jurisdiction. Cases within their legal jurisdiction can be referred to them, and their decisions are reviewable by the courts of law.

The Act then establishes alternatives to both customary adjudication and the courts of law in the form of commercial arbitration and mediation—processes imported from the western ADR model. These processes have modern roots in the western autonomy value. Arbitration—both in the west and in Ghana—is made viable by legal rules allowing parties to opt out of the (public) court system and choose their own (private) decision-maker. Although the parties subject themselves to the determination of a third-party, they do so voluntarily, by way of private contract. The arbitrator's role is to carry out the parties' agreement; the arbitrator should not import either legal rules or customary norms except to the extent the parties have tasked him with doing so. Mediation is entirely a function of party consent, and western mediators are expected to act primarily as facilitators helping the parties find their way to a negotiated resolution. Negotiation, in turn, is widely understood in the west to involve autonomous actors seeking to make trades based on self-interest and the rational invocation of market-based norms.⁷⁶

The Ghanaian versions of commercial arbitration and mediation limit party autonomy by injecting legal norms into the process and, in the case of arbitration, imposing greater court oversight than that found in the U.S. They assume an active role for the neutral that reflects social recognition of hierarchical decisionmaking even for processes ostensibly defined by party consent. The respect for authority that is a fundamental feature of traditional societies valorizing community and sanctity remains a

⁷⁶ See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 10-11 (2nd ed. 1991). By far the most influential negotiation text in the English language, *Getting to Yes* posits a vision of “principled negotiation” resting on four principles: 1) separate the people from the problem; 2) focus on interests, not positions; 3) generate a variety of possibilities before deciding what to do; and 4) insist that the result be based on some objective standard. *Id.* The underlying assumption is that people are autonomous actors, freed from the constraints that social relationships entail (“separate the people from the problem”) and entitled to claim benefits based on their “interests,” as tested for fairness by reference to “objective standards.”

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powerful influence in Ghana's evolving dispute resolution system. The Ghana ADR Act has one foot in the western, autonomy-based model of private dispute resolution, but the other in a traditional model in which distinctions between the public and the private are much blurrier and in which community-based values take precedence.

VI. THE ADR ACT IN PRACTICE: INITIAL EVIDENCE

Whatever the intentions behind the ADR Act, its importance will be determined by its implementation. A sufficiently large group of neutrals must be available to mediate and arbitrate appropriate disputes, and the processes they use must meet the needs of those disputing parties. To date, forty-seven district and circuit courts have instituted court-connected mediation programs, with a goal of full implementation into all courts by 2017. In 2012-13, almost 5,000 cases were mediated through those programs, with a settlement rate of just under 50%.⁷⁷ Implementation has gone furthest in the major metropolitan areas. The mediation trainings I participated in were undertaken to extend the pool of qualified mediators in the more rural, Brong-Ahafo region.

Consistent with the expressed desires of our Ghanaian hosts and colleagues, the trainings imparted a facilitative model of mediation, while acknowledging the subtle differences in emphasis between the Ghana ADR Act and western standards of conduct for mediators. One of the most striking aspects of the experience was the participants' response to the facilitative model of mediation. Although few of the participants came in with any knowledge of the Ghana ADR Act, they tended to assume, as it does, that the third-party neutral would do more than disinterestedly facilitate the disputants' autonomous negotiations. When playing the role of mediators, the participants typically expected to be paid deference (at least initially). And when playing the role of disputants, they invariably looked to the neutral for guidance on everything from process to outcome (again at least initially). And whenever a chief was in the room, everyone looked to the chief for guidance (both initially and thereafter). The notion that the disputants "owned" their dispute, in the terminology we sometimes use in the west,

⁷⁷ See Nolan-Haley & Annor-Ohene, *supra* note 47.

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seemed foreign to many participants. It did not fit with their traditional cultural norms.

Despite the unfamiliarity and initial hesitation, however, many of those participants seemed eager to engage in processes that emphasized party autonomy and equality. In particular, the professionals with whom we interacted recognize the benefits of western-style economic development. Some see the hierarchy of traditional authorities as hidebound and unaccountable, if not corrupt.⁷⁸ They embraced western-style ADR as a forward-thinking alternative to anachronistic chiefs and sclerotic courts—one that could help Ghana's development into a modern economy benefitting from western engagement.

Initial research into the perceptions of participants in court-connected mediation in Ghana suggests that disputants often have the same reaction to mediation that the trainees had. They are often surprised by the absence of a third-party empowered to make decisions. At the same time, however, many seem to embrace the more western-style emphasis on autonomy they find in court-connected mediation. In the summer of 2013, Jacqueline Nolan-Haley and Rev. James Kwasi Annor-Ohene surveyed fifty-four litigants who had participated in court-connected mediations conducted by mediators trained at the Marian Conflict Resolution Center, asking them a series of questions focusing on their perceptions of the procedural justice of the process in comparison with other processes.⁷⁹ While the sample is relatively small, the responses suggest that most mediators used a facilitative style and that most respondents reacted positively to the emphasis on autonomy that style entails.

The respondents overwhelmingly reported that the mediators gave them time to speak, treated them fairly, and did not pressure them to accept a settlement. Those responses are at least consistent with the conclusion that the mediators employed a mediation style placing a premium on party autonomy. The individual responses confirm that most respondents felt that their autonomy had been respected and liked that dimension of the

⁷⁸ Concerns about judicial corruption, specifically reports that litigants often pay bribes to judges to move their cases toward decision, partly motivated the push for greater ADR. *See* Nolan-Haley & Annor-Ohene, *supra* note 47.

⁷⁹ *See* Nolan-Haley & Annor-Ohene, *supra* note 47.

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process. In describing things they liked about the mediation, parties said:

“I was given the opportunity to express myself.”

“Everyone was given the opportunity to express himself.”

“The mediators gave much respect to me and allowed me to express myself freely.”

“That mediators treated parties with respect.”

“The explanation of the ground rules. My right to terminate the session if I didn’t wish to continue.”

“Fairness. Respect.”

Notably, most of the respondents had never participated in a formal customary adjudication before a chief or queen mother. In addition, more than half were plaintiffs in civil lawsuits. So the particular pool surveyed may be more comfortable with processes emphasizing autonomy than other Ghanaians experienced in customary adjudication. And even among this pool, a number of respondents expressed frustration with the relative lack of structure and the absence of a decision-maker. Responses to a question about things they did not like about mediation included:

“liberal nature of the process”

“too much liberty for the parties”

“The other party was allowed plenty of time to speak”

“wanted the mediator to pronounce judgment”

“the respondent was not punished enough”

As those responses suggest, the same characteristics that one disputant considers a virtue may be considered a drawback by another disputant.

VII. CONCLUSION

Ghana’s ADR project is a bold experiment in melding traditional and modern dispute resolution processes. Because those processes rest on different sets of values, the alchemy Ghana is attempting will challenge customary norms about the roles of parties and neutrals in resolving disputes. Much more study is required to assess how mediation is being employed and received in Ghana. But the limited data available suggests that many

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Ghanaians welcome the introduction of dispute resolution processes like western-style mediation that emphasize party autonomy.

Whether the traditional authorities share the more cosmopolitan Ghanaians' enthusiasm for these trends is another question. I spoke with more than one chief who lamented a perceived indifference to the chiefs' concerns in the drafting and enacting of the Ghana ADR Act. Given the prominent role the traditional adjudicators still play in Ghanaian life, their acceptance and participation will likely play an important role in the success, or failure, of Ghana's ADR experiment. Ghana simply does not have the resources to pay a cadre of professional neutrals large enough to meet the demand for dispute resolution services. The chiefs are, and will remain for the foreseeable future, key cogs in the dispute resolution system.⁸⁰

The success of Ghana's ADR experiment will likely hinge on its ability to bring together the traditional authorities and the modernizers in the legal establishment to create a system of alternative dispute resolution that is perceived as legitimate and effective. The system that emerges will look very different from an American court-connected ADR program, as it must. It will almost certainly include both elements of the traditional processes and western innovations. It will respect traditional values associated with community, sanctity, and structures of authority, while also emphasizing party autonomy, fairness, and equity. Its success will not be known for years. But if it does succeed, it may provide a valuable model for other emerging nations to follow.

⁸⁰ Informal reports from the Marian Conflict Resolution Center indicate that at least one of the chiefs who participated in the training has gone on to become a mediator in court-referred cases, successfully mediating a number of cases to settlement.