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A case of practical hybridity

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Alternative dispute resolution and the Magistrate's Courts in Ghana:

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Richard C Crook*

Since 2005 the Magistrate's Courts in Ghana have been offering Court-connected 'alternative dispute resolution' (ADR) for litigants who opt for an amicable settlement through mediation. To what extent has this form of state-supported ADR been successful at providing justice which is both more expeditious and accessible than the formal courts and congruent with popular values and expectations? It was found that the programme was genuinely accessible, and did fulfil popular desires for dispute settlement to be a 'truth seeking' and balanced process, as well as offering enforceable agreements. But it was less effective than expected because mediators faced considerable resistance in achieving agreements, with a settlement rate of only 40-50%. The role of the state institutions as 'practical hybrids' was crucial in combining the authority, organisational support and professional mediation skills necessary for such a programme, with responsiveness to shared popular values and expectations.

1 Introduction

In our previous Working Paper (Crook et al., 2010) we argued that, contrary to current stereotypes of state justice in Africa, state courts and paralegal institutions in Ghana are providing forms of civil dispute resolution which are popular, reasonably accessible and congruent with the expectations and values which ordinary citizens have about justice. The Magistrate's (District) Courts and the Commission on Human Rights and Administrative Justice (CHRAJ) in particular were found to be offering the remedies which people wanted for different kinds of disputes, using procedures which were both informal (hence comprehensible) and seen as fair or impartial, in accordance with popular definitions of fairness as a 'balanced process'.

In the case of the CHRAJ, its dispute resolution service is based on the use of a modern and internationally accepted form of Alternative Dispute Resolution (ADR) which focuses on mediation and the construction of mutually accepted agreements between individual disputing parties. The Magistrate's Courts, however, offer a much broader range of procedures and codes of settlement combining formal legal remedies and application of statute, common and customary laws with informal procedures, and the opportunity to use ADR if chosen by the litigants. The hybridity of the Magistrate's Courts provides an opportunity to investigate further the differences between court adjudications, which no matter how informal or user-friendly, are bound by formal law, and ADR.

In this paper we ask, therefore: how successful is state-sponsored ADR in Ghana ? Does it provide justice which is both more expeditious and accessible than the formal courts and also

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congruent with popular demands and values? Can it solve the crisis of an overloaded state courts system, as anticipated by official government policy for encouraging ADR, or is there still a role for the formal courts even at local level dealing with small scale, first instance civil cases? The focus will be on the procedures and codes of law used in the Court-Connected ADR service; how legitimate, accessible and effective are they, compared to formal trials in the full Court?¹

2 ADR and legal reform in Africa

Alternative Dispute Resolution (ADR) is currently extremely popular in justice sector reform programmes throughout the developing world, and has been officially introduced in India, Bangladesh, and various Latin American and African states in recent years (see Penal Reform International, 2001). It is generally advocated as offering a cheaper, faster and more accessible form of justice for ordinary citizens, particularly the rural and urban poor, who do not have access to state justice either because of lack of resources, social exclusion or lack of physical access (distance). On a more practical level, it is also seen as a remedy for relieving the crisis of overburdened state courts facing impossible backlogs of unresolved cases.

The essence of the modern ADR concept, as developed by its European and North American advocates, is the idea that a *better* form of justice can be obtained by focussing on mediation or the search for a mutually agreed settlement, rather than on binding adjudication by an external (usually 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, which is 'de-legalised', relying on 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 (Harvard Law Review, 2000).

In European and North American states, the ADR concept is based on three main assumptions:

- Disputes are about individual rights and thus dispute resolution requires agreement between the individual parties. This is most appropriate in urban societies where one cannot assume a 'community public' with an interest in social harmony or groups which will somehow police the settlement between the parties.
- ADR will be monitored so as to ensure fair procedure, and should not lead to denial of the right to trial under the law (Harvard Law Review, 2000: 1869).
- ADR is based on finding a neutral mediator who will help the parties to bargain freely in order to reach an agreed settlement without pressure or intimidation -- an assumption which has provoked much criticism from those who argue that ADR enthusiasts too often ignore differences in status and power between the parties (Nader, 2001).

¹ The research was a collaboration between Richard Crook of IDS and CDD-Ghana researchers under the leadership of Professor Gyimah-Boadi. The important contributions of Kojo Asante and Victor Brobbey to the research and analysis presented here are especially acknowledged. We are also grateful for the contributions of other CDD staff including Daniel Armah-Attoh and Sewor Aikins, who worked on the questionnaires and data entry, and Kwabena Aborampah-Mensah (Programme Manager and mass survey supervisor).

The idea that ADR could be a powerful reform tool in developing countries may well have emerged from the ideals of some of the original campaigners for ADR, who were predominantly anti-state and pro-community empowerment. They sought justification in the popular, community-based or rural traditions of their own societies; but they also drew inspiration from what they saw as the virtues of traditional approaches to dispute settlement in African and some Asian societies. These were praised for emphasising consensus and socially-sanctioned compromise; hence, ADR became linked with a rhetoric of ‘harmony law’ (Brown and Marriott, 1999; Silbey and Sarat, 1989; Nader, 2001). This strong ‘communitarian’ strand in the ADR concept underpins a marked tendency in many of the justice sector reform programmes adopted by donors to equate ADR with customary forms of justice or chiefs’ courts, an equation which has become widely adopted by African advocates of ADR themselves. An ideal of African village justice – the ‘meeting under the tree’ in which a dispute is resolved through a search for community consensus and the remedies of restorative justice– is often cited as a basic inspiration for ADR in Africa. Critics, on the other hand, suggest that this is an idealised picture which may conceal a real misunderstanding of the nature of community and traditional dispute settlement procedures in African societies (Grande, 1999; Amanor, 2008).

Whilst the Ghanaian Judicial Service’s Court-connected ADR programme does not specifically link itself with customary justice in this way, one can detect elements of these ideas in the official description of the new ADR programme as a ‘holistic’ way of mediating disputes, which will improve access to justice by ‘demystifying’ formal legal adjudication (Ghana, 2008a: v; Ghana, 2010a: 5). In this respect, the Ghanaian judiciary has aligned itself with an international climate of opinion which advocates ADR. No doubt such international influences have been strengthened through the close training links which have been established between the Ghanaian judiciary and the Leitner Center for International Law and Justice at Fordham Law School, New York. Donor development partners such as DANIDA, UNDP and the World Bank have also been strong advocates of ADR and have been willing to fund Ghana’s ADR programmes.²

3 The Ghana Magistrate’s Courts

The 153 Magistrate’s Courts form the lowest level of the Ghanaian state court system and are to be found in virtually every District in the country (Ghana, 2010a: 44-49).³ They are well established institutions with a long history going back to the District Commissioner’s Courts established in the Gold Coast under the Judicature Act of 1873-5. But it was only after Ghana’s independence, in 1958, that the District Courts (renamed Local Courts with stipendiary magistrates) replaced the chiefs’ Native Courts as the sole, legally empowered first instance courts at the local level (Crook, 2008: 139; Rathbone, 2000: 51). Under the Courts Act 1993 they were renamed Community Tribunals and incorporated a panel of lay ‘community assessors’ sitting with a legally qualified Magistrate.⁴ These were abolished by Executive Instrument in 2002 and the courts reverted to operating under a single judge, either legally qualified (known as a ‘Professional District Magistrate’) or specially trained (known as

² The World Bank has even funded extensive training in ADR for Ghana’s traditional chiefs (Ghana, 2010a: 25).

³ There are now 169 local government and administrative Districts in Ghana, including the Metropolitan and Municipal Assemblies as well as the rural District Assemblies (www.ghanadistricts.com accessed 10/5/12).

⁴ Between 1982 and 1992 the Magistrate’s Courts had run in parallel with the so-called Public Tribunals created during the PNDC’s ‘revolutionary’ era; these Tribunals were incorporated into the main legal system in the 1993 legislation and served as a form of special criminal court at the Circuit and Regional levels (Gocking, 2000).

a 'Career District Magistrate').⁵ Their official name is 'District Court' although they are still colloquially known as Magistrate's Courts as this is the title of their judges. These courts also serve as Family Tribunals to hear cases arising under the Children's Act 1998, which involve matters such as parentage, custody, access and maintenance, and supervision orders. When constituted as a Family Tribunal the judge is assisted by a panel of between two and five members which must include a Social Welfare Officer.

The jurisdiction of the Magistrate's Court covers both civil and criminal matters at first instance; civil matters are limited to personal actions under contract or torts (mainly commercial debts and damage to property, nuisance and 'defamation') up to a value of GC 5000, landlord-tenant relations, matrimonial matters and land cases where the value of the land does not exceed GC 5000.⁶ Criminal jurisdiction 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 of up to two years.⁷

Since 2005 the Magistrate's Courts have become the venue for an important experiment in 'Court-connected ADR' launched by the Judicial Service. The decision to introduce ADR into the formal court system was the product of a strong commitment to ADR championed by the former Chief Justice, George Kingsley Acquah and continued with equal vigour under Chief Justice Mrs Georgina Wood. The policy was clearly motivated by two main considerations: tackling the crisis caused by the inability of the judicial system to cope with the large numbers of new cases filed every year, and an acceptance of the idea that ADR is a method of dispute resolution which can improve access to justice for the poor and vulnerable. Table 1 shows the extent to which the Magistrate's Courts are the victims of their own popularity; even though real efforts have been made to improve the clear-up rate over the past three years, the total number of both civil and criminal cases in the courts has hardly changed, such is the flood of new cases every year. Even the slight drop in civil cases in 2010 still represents an 81% increase on the total number before the Magistrate's Courts in 2003-4 (Ghana Judicial Service, 2004), whilst the settlement rates have on average changed little from the 40% achieved in 2003-4.

After piloting ADR in a few of the Accra Magistrates Courts, ADR was rolled out across all ten Regions of Ghana and is now (at time of writing) offered in 45 courts (41 Magistrate's Courts and 4 Circuit Courts). In practice Accra and Tema still account for the majority (around 60%) of cases referred to ADR. A National Secretariat was set up by the Judicial Service Administration with a National ADR Coordinator, assisted by ten Regional ADR Coordinators, charged with expanding the programme to all Districts by 2015. The system was given a further boost by the passing of an ADR Act by Parliament in 2010. This sets out a legal framework for ADR practice including customary arbitration, and provides for an ADR Fund and a national ADR Centre. The Magistrate's Courts ADR service is empowered to handle civil 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. In the Accra courts observed, there was no official breakdown available of the types

⁵ As of 2010, there were 42 Professional Magistrates and 98 Career Magistrates; the Career Magistrates were developed in an attempt to address the severe shortages of legally qualified candidates willing to serve as magistrates, a problem which had left many District Courts without a judge for many years. As recently as 2004 there were only 65 Magistrates to cover the 131 courts across the country – a situation caused, according to the official Judicial Service report, by 'low remuneration' (Ghana Judicial Service, 2004: 22).

⁶ 5000 Ghana Cedis = approximately \$2,590 or £1666 at 2012 rates.

⁷ A penalty point is GC12, so the Magistrate's Court maximum fine is GC6000 – quite a substantial amount in Ghana.

of cases heard, but there seemed to be differences in the predominance of particular kinds of case according to the locality. In the Ministries court, which was linked with a very busy and popular Family Tribunal, mediators reckoned that 70% of cases were family or ‘matrimonial’ affairs, with most of the others breaches of contract and debt. In La, the Registrar also noted that the land and property cases tended to be intra-family disputes – because the ‘families wanted to avoid serious divisions’ – as well as a mixture of mainly assault, defamation and debt cases. In Madina, James Town and Amasaman, there was more of a mixture of minor assault, landlord-tenant disputes, debt and family cases.

Table 1: Cases in the Magistrates Courts, 2007-2010

	2007-8	2008-9	2009-10
<i>Total cases filed, pending + new</i>	183,124	187,939	178,619
<i>Total civil cases filed, pending + new</i>	113,289	111,786	106,910
<i>Civil cases pending at year end (July)</i>	70,189	64,619	50,214
<i>Civil cases settlement rate</i>	38%	42%	53%
<i>Total criminal cases filed, pending + new</i>	69,835	76,153	77,709
<i>Criminal cases pending at year end</i>	49,272	47,280	34,114
<i>Criminal cases settlement rate</i>	30%	38%	56%

Sources: Ghana Judicial Service (2008a; 2009; 2010a)

A mixed set of methods was used to collect the data on both ADR mediations and on cases heard in full court. Three case-study Districts were selected for intensive study: one in a peri-urban area of Greater Accra (the capital city); the second a rural cocoa-growing District in the Brong-Ahafo Region and the third the capital of the Northern Region, Tamale (a predominantly Muslim city). A further four Magistrate’s Courts in Accra were chosen for intensive study of ADR, given that this was where most ADR cases were being heard. The primary method was observation of proceedings in the seven courts over a six month period, on a daily basis for the three primary case study Districts. (ADR was not offered in the Brong-Ahafo court). Observation was combined with a representative sample survey of popular opinion (800 respondents) in the first two Districts, together with interviews with 300 litigants using a structured questionnaire, and elite semi-structured interviews with judges, mediators and officials.

4 ADR in the Magistrate’s Courts: the formal process

Litigants are referred to ADR by the Magistrate only after they have appeared before him or her, and with their consent; but because of the concern to make this option attractive to the ‘poor and vulnerable’ there is currently no charge for ADR, beyond the basic filing fee which litigants have already paid to bring the case to the court. In order to encourage the adoption of ADR, Magistrates now routinely put the option of ADR or ‘amicable settlement’ to parties when they first appear, and in most of the courts observed the ADR coordinator (one of the

court officials or the Registrar) gives a short explanation of ADR at the opening of each day's proceedings. In courts where the Magistrate is very committed to the policy, it was clear that ADR was often being promoted by judges particularly where they felt that the case was 'suitable' for ADR, giving rise to the danger that parties could be pressured into mediation. In one court, the judge regarded family cases as almost automatically referable to ADR. There is an obvious motivation for judges to use referrals to help clear case-loads, given that this is an official goal of the policy anyway.

Once the parties have opted for ADR, the court ADR coordinator explains the system to them in more detail. It is stressed that ADR is voluntary and depends on a willingness to agree; 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.⁸

The cases are heard by a newly recruited and trained body of para-legal Court Mediators, at least three for each Court. Officially, parties can 'choose' their mediator, but in practice it just depends on who is available that day. The mediators were deliberately recruited from the ranks of 'retired professionals' (mainly social workers, police officers, ex-court officials or teachers) under the age of 65 or 'self employed' people, although in Accra the pool was boosted with a number of specially recruited, younger social workers.⁹ Initially they were paid on a per-case basis at the rate of 5 Ghana cedis per case successfully settled, but because of financial constraints are now limited to claiming for a maximum of 10 per month.

The procedures used by the Court Mediators are supposed to conform to a model laid down in the Judicial Service's 'Uniform Practice Manual on Court-connected ADR', produced with the support of UNDP (Ghana Judicial Service, nd). All of the Court Mediators have undergone training based on this manual, and observation of cases suggested that for the most part they were implementing the basic principles and devices in which they had been trained.

The case usually begins with the mediator explaining that ADR is different from a court trial because it's about the parties themselves finding an acceptable agreement – so it's about compromise or 'for the sake of peace' between the parties – implying that ideally there should be some form of reconciliation or, at the least, acceptance that a dispute is over. The mediator also checks that the parties have really agreed to ADR and they have to sign a consent form. (One mediator urged them to be realistic and not to press too hard for money which they knew the other one didn't have). The proceedings are supposed to be in private and confidential, involving only the parties themselves and the mediator, with a minimum of witnesses who are only called in when needed – although this was a condition which was not always observed in practice, as the case observations will show.

The procedure for hearing the case is very simple and informal, and puts a premium on giving each party a chance to present their point of view on the dispute. The complainant begins by stating their complaint and setting out what they are seeking from the process. The mediator may interrupt or ask the complainant a number of questions in order to clarify aspects of the story or of their demands. The respondent is then invited to give their version of events and what they think would be an appropriate response or the terms on which they would be prepared to settle. In most cases the ensuing discussion is actively led by the mediator as he or she tries to draw out from each party in turn what the real issues are, and in particular to clarify the facts of the case. It is the mediator who in the end suggests what an appropriate

⁸ The logic of this is that a party cannot appeal against their own agreement.

⁹ In practice many of the mediators are older than 65 – one in Tamale was 77. Recruitment has proved increasingly difficult as the ability of the Judicial Service to pay even the small fees has come into doubt, with serious backlogs of payment and consequent demoralisation (Ghana Judicial Service, 2008b: 18).

settlement might be, having assessed what seems both fair and realistic with regard to the positions of each party.

A number of devices are used to defuse tension and hostility between the parties, the most common being told to address each other by their names, to show respect and not interrupt each other, and 'caucusing'. The latter is a practice used when there is an impasse or conflict; one or both parties are taken aside for a private discussion in which the mediator tries to find out what the sticking point is and what they are prepared to accept. This can also be used at the beginning of the session in order to get an idea of where each party stands, and what they are really wanting from the process. This is to help the mediator guide the discussion in the direction which is most likely to result in agreement.

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 bailiffs if one party fails to honour the agreement. If the mediator cannot resolve the dispute through a mutual agreement the parties have to go back to court for the normal trial process to resume. But none of the facts brought out or statements made during the mediation can be brought up in court, and indeed mediators are supposed to destroy any written records of the mediation sessions (see Ghana Judicial Service, nd: 23). The ADR process is therefore both confidential and, in legal terms, 'without prejudice'.

5 ADR in action: how congruent with popular values and expectations?

5.1 Popular values¹⁰

Our survey of popular opinion in the three case-study Districts showed that when ordinary Ghanaians were asked to define what they regarded as a fair way of settling disputes, the majority (68%) put most value on the necessity for an impartial and/ or competent judge who could ensure that the 'truth' would come out and that all parties were given a chance to present their side of the story. (These views were especially prevalent amongst those who had had actual experience of a dispute – 20% of the sample). This is very much a 'process' definition of fairness. An important minority of respondents (14%) also emphasised the need for both parties to publicly accept or acknowledge the truth once established, particularly where one party was shown to be at fault. This idea was linked with the possibility of reconciliation – which has to be distinguished from compromise, where people may agree to accept a sub-optimal settlement for the sake of better relations or social harmony.

Litigants who had civil cases in the Magistrates Courts shared some of these values, but displayed a rather different set of concerns in their search for justice, which are of particular significance when assessing the appeal of Court-connected ADR. As might be predicted, by the time disputants arrive in court, their attitudes to the other parties have already hardened and they are in no mood for compromise. Relationships, particularly in intra-family inheritance or land cases have often deteriorated into violent hostility. Indeed, 53% of the litigants interviewed had taken their case straight to the court, without even trying an informal or non-state dispute resolution institution first. Thus In assessing the value of having their cases heard in court, 45% of litigants (both plaintiffs and defendants) emphasised the importance of

¹⁰ A full account of the surveys upon which the data in this section are based can be found in Crook et al. (2010; 2011).

getting an enforceable legal remedy, which would ‘change the behaviour’ of the other party and establish who was at fault. Only 7% mentioned the benefits of impartiality. On the other hand, an important minority (23%) drawn mainly from those who were dissatisfied with the whole experience, felt that the court had offered the opportunity of a peaceful settlement, or that they would have preferred to have gone for an amicable settlement – about the same proportion as those who said they had tried ADR (17%) .

The more generally held notions of justice were, however, echoed quite clearly by those whose cases had been determined.¹¹ When asked to explain why they thought the verdict was fair or unfair, a majority (58%) said the verdict was fair to the extent that the truth had come out and been accepted or not accepted by the party at fault, and/or that both sides had been properly heard. Nevertheless, a substantial minority (one third) of those who had had verdicts focused primarily on whether they had got the remedy they wanted – for them it was mainly about winning, by getting the legally enforceable remedy.

It is clear from the above that only a minority – albeit a significant one -- of litigants who resort to the Magistrates Courts come with a mindset which is likely to be favourable to the mediated compromise offered by ADR. The rate of ‘out of court’ settlement in Ghana is in fact extraordinarily low, compared to other common law systems (Crook et al., 2007). Even those willing to try ADR are, like the other litigants, still likely to put a high value on an enforceable settlement. And they will also value an impartial, ‘truth seeking’ process.

5.2 Principles and codes of settlement used in ADR

Observation of cases which had been sent for ADR mediation by the Magistrates of the courts at Madina, James Town, Amasaman, La, and Ministries (all in Accra) and Tamale showed that, as noted above, the mediators were generally conforming to the requirement to offer an impartial and balanced process. Mediators in many cases were prepared to spend more than two to three hours patiently trying to sort out the details of what had happened between the parties; in one case, for instance, a dispute concerning an alleged breach of contract between a businesswoman and a trader to whom she had supplied jeans and shirts, the mediator spent a whole afternoon with both parties, going through a chaotic and incomplete set of delivery notes and accounts in detail, trying to work out what had been promised, at what price, and what had been actually delivered. It was basically a misunderstanding deriving from poor record keeping. Frequently the mediator had to ask the woman, who was the more aggressive of the two, to let the man make his point; ‘you’ve had all the time in the world to make your case’, he says. In the end, no agreement could be reached, with the mediator advising the trader to take a course in business administration.¹²

In another contract case, a woman day-nursery owner complained that a carpenter had failed to deliver benches and tables for her school, for which she had paid an advance. Unfortunately, as the mediator established, there was no written record of the contract price or of the advance she had given him. But the mediator made an extensive effort to establish the true facts by engaging with both parties; and then used a private conversation with the complainant to suggest that she accept an offer from the carpenter to finish the job within one month. She agreed, although she was sceptical (she’d ‘heard it all before’ from the carpenter) and insisted that her legal costs be deducted from the agreed final price, on delivery.¹³

¹¹ 37% of those interviewed.

¹² La District Court, 9th February 2011.

¹³ Ministries District Court, 9th February 2011.

A very different kind of case involved an allegation of assault, very typical of the many minor criminal cases remitted to ADR. At first sight this appeared to be a trivial quarrel, in which two young women complain that two young men, their neighbours, had assaulted them because their dog ate the food of the boys' pet cat. All the parties were illiterate and the parents of both families attended, creating a rowdy and constantly interrupted hearing. The mediator spent two hours trying to establish what had happened, through constant interchanges and conversations with both sides, often alternating between jokes and stern reprimands especially to the young people and to an aggressive mother who tried to challenge statements from the opposing side. In effect, the mediator was conducting a continuous yet flexible or informal cross-examination of all the parties. He eventually established that underlying the quarrel was a much longer-running dispute involving the boundaries between their properties along the street frontage. Although he managed to persuade the parties to shake hands and agree (with obvious reluctance) to make peace over the pet food quarrel, they were required to return the following week to resolve the more serious property dispute.¹⁴

In none of these cases would a Magistrate have had the time or the patience (in the absence of documentation) to hear the details of what each party had to say, and to try to work out a solution that seemed acceptable; finding a legal rule to apply would not have been easy or necessarily relevant. Nor would a formal cross examination by a lawyer have been very effective in drawing out what the real problem was, or what might be a viable solution. In this respect, therefore, the ADR procedure was clearly working well as a device for 'seeking the truth', using a process which was transparently fair to both sides (neither side was being intimidated by a lawyer).

It was very evident, however, that the emphasis of ADR on the search for reconciliation, compromise and mutual agreement was a feature of ADR which often provoked resistance from disputants. This emphasis was not just an official purpose as promoted in the ADR training; for many mediators it was clearly a personal moral commitment which justified their work. Typical comments from mediators were that ADR was about 'healing the two parties', 'helping people to resolve their problems', 'reconciling people', or 'as we are all under one God we should love one another and make peace'.¹⁵ Many also felt that ADR was especially relevant for family conflicts, and one saw her job as helping to prevent family break-up.¹⁶ As one said, they did not do it for the monetary reward, which is not only very modest and barely covers the cost of their transport and other expenses, but is rarely even paid on time.¹⁷

This personal commitment of the mediators often, therefore, led them to exert a fair degree of pressure on the parties to agree to a settlement, even when they seemed reluctant or still hostile. It would be easy to dismiss this as a function of the original payment system which was linked to the number of cases settled. But their behaviour did not change after their payment was capped at 10 cases per month. Unfortunately their ideals were most often challenged by the harsh realities of family conflict in Ghana.

In spite of their commitment to family values, it was most frequently the presence or involvement of relatives of the disputing parties which created the most resistance to settlement or led to the unravelling of agreements which the mediator had persuaded the parties to accept. In one case, for instance, involving a commercial driver who owed money to

¹⁴ La District Court, 9th February 2011.

¹⁵ Interviews with CD, Madina, 7th December 2010; O, Amasaman, 7th December 2010; SD, Tamale, 4th February 2011.

¹⁶ Interview with CD, Madina, 7th December 2010.

¹⁷ Interview with JO, Amasaman, 8th December 2010. In January 2011 the National ADR Coordinator admitted that mediators had not been paid for nearly a year (interview 26th January 2011).

two women traders, the mediator had been on the point of agreeing a plan for the driver to repay his debt in instalments when one of the women said she needed to consult her husband. The mediator predicted that this would probably lead to a rejection of the settlement; sure enough, when she returned, she withdrew from the agreement.¹⁸ Another mediator said that allowing the parties to leave the mediation and consult relatives was a constant danger as it would lead to 'their minds being polluted'. She recalled one case where a complainant's husband had burst into the hearing and simply demanded that his wife refuse to sign any agreement.¹⁹ Third parties try to exert pressure and some mediators feared being subjected to 'evil forces' ('juju') aimed at influencing their judgement, as if they were judges with a power of adjudication.²⁰ Indeed, in an effort to sustain ADR settlements, the Magistrates of the courts observed had adopted the practice of asking the mediators to bring the agreements to court for immediate endorsement as consent judgements as soon as the case was concluded, even if this meant they had to stay at work late. This was to prevent the parties changing their minds.

The resistance to settlements created by the involvement of relatives and other parties was also considerably exacerbated by the lack of private rooms available for ADR in all but one of the five courts observed. In one court, ADR mediations were being heard in the corner of a main office which contained the cashier's desk so that there was a constant queue of people causing interruptions; in another, to the side of the entrance to the main administration office. The worst situation was where the full court room, vacated for the purpose, was being used.²¹ This meant that not only relatives and witnesses but even other litigants waiting for their cases to be called were sitting in the court room, in effect turning the mediation into a public hearing. In the 'pet food' case cited above, the parents of one of the parties kept shouting and interrupting the proceedings to such an extent that they had to be ejected by a police officer and the mediator threatened them with arrest. Other people sitting in the court room also got involved in the case, laughing or exclaiming as the mediator made jokes or indulged in moral homilies (at one point he asked rhetorically: 'is it right that the animals should be friendly but we humans should not?'). All of this made it more difficult to create the calm atmosphere needed for an agreement, and entrenched the attitudes of hostility which existed between the parties and their families.

The most important cause of resistance to settlement was, however, a more basic factor: the degree to which the case involved such high stakes for one or both of the parties that they could not easily give up what they saw as their rights. This was especially true of land and inheritance disputes. A typical case was again one which initially presented itself as a minor assault charge: the respondent, D, had been charged with threatening behaviour after the complainant, Y, alleged that she had cursed her with a death threat when she attempted to take possession of a piece of land which she said she had bought from a local Ga family. The respondent was actually the current occupier of the land, part of a plot which her husband had purchased 13 years previously on which he had built a house, and on which she (the respondent) had set up a kiosk along the roadside. An attempt had been made to settle the affair amicably using the elders of their local Pentecostal church, but this had failed because the complainant insisted on having the land dispute dealt with at the same time. D had then been charged in the Magistrate's court.

¹⁸ James Town District Court, 7th December 2010.

¹⁹ Interview with JO, Amasaman, 8th December 2010.

²⁰ Interview with CD, Madina, 7th December 2010.

²¹ This was at the La District Court – a court cited by the Judicial Service as one of their best performing models for ADR.

The mediator had decided, perhaps unwisely, to try to deal with the land issue at the same time as the threatening behaviour charge and this produced a two hour session of enormous complexity involving not just the two women but their respective partners, land surveyors and representatives of the family which claimed it had a right to sell the land occupied by D and her husband. The respondent and her husband were clearly absolutely furious and regarded the whole episode as a case of attempted fraudulent land sale; D's husband made it quite clear that he had purchased the land under a properly documented deal and denied that the family concerned had any rights whatsoever to sell it to Y. He and the respondent were not prepared to accept any challenge to their ownership and possession. The exchanges during the mediation were very hostile and emotional with frequent rejections and rows and the mediator experienced great difficulty in controlling the proceedings. It was only because the mediator was a very strong and forceful personality that he 'persuaded' D to make a formal apology to Y and shake hands, in a way which she clearly experienced as a public humiliation. Part of the persuasion was the possibility that she could be found guilty if it went back to court, although the mediator also suggested that the husbands might have settled it had they spoken to each other 'man-to-man' – a suggestion rejected by D's husband.

The continuing dispute over Y's claim to the land was scheduled for another hearing the following week, but in an interview after the mediation, Y and her husband made it clear that they would not bring any documentation to the ADR session as this might prejudice any subsequent trial in court. Whilst they were sorry for Y, who they saw as a victim of the fraud, they had no intention of accepting any challenge to their ownership of the land.

This case is a good illustration of the limits of ADR; it may be doubted that such a serious matter (fraudulent land sale) can really be dealt with by ADR when the stakes are so high; people's home and livelihood were under threat from this illegal activity and there was little likelihood that in this urban setting the respondents would be willing to compromise over such a fundamental threat to their interests, merely for the sake of 'peace'. They wanted their formal legal title confirmed.

Overall, therefore, the Court-connected ADR mediations did correspond quite well to the popular belief in the importance of a truth seeking, balanced process. And the fact that the agreements could be enforced as consent judgements also helped to make the ADR procedure seem as good as a trial in full court, given that a primary motivation for litigants in court was to obtain a certain and enforceable remedy. But the emphasis of ADR on compromise at the expense of legal rights did not fully correspond with either the specific concerns of a considerable proportion of the litigants, or with popular beliefs more generally about the need to accept fault.²² And for many, the stakes were simply too high, or the dispute too bitter.

6 The accessibility of ADR

The ADR mediations can be scored very highly in terms of their accessibility to ordinary people, no matter how poorly educated.²³ The sessions were all conducted entirely in

²² The importance of accepting fault and rendering public apology has some roots in older traditions of dispute resolution, at least in Akan culture – see Rattray (1969: 388).

²³ The sample of litigants in the Magistrate's Courts tended, however, to be older and better educated compared to the general population profile: 48% were over 40 years old, compared to 35% of the adult population aged over 19 in the Accra Region; 36% had a secondary or post-secondary educational level, compared to 26% in the Accra Region (although this figure includes all those over six years old, so overstating the percentage for the adult population). Only 9.5% were illiterate compared to 20% of those

whatever local languages were appropriate for the parties, although in some cases, particularly in Tamale, English was the only common language. But generally this was better than the full court in that it was more spontaneous and there were no delays for translation, in spite of the extensive use of local languages by the Magistrates during statements and cross examinations. ADR was also a much cheaper option compared to going on with the full legal case, in that the parties were not charged any further fees after paying their basic 'filing fee', usually around GC15 (\$7.50). If litigants go on to a full trial the fees could amount to GC50 (\$25) or more. The process was also much less costly because the case is usually settled more quickly (see below) and the services of their lawyers, if they have been engaged, could be dispensed with, although it should be noted that only 33% of litigants surveyed had used lawyers.²⁴ Nevertheless 40% of litigants surveyed said they had spent up to GC100, and another 36% between GC101 and GC500 during the litigation process, so the savings from choosing ADR could be considerable.

The procedures of ADR were also completely informal and 'de-legalised'; the style was conversational and intimate wherever possible (although as noted above this was not always the case where there was limited privacy and involvement of other witnesses and family members). Legal language was rarely used except to remind parties of the legal position if they rejected ADR and went back to court, or the rights and wrongs of somebody's position had to be explained – e.g. on custody of children or landlord-tenant relations. In this respect, ADR was more informal than the procedure in court, in spite of the efforts of Magistrates to create a more informal process (Crook et al., 2010).

The 'moral codes' or principles of settlement which mediators tended to draw on during the sessions were quite varied and certainly did not exclude the citation of legal rights or duties. But the basic message of ADR was the appeal to 'make peace' and achieve a reconciliation between the parties which would reduce the hostility and tension which existed between them. It was therefore not surprising that mediators made frequent use of the vocabulary of Christianity, given the widespread popularity of evangelical Christianity in Ghana. Many mediators used prayers, 'sharing a Bible story' or a Bible reading to start the proceedings, although in their training they were told not to do this unless certain that the parties were both Christians. Nevertheless it seemed to be assumed that this was appropriate because it corresponded with what mediators saw as a shared popular culture (which they themselves shared). Even in Tamale, where the parties were likely to be Muslim, the mediator (a southern Christian) said that he advised the parties that 'we are all under one God and so we should love one another and make peace'. If he identified the parties as Muslims he would ask one of them to lead a prayer 'in the Muslim way'. Nevertheless the Court staff here began each day with a Christian prayer meeting led by the Magistrate.

The way in which these ideas were used can be illustrated by a case involving a violent dispute between a mother and her son, in which the mother brought criminal assault charges against her son. The problem was that the mother wanted to evict her son from their home, where he ran his clothing design business in a shop in front of the house, claiming he didn't pay his electricity bills, and had too many drunken parties. The conflict had come to a head in a violent row during which she had called the police and the son had been arrested and left in police cells for a week. As an agreement for the son to leave the premises was being worked

over 15 in Accra (Ghana Statistical Service, 2000). There were slightly more men than women – 58.7% were men and 41.3% women.

²⁴ Although lawyers are permitted to attend ADR mediations, it is rare, and none were observed during the research period. On the whole, barristers who practise in the lower courts are not supportive of ADR (which they see as a threat to their profession) and both mediators and Magistrates reported that barristers routinely advised their clients to refuse ADR or even to go back to court after an ADR hearing.

out, the mediator argued that the son's behaviour was due to his possession by the Devil. The son thereupon brought in as his witness and supporter his pastor, who confirmed that he had now accepted Jesus Christ. The mediator was very pleased by this and argued that his agreement to the 'terms suggested' would be a living proof that he had changed his wicked ways and escaped the Devil's influence.²⁵

Another cultural norm frequently invoked by the mediators was respect for the elderly – a value also used by the Magistrates in full court hearings. In the case of the son accused of assaulting his mother cited above, the mediator did not really attempt to ascertain the truth or otherwise of the accusations and counter-accusations flying between them; instead, sympathising with the mother's plea that she 'just wanted him out', he sought an agreement that involved the son moving out. The mediator advised the son (a man in his mid-thirties) to accept that 'his mother could do no wrong' and that he should apologise and show her respect. This he did (kneeling in front of her as he apologised), and agreed to the terms of the settlement because he just wanted to get out of the situation and not face police charges.²⁶ Another mediator argued that in family cases, as a matter of general principle, the right course of action was always for children and younger family members to apologise, in order to keep the family together.²⁷

7 The effectiveness of ADR

From the point of view of the Judicial Service, one of the main goals in introducing Court-connected ADR was the hope that this option would be speedier and thereby help to reduce the delays and backlog of cases clogging up the formal court system. 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 (Ghana Judicial Service, nd). In practice, most of the cases were dealt with in one or two mediation sessions. One ADR officer cited with pride a case involving two step brothers, in dispute over their father's estate, which had been in court for 10 years but was resolved by the ADR mediator in 30 minutes.²⁸ ADR therefore compared very favourably with going for the full trial process, with its constant adjournments and delays; 55% of the litigants surveyed said they had already had to attend court more than six times, and 30% between two and five times, although it was observed that once a case was actually heard in court, the Magistrate usually disposed of it within two or three sittings. Land cases took longer because of the need for site inspections and other investigations.

The real challenge facing ADR, however, was its effectiveness in actually achieving settlements. As noted, there was frequently considerable resistance to making a compromise agreement, and the settlement rates for ADR reflect this (see Table 2). Between 2007 and 2010, the settlement rate for ADR was only a little better than that of the courts, except for 2009 when it achieved an unusually high percentage, but slipped back to below the court rate in 2010. This was rather surprising and certainly disappointing for those in the Judicial Service who had had such high hopes for the programme.

²⁵ Amasaman District Court, 11th September 2009.

²⁶ Ibid.

²⁷ Interview with CD, Madina, 7th December 2010.

²⁸ Interview with GO, La, 8th December 2010.

Table 2: ADR in the Magistrate's Courts, 2006-2010

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

Sources: Ghana Judicial Service (2008a; 2008b; 2009; 2010a; 2010b).

Although any judgement on the programme has to recognise that it is still only in a pilot phase, with the majority of ADR mediations confined to the Accra-Tema courts, it is clear that ADR is not yet making any significant impact on the overall backlog of cases in the formal system. But the low settlement rate, particularly the drop back to under 50% in 2010, cannot be blamed on entirely on the reluctance of litigants to settle amicably. There are also real problems of finance and staffing which are having an impact on the success and even likely survival of the programme in the immediate future.

The main funder for the start of the ADR programme was DANIDA, with minor contributions from UNDP. With the DANIDA funding coming to an end, the Judicial Service has had to take over responsibility for the costs of ADR – mainly the National Secretariat and the fees of the mediators – since 2010. Unfortunately the Judicial Service budgets have been severely squeezed over the past few years and this has created a crisis in the recruitment and payment of mediators. As well as capping the number of cases which they can claim for each month to 10, mediators have experienced severe delays in receiving payment, with many not having been paid at all since February 2010. This has had a serious impact on morale and many have resigned or stopped turning up; interviews with mediators in our case-study courts revealed that many continued only because of their sense of moral commitment. But others have already petitioned the Chief Justice and the Judicial Service leaders to abandon the cap on 10 cases per month, increase the payments substantially, improve the physical conditions and ensure that existing payment contracts are honoured.

The senior officials and judges of the Judicial Service have not formally responded but the Service is actively considering how to fund the ADR programme in a more sustainable way. One method (discussed with APPP researchers at a Judicial Service Workshop on ADR in July 2011) would be to charge a fee for the ADR mediation, set at a level which would still make it cheaper than going to trial in the full court. But the ADR Secretariat and senior judges are reluctant to abandon the 'free' character of ADR, arguing that it would make Court-connected ADR less attractive and hence less accessible than the similar service offered by

full time salaried officers of CHRAJ in its district offices (Crook et al., 2010). Another way of raising funds which has been suggested by the ADR Secretariat is to introduce a small increase in the basic filing fee and earmark an element of that fee for the ADR programme, regardless of whether the complainant uses ADR or not. This could be seen as rather unfair to litigants who do not choose ADR, but has the merit of reducing the cost by spreading it more widely and it retains the 'free at the point of use' character of the ADR mediations. DANIDA is now (at the time of writing) considering further aid to the ADR programme but this will not be sufficient to ensure its long term sustainability. Without substantial new funding, the aim of extending ADR to all District Courts by 2015 is unlikely to be achieved. And maintaining the quality and impartiality of the mediations will ultimately require the mediators to be salaried officials like those of the CHRAJ, which also costs more money.

8 Conclusion

The evidence from the APPP research shows that the new Court-connected ADR programme in Ghana is successfully offering a process which is not only informal and accessible to ordinary people but also works with local cultural repertoires, corresponds with local understandings of justice and provides remedies which to some extent respond to the demands of those who resort to or are brought before the state courts. The ADR mediations certainly fulfil the popular desire for dispute settlement to be a 'truth seeking' and balanced process, which also offers an opportunity for fault to be recognised and apologies made; the agreements are enforceable as court judgements, which is a major motivation for those seeking state justice, and the kinds of codes used in settlement draw on elements of popular shared norms such as Christianity and respect for the elderly. But the emphasis of ADR on agreement through compromise is not as popular as might be expected, given the widespread stereotypes which surround notions of 'African' justice. Mediators faced considerable difficulties and resistance in achieving agreements between parties who had come to court, because they were already in a state of mind which was hostile to an amicable settlement; even the prospect of saving money and time did not alter the determination of over half of disputants to get what they saw as their due, through a legal remedy.

ADR was not therefore as effective as expected, although certainly speedier and cheaper than a full trial in court. To some extent the resistance to compromise can be attributed to the 'difficult' character of many of the cases referred to ADR. In modern, urban Ghana the stakes involved in commercial transactions, land and property relations and even family affairs are often too high for people to accept compromise easily; conflicts are too intense and the consequences of losing legal rights too serious. Moreover, given the nature of Ghanaian family relationships, a property dispute cannot always be confined to just two private individuals as assumed by classic ADR doctrine. In Ghana, the extended family, as embodied in the 'head of family', is often the corporate owner of real property (houses and land) and the moral obligation to give mutual support attributed to the extended family is very widely invoked – although just as frequently contested. The conflictual nature of these obligations and relationships was clearly evident in many of the ADR mediations. Once family interests were brought into the disputes observed, it was very common for the ADR compromises to be rejected or modified. When it came to family cases, in the sense of 'matrimonial affairs' involving breakdowns in relationships between husbands and wives, custody of children, maintenance agreements and domestic violence, many ADR mediators felt that ADR was especially suitable, perhaps not inappropriately given that so much of their work was linked to that of the Magistrate's Family Tribunals. Adopting the role of a marriage guidance counsellor, it was possible for a patient and forceful mediator to broker an agreed settlement of a 'matrimonial affair'. But overall there is little evidence that these family disputes were any less bitter and conflictual than those involving property alone.

In spite of its current limitations, the record of the Court-connected ADR programme therefore confirms the crucial role of the state in organising and sustaining a genuinely informal, popular and accessible form of dispute resolution. Whilst many forms of ADR in Ghana flourish in the non-state sector, at the level of families, churches and village elders or chiefs, it would be very difficult for any privately-based collective action, whether based on an association or other religious or cultural institutions, to create a programme of informal dispute resolution with the authority, organisational support, professional mediation skills, and national spread of the Court-connected ADR. The ability to give ADR agreements the force of a state court's judgement is particularly important; but so too is the capacity to provide a form of mediation which manages to be responsive to, indeed share, popular values and expectations whilst maintaining a consistency of standards. The practical hybridity of the Court-connected ADR is at the core of what success it has enjoyed, even though it has yet to change a well-entrenched culture of resistance to amicable settlement amongst those who go to court to settle their disputes.

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