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Alternative Dispute Resolution and its Implications for Women's Access to Justice in Africa – Case-Study of Ghana

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Abstract
Western states have sought to globalise and popularise the practice of alternative dispute resolution (ADR) as a means of promoting access to justice in developing countries. In spite of the popularity of the practice, the issue as to whether and to what extent the benefits of the practice is spread evenly across gender lines with particular reference to Ghana and Africa in general has not been thoroughly examined. Tackling the issue from that angle, the paper contends that the introduction of ADR has no doubt helped women to obtain greater access to some form of justice. However, some of the inherent weaknesses located in the formal justice system remain embedded in the ADR process, thereby hindering women from reaping the full rewards of the ADR mechanism. Therefore, for ADR to promote qualitative justice for African women, the historical and cultural contexts informing gender biases in Africa have to be unearthed and dealt with. The paper concludes by proposing some solutions that may help women realise the maximum benefits in the use of ADR.

Key words: Access to justice; Alternative dispute resolution; Women's rights

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INTRODUCTION: WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

Alternative Dispute Resolution (ADR), sometimes referred to as "informal justice"[1] or "privatisation of judicial proceedings,"[2] has been defined by Uwazie as "encompass[ing] a series of mediation mechanisms for resolving conflicts that are linked to but function outside formal court litigation processes."[3] The definition, however, seems to limit ADR to mediation processes only but other mechanisms exist, such as arbitration, interest-based negotiation, conciliation, facilitation, arbitration and court-annexed ADR. Thus, as noted in the ADR Practitioner Guide,

> The term 'alternative dispute resolution' or ADR is often used to describe a wide variety of dispute resolutions that are sort of or alternative to full-scale court process [...] The term can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or mini trials that look very much like a court room process.[4]

ADR is not meant to replace the formal court system or diminish the need to improve the current system but only as an alternative to full-scale court processes.[5] It is often used as the default resolution method in connection with, for example, cases which may not "cover or deal with constitutional or legal interpretation where there is a need to set precedence, in cases with major public policy implications, or as a last resort after ADR has been tried."[6] It is usually not recommended for use in instances where cooperation between the parties to the dispute is lacking, where a court ruling on a case may result in the law being changed, where control offered by the justice system is required or where punishment by jail is required to show disfavour for criminal actions.

In this connection, one may refer to section 1 of Ghana's Alternative Dispute Resolution Act, 2010 (Act 798) which precludes the following legal matters from being resolved through ADR. That is, where the matter relates to:

(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.

ADR is not a novelty.[7] It has been the main means of dispute resolution among pre-colonial societies. According to the Law Reform Commission of Ireland,

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[1] Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L.R. at 1443 (1992).

[2] Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO WASH. L. REV. at 482 (1987).

[3] Ernest E. Uwazie, *Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability*, 16 AFRICA SECURITY BRIEF, at 3 Nov 2011.

[4] Centre for Democracy and Governance, ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS' GUIDE 8 (Technical Publication Series, March 1998).

[5] ELAINE WYCHRESCHUK & BOBBIE BOLAND, MAKING IT SAFE: WOMEN, RESTORATIVE JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION 8 (Department of Justice, Government of Newfoundland and Labrador, July 2000).

[6] *Ibid.*

[7] Laurence Boulle, *A History of Alternative Dispute Resolution*, 7(7) ADR BULLETIN (2005), Article 3, available at http://epublications.bond.edu.au/adr/vol7/iss7/3

> [...A]rchaeologists have discovered evidence of the use of ADR processes in the ancient civilizations of Egypt, Mesopotamia, and Assyria. Furthermore, it can be argued that many of the modern methods of ADR are not modern alternatives, but merely a return to earlier ways of dealing with such disputes in traditional societies.[8]

Also, Carlo Osi notes:

> While Western forms of ADR were generated as a response to the difficulties and deficiencies associated with court proceedings, Indigenous Dispute Resolution processes were not an "alternative" to anything. There were no courts or highly formalized procedures and institutions to speak of when they were first developed and practiced. Generally, Indigenous Dispute Resolution processes were all that the communities had. Although they seem very ADR-like, they were truly indigenous and unique to these peoples.[9]

One of the available means of promoting access to justice is through ADR. As noted by Georgina Theodora Wood, Ghana's Chief Justice, "ADR is a tool for promoting and improving access to justice."[10]

WHAT IS ACCESS TO JUSTICE?

Access to justice is ancillary to the right to a fair trial and, among others, respect for the principles of natural justice.[11] The Human Rights Committee[12] has noted in its General Comment 32 on article 14 of the International Covenant on Civil and Political Rights (ICCPR)[13], *inter alia*, that "availability or access to legal assistance is often determinative of whether or not a person can access the relevant judicial proceedings or participate in them in a meaningful way."

Access to justice is therefore seen as a means to dismantle the structural barriers that marginalised people face in their attempts to obtain legal representation and a remedy where their rights are violated. In sum, it relates to how to attain qualitative justice at the end of the legal process for the poor generally, children, women, persons with disability and indigenous minority groups and other marginalised entities. Qualitative justice is about justice that is sensitive, responsive and effective – it recognises the peculiar and unique perspectives and concerns of the marginalised entities and provides mechanisms for responding to these concerns which in the end provides a kind of justice that brings satisfaction to the victim. According to the UNDP,

> Access to justice entails much more than improving an individual's access to courts or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial

[8] Law Reform Commission (Ireland), *Consultation Paper Alternative Dispute Resolution* at 20 (July 2008).
[9] Carlo Osi, *Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution Cultivating Culturally Appropriate Methods in Lieu of Litigation*, 10 CARDOZO J. OF CONFLICT RESOL. 163, 166 (2008). Avaliable at http://cojcr.org/vol10no1/163-232.pdf.
[10] *Over 16,000 cases settled through ADR*, DAILY GRAPHIC August 11, 2012 at 14.
[11] Tilda Hum *et al*, *The Right to a Fair Hearing and Access to Justice*. Submission of the New South Wales Young Lawyers Human Rights Committee to the Senate Legal and Constitutional Affairs Committee: Inquiry into Access to Justice (2006). Avaliable at https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=2688b824-7dd8-4046-b04d-cbd8d1d7c1c6 (last visited October 2012).
[12] The treaty-based body for the International Covenant on Civil and Political Rights.
[13] The article deals with the right to equality before the courts and tribunals and the right to a fair trial.

outcomes are just and equitable.[14]

Expanding on this definition, one may further say that access to justice is about "[a]ccess to fair, effective, democratic and accountable mechanism for the protection of rights, control of abuse of power, and resolution of conflicts."[15]

Like ADR, the concept of access to justice can be traced to ancient times.[16] However, it has come to acquire renewed importance in the post-Cold War period, particularly as part of the law/justice reform package that has accompanied Western development assistance to developing countries.[17] To attain its objectives, access to justice is re-packaged to take into account the desire for a form of 'justice' which may or may not be possible through the existing legal system, and therefore may involve a substantial reform of the actual system rather than merely focusing on the mechanisms for utilising it. In this regard, the services may be carried out by the formal system of justice – the judiciary – or where that is found to be inadequate, through alternative dispute resolution (ADR) mechanisms which may include the judiciary or other bodies.[18]

Access to justice employs various methods, both within and outside the formal justice system, to promote qualitative justice for disadvantaged groups. One of the effective means for realising this goal is through the ADR process.

However, the work reveals that there are some situations where the ADR process perpetuates the *status quo* and does not lead to expanding the frontiers for accessing justice, particularly for women.

This is as a result of the fact that the originators of the access to justice concept failed to take into account the fact that the ADR process is not new to developing countries. It was the sole means for dispute resolution in pre-colonial Africa until colonialism, with its *mission civilisatrice*, came to set it aside and replace it with what is known today as the "formal legal system." Even where it was allowed to function alongside the formal system, it was pejoratively termed as the "indigenous justice system," and declared inferior to the formal system. However, having recognised weaknesses in the formal justice system, legal/judicial reformers invented the ADR system which incidentally contains key doctrinal and procedural

[14] UNDP, Access to Justice: Practice Note (Draft 1), 8/3/2004 at 3.

[15] *World Bank, A Framework for Strengthening Access to Justice in Indonesia*, available at siteresources.worldbank.org/INTJUSFORPOOR/Resources/A2JFrameworkEnglish.pdf (Last visited: August 2012). Also, P. Pleasence, A. Buck, et al., Local Legal Need, (Legal Services Research Centre, London, 2001); and, Schetzer L Mullins, J & R. Buonamano, Access to Justice & Legal Needs, A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW. (Background paper) Law and Justice Foundation of NSW, Sydney, 2002, available at http://www.lawfoundation.net.au/report/background (Last visited: August 2012).

[16] *Leonard W. Schroeter, The Jurisprudence of Access to Justice: From Magna Carta to Romer v. Evans via Marbury v. Madison*, available at http://www.seanet.com/~rod/marbury.html

[17] DFID, Justice and Poverty Reduction: - Safety, Security and Access to Justice for All (London, UK (2000); and, Cynthia Alkon, *Lost in Translation: Can Exporting ADR Harm Rule of Law Development*? 2011 J. DISP. RESOL. 165 (2011)

[18] R. Sudarshan, *Rule of Law and Access to Justice: Perspectives from UNDP Experience*, available at http://www.undp.org/oslocentre.access.htm (Last visited: August 2012). Also, M. T. Ladan, *Towards an Effective African System for Access to Justice on Environmental Matters*, 23-24 Ahmadu Bello University Law Journal, 17 (2005-06).

processes inherent in the once denigrated pre-colonial justice system.[19] This ADR process is re-introduced as a "foreign package" that is meant to cure the woes plaguing the formal justice system in developing countries as well. In the view of the reformers, the formal justice system in the developing world is plagued by corruption, inefficiency, case backlog, lack of mechanisation, etc.[20] Yet to do so without recognising the cultural misfit of the formal system of justice from the time of its introduction and how this has influenced the state of the justice system in the former colonies today; but to introduce a supposedly "new" concept as the panacea smacks of double standards. Therefore, the ADR process cannot be wholly adopted and incorporated into the legal system of developing countries and Africa in particular without appreciating the practice's historical antecedents in African politics and culture. Moreover, the concept, as it was packaged and delivered to Africa did not unpack and address the innate weaknesses in the system that dealt injustice to women in these Western countries. Therefore, the paper contends that resorting to ADR without addressing these fundamental stumbling blocks inherently pre-determined by patriarchal notions and biases will not allow for the ADR process to be transformed in an instant into a useful tool to promote access to justice for women.

Moreover, it has been contended that the access to justice/ADR concept is fundamentally geared towards promoting the "market democracy" agenda of developed economies which aims more at ensuring the efficacy of the democratic structure to promote market efficiency for foreign investors.[21] The realisation of this goal is linked to judicial, legal and justice reforms with the goal of ensuring efficiency in the delivery of justice through reduction of case backlog and adjudication time, among others. Therefore, the attention of access to justice or the ADR process to address women's rights issues is perfunctory or tangential to the principal motive for introducing the practice in Africa.

Be that as it may, it is the contention of the paper is that the fact cannot be disputed that Ghana and other African countries are in need of legal and judicial reforms. Therefore, it is up to African leadership (inclusive of civil society and traditional authorities) to re-negotiate the terms of these packages to ensure that it brings real benefit to the ordinary person on the ground, particularly marginalised groups such as women. Leadership will also do well to recognise the fact that laws of the land lends support to some modicum of reforms, at least. For example, the 1992 Constitution provides some guide – it prohibits all cultural practices that

[19] Centre for Democracy and Governance, *supra* note 4.

[20] Linn A. Hammergren, Envisioning Reform: Improving Judicial Performance in Latin America (Pennsylvania State University Press, 2007); Petter Langseth & Oliver Stolpe, *Strengthening Judicial Integrity against Corruption,* United Nations Global Programme against Corruption, Centre for International Crime Prevention, Office for Drug Control and Crime Prevention, United Nations Office at Vienna, 20 December 2000, for CIJL Yearbook, 2000; and, World Bank, *Judicial Reform for Improving Governance in Anglophone Africa: A Distance Learning Program for Ethiopia, Ghana, Kenya, Nigeria, Tanzania and Uganda* (October–November, 2003) available at http://info.worldbank.org/etools/docs/library/108516/BrochureJRAfricaDLP.pdf (last visited: March 2013)

[21] Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, 253-300 David Trubek & Alvaro Santos, eds., The New Law and Economic Development: A Critical Appraisal (New York: Cambridge University Press 2006).

dehumanize or are injurious to the physical and mental wellbeing of a person.[22] At the same time, the National House of Chiefs of Ghana, as custodians of the nation's culture, are empowered by the Constitution to "undertake an evaluation of traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful."[23] Therefore, chiefs, among others, have a critical role to play to weed out some of the weaknesses that this work will identify as affecting the ability of the ADR to reap its maximum potential for women.

WOMEN AND ACCESS TO JUSTICE

Women, like any recognised marginalised entity, deserve access to justice to help address and redress the generations of injustice meted out to them in various facets of life, be it in marriage, inheritance, widowhood rites, access to land and access to reproductive choices. In this regard, the courts or other dispute resolution fora are expected to serve as the vehicle for remedying the disadvantaged status of women and ensuring the realisation of the recognised rights.

For this objective to be realised, article 15 of the Convention on the Elimination of Discrimination against Women (CEDAW),[24] for example, demands, among others, that "States Parties shall accord to women equality with men before the law."[25] Paragraph 2 thereof further provides that

> States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall … treat them equally in all stages of procedure in courts and tribunals.

Also, article 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol) recognises equality before the law between men and women, it also stipulates that States Parties shall take all appropriate measures to ensure effective access by women to judicial and legal services, including legal aid. The provision also calls for support for local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid; and that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights.

Among the processes which have been recognised by international law as likely to promote access to justice include the following:

i) The right to procedural fairness;
ii) The right to a hearing without delay;
iii) The right to legal advice and legal representation;
iv) Equal access to the courts;
v) Equality before the courts;
vi) The right to a competent, independent and impartial tribunal (established by law);
vii) The right to a public hearing; and

[22] Article 26(2) of the Ghanaian Constitution.
[23] Article 272, *ibid*.
[24] Adopted by the United Nations General Assembly on 18 December 1979 and entered into force as an international treaty on 3 September 1981.
[25] Paragraph 1 of Article 15.

viii) The right to have the free assistance of an interpreter (if required).[26]

However, implementation of norms in order to promote qualitative justice has been a challenge. From a gender perspective, the application of the rules and procedures as well as the substantive law in the formal justice system continues to favour men over women. As noted by Her Ladyship Chief Justice Georgina Wood:

> At the heart of the common law, civil justice system is the well known adversarial system of LITIGATION. The general notion is that in spite of its obvious advantages, this traditional or convention approach to dispute resolution has been found to be inappropriate for the resolution of a number of disputes, notably, interpersonal disputes, involving women and children.[27]

This situation is attributed to the fact that access to justice for women has been affected by the historically inferior and subordinated role and status constructed for them by an inherently patriarchal system.[28] Laws, or for that matter social norms, have been the vehicle for the perpetuation of this subordinate status and role for women. The language, logic and structure of the law are male-created and bolster male values. By presenting male characteristics as a "norm" and female characteristics as deviation from the "norm" the prevailing conceptions of law have reinforced and perpetuated patriarchal power.[29]

Feminist legal scholarship has helped to unveil the law's instrumental role in fostering women's historical subordination by questioning and debunking certain supposedly infallible notions attributed to law.[30] Yet, the injustices and discriminatory norms prevail.

Apart from the formal legal system, the indigenous system – derived from the local laws, norms and practices of each ethnic community – also possesses these gendered components whose application have resulted in gendered implications for African women. These elements have featured in areas of law such as marriage and divorce, inheritance, right of access to land, employment, rape, domestic violence,[31] etc.

As noted by an African feminist scholar,

> Formal laws and cultural norms are modes of social control that play an important role in constructing social arrangements. Formal law may operate to give a natural and immutable appearance to dominant articulations of custom, and custom may be invoked to legitimize formal law.[32]

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[26] Tilda Hum *et al*, *supra* note 11.

[27] Justice Georgina Wood, *Non-adversarial Conflict Resolution*, 77 at 77 (M. Ruenger, ed., Access to Justice Paper 9. Conference Proceedings at the West African Regional Conference on Legal and Judicial Reform to Promote Improved Women's Rights in Land and Family Law within Plural Legal Systems, Accra (2004).

[28] See eg., Eudine Barriteau, ed. Confronting Power, Theorizing Gender: Interdisciplinary Perspectives in the Caribbean (UWI Press, Kingston, 2003).

[29] Karen J. Maschke, ed., Feminist Legal Theories (Garland Publishers, 1997).

[30] Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (Harvard Univ. Press, Cumbreland, Rhode Island, U.S.A. 1993).

[31] Domestic violence in this context means an act which constitutes a threat or harm to a person under a country's criminal code and which may result in physical, sexual, economic, emotional or other form of abuse or in any way endanger the safety, health or well-being of a person. The work concedes that gender-based violence is criminal in nature. However, it recognises the fact that less serious acts of violence (misdemeanour) may be resolved through ADR. In the context of this work, attempts at resolution of conflict between the sexes through ADR would refer to the misdemeanour type.

[32] Celestine Nyamu, How should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries? reprinted in Cynthia G. Bowman and Akua Kuenyehia, Women and Law in Sub-Saharan Africa, 147 at 150.

In reality, the formal justice system, while claiming to reform indigenous cultural practices which are considered 'repugnant to natural justice, equity and good conscience'[33] did not actually seek to expunge some aspects of the local laws which worked injustice for the marginalised and oppressed.[34]

Thus, it ended up upholding customary legal principles which debase and dehumanise women and do not respond to their concerns. Moreover, some of the proposed solutions are ineffective. For example, in the Ghanaian case of *Quartey v. Martey*[35] which involved the rights of a widow to the property of her deceased husband, Ollennu J held that

> [By] customary law it is the domestic responsibility of a man's wife and children to assist him in the carrying out of the duties of his station in life, eg., farming or business. The proceeds of this effort of a man and his wife and/or children, and any property which the man acquires with such proceeds, are by customary law the individual property of the man. It is not the joint property of the man and his and/or children. The right of the wife and children is a right to maintenance and support from the husband and father.

In Ghana, the process of recognising the contribution of a wife to the family property has taken a tortuous and frustrating turn for women.[36] However, finally, in *Boafo v. Boafo*,[37] the court found that the property which was at the centre of the divorce suit was acquired jointly and as such an equitable sharing of the properties was applied to distribute it between the parties. This case was followed in the Supreme Court of Ghana case of *Mensah v. Mensah*[38] which has recognised and granted equality to women over sharing of marital property. Among others, the court held:

> We are therefore of the considered view that the time has come for this court to institutionalise this principle of equality in the sharing of marital property by spouses, after divorce, of all property acquired during the subsistence of a marriage in appropriate cases. This is based on the constitutional provisions in article 22 (3) and 33 (5) of the Constitution 1992, the principle of Jurisprudence of Equality and the need to follow, apply and improve our previous decisions in *Mensah v Mensah* and *Boafo v Boafo* already referred to supra. The Petitioner should be treated as an equal partner even after divorce in the devolution of the properties. The Petitioner must not be bruised by the conduct of the respondent and made to be in a worse situation than she would have been had the divorce not been granted. The tendency to consider women (spouses) in particular as appendages to the marriage relationship, used and dumped at will by their male spouses must cease. Divorce, as Lord Denning stated long ago, should not be considered as a stigma.[39]

In addition, there have been significant modifications of the law to ensure better protection of the rights of women. These include the special recognition of

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[33] Taslim O. Elias, The Judicial Process in Commonwealth Africa (Legon, Ghana: University of Ghana Legon, FEP International, 1977).
[34] See details below.
[35] [1959] GLR 377.
[36] Eg., in *Yeboah v. Yeboah* [1974] 2 GLR 114 and *Abebreseh v. Kaah* [1976] 2 GLR 46. In the latter, it was held that joint ownership of property by person not connected by blood was not a principle of customary law though customary law did not prohibit joint-ownership.
[37] Eg., *Boafo v Boafo* [2005-2006] SCGLR 705.
[38] SC Civil Appeal No. J4/20/2011 22ND February, 2012
[39] *Ibid* at 18 and 19.

women's rights in the 1992 Constitution of Ghana,[40] as well as the criminalisation of the practice of Female Genital Mutilation (FGM)[41] and the customary or ritual enslavement of any kind, including the trokosi practice.[42] One can also mention amendments to the country's rape laws and the enactment of the Domestic Violence Act, 2007 (Act 732). The coming into force of these legislation and the combined efforts of government and civil society organisations have helped to raise awareness on women's human rights such that there are more women ready to seek redress for abuses than before.[43]

Similar developments have been recorded in other African countries. For example, Ethiopia passed a revised Family Law Code in 2000 to bring its laws on the subject of consent to marriage, equality, among others, to be in line with its Constitution and international commitments.[44] Sierra Leone and Uganda also enacted their domestic violence legislation in 2007 and 2010, respectively. And in Liberia, the penal code was amended to criminalise rape to be followed by the establishment of a special court to try cases of sexual violence.

In spite of these progressive developments, significant challenges remain in the way of women in seeking to access justice. For instance, in the case of Liberia, since the inception of the special sexual violence court in 2009, only 18 cases of rape, resulting in 10 convictions, have been tried there. Also, in Sierra Leone, by the end of 2010, a single person had been prosecuted.[45]

In the case of Ghana, the Shadow Report prepared by Women in Law and Development in Africa (WilDAF) to the Committee on the Elimination of Discrimination against Women[46] identifies some of these fundamental concerns. The Report makes reference to the large backlog of cases which have not been disposed of and concludes that "[t]his discourages and intimidates women, especially rural women, from seeking redress in court. Many people, including rural women, who have grievances therefore may not seek redress at all and would rather resort to the use of unorthodox means like employing militia or 'Macho' men (strongmen) to claim the justice which they think is being denied them by the formal legal system."[47]

The Report also notes that problems associated with women's access to justice are related to the limited scope of legal aid services, lack of resources to the state-run legal aid system, inadequate number of lawyers outside of the cities to assist needy women and a general apathy by women to the court system because of

[40] Among others, article 27 thereof.
[41] Section 69A(1) of the Criminal Code, 1998 (Act 554) which reads thus: "Whoever carries out female genital mutilation and excises, infibulates or otherwise mutilates the whole or any part of the labia minora, labia majora and the clitoris of another person commits an offence, and is liable on summary conviction to imprisonment for a term of not less than five years and not more than ten years.
[42] Section 314A of the Criminal Offences Act, Act 29, 1998.
[43] WiLDAF, *Shadow Report to Ghana's Third, Fourth & Fifth Reports on the Implementation of the CEDAW in Ghana* (Coordinated by WiLDAF- Ghana, June 2006 at 2) available at www.iwraw-ap.org/resources/pdf/Ghana_SR.pdf. These reports are the latest to be ones sent by Ghana to CEDAW.
[44] Federal Negarit Gazetta Extra Ordinary Issue No. 1/2000. The Revised Family Code Proclamation No. 213/2000
[45] Domestic violence is biggest threat to west Africa's women, IRC says, THE GUARDIAN, May 22, 2012, available at http://www.guardian.co.uk/global-development/2012/may/22/domestic-violence-west-africa-irc). Last visited January 28, 2012).
[46] WilDAF, *supra* note 41.
[47] *Ibid* para 196.

delays, high costs[48] and, generally, their lack of education on their legal rights.

The concluding comments of the CEDAW on Ghana's report responded to some of these challenges. The Committee was "concerned that, although women's access to justice is provided for by the law, women's ability in practice to exercise this right and to bring cases of discrimination before the courts is limited by factors such as limited information on their rights, lack of assistance in pursuing these rights, and legal costs."[49]

It is in this context that Bernard laments:

> While statutory rights grant a modicum of power to the powerless individual, they represent only a starting point for justice. Those rights will remain mere abstractions without tangible, lasting results unless the people dynamics surrounding the legal dispute can be resolved in a way that invokes the support of the community.[50]

LEGAL TRANSPLANTATION IN AFRICA AND ITS IMPACT ON WOMEN'S ACCESS TO JUSTICE

The formal justice system owes its origins to the common and civil law traditions as a means by which such traditions regulate conduct and protect the rights of citizens through the adversarial process of litigation.[51] These traditions are reinforced by the Western ontological focus on the individual as an end in him/herself who is endowed with civil and political rights and freedoms. Where these rights are interfered with, the justice system entitles the individual to a legal recourse to vindicate his/her rights and claim for remedies.[52]

On the other hand, African societies had their peculiar legal traditions, which Glenn, for example, refers to as the chthonic tradition.[53] This amalgam of traditions was influenced by the societies' ontology, cosmological outlook and worldviews and underpinned by systems of norms and rules known as customary laws, which defined their peculiar notion of rights.[54] The rights concept featured a workable blend of individual and community-based rights.[55] One principal way in which this individual-community notion of rights found expression was through the non-adversarial process of dispute resolution.

However, this traditional non-adversarial means of dispute resolution was branded as antiquated by the colonial powers and subsequently discarded or made to apply only among the natives in relation to application of personal laws in

[48] WiLDAF, *supra* note 41 at 2.

[49] Paragraph 15 of Concluding observations of CEDAW in relation to Ghana's Combined third, fourth and fifth periodic reports to CEDAW.

[50] Phyllis E. Bernard, *Begging For Justice? Or, Adaptive Jurisprudence? Initial Reflections on Mandatory ADR to Enforce Women's Rights in Rwanda* 7 CARDOZO J. OF CONFLICT RESOL., 325 at 326, 327 (2006).

[51] H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD (New York, Oxford: Oxford University Press, 2004); and, VAN CAENEGEM, BIRTH OF THE ENGLISH COMMON LAW (Cambridge, 1988).

[52] LEON TRAKMAN, REASONING WITH THE CHARTER (Toronto/Vancouver: Butterworths, 1991).

[53] Glenn, *supra* note 49.

[54] K. Appiagyei-Atua, *Contribution of Akan Philosophy to the Conceptualisation of African Notions of Rights*, (July 2000) CONSTITUTIONAL AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA, 165.

[55] Timothy Fernyhough, *Human Rights in Pre-Colonial Africa* (RONALD COHEN, ED., HUMAN RIGHTS AND GOVERNANCE IN AFRICA, 42 (University Press of Florida, 1993).

'native courts.'[56] In the case of the Gold Coast (now Ghana), the Native Jurisdiction Ordinance (1883) was enacted by the British to enable local chiefs to exercise some adjudicatory functions within their communities. But largely, the colonial authorities imposed its system of justice over the pre-colonial/customary law judicial system they came to meet in Africa and established it as the formal judicial system.[57] For example, the British imposed its legal system on Ghana through the Bond of 1844 which it signed with some coastal chiefs. The Bond reads as follows:

> Whereas the power and jurisdiction have been exercised for and on behalf of Her Majesty the Queen of the Great Britain and Ireland, within divers countries and places adjacent to her Majesty's forts and settlements on the Gold Coast, we the chiefs of countries and places so referred to adjacent to the said forts and settlements, do hereby acknowledge that power and jurisdiction, and declare that the first objects of law are the *protection of individuals and property*. Human sacrifices and other barbarous customs, such as Panyarring, are abominations and contrary to law. Murders, robberies and other crimes and offences will be tried and inquired of before the Queen's judicial officers and the chiefs of the district, *molding the customs of the country to the general principles of British law*. [Emphasis added].[58]

Through this means, not only was the judicial system of the affected communities annexed by the British, the Bond eventually led to the annexation and colonisation of the Gold Coast which later became Ghana at the time of independence on 6th March 1957.

At independence, the traditional system of dispute resolution was not very much encouraged. For example, the Native Jurisdiction Ordinance (1883) was repealed. Also, the Arbitration Act, 1961 (Act 38), did not give space for customary forms of arbitration, unlike the new law.[59]

CHALLENGES WITH THE FORMAL SYSTEM OF JUSTICE

The formal justice system has not been without its inherent weaknesses and pitfalls. It is observed, among others, that the adversarial litigation process associated with it is not user-friendly having been influenced by "abstract, rationalistic, and universalistic theories of justice in the Eurocentric justice tradition"[60]; and, by its over-reliance on rules of procedure and evidence,[61] Also, its "win or lose" approach of dispute resolution is said to disrupt social cohesion. In addition, the system is

[56] Simon Robins, *A place for tradition in an effective criminal justice system. Customary justice in Sierra Leone, Tanzania and Zambia,* Institute for Security Studies Policy Brief Nr 17, October 2009; also, Kwame Gyekye, An Essay on African Philosophical Thought: The Akan Conceptual Scheme (Cambridge: Cambridge University Press, 1987).

[57] T. O. Elias, *supra* note 31 at 101.

[58] Done at Cape Coast Castle, before his Excellency the Lieutenant Governor on this 6th day of March, in the year of our Lord, 1844.

[59] See a discussion of the new law below.

[60] Craig Proulx, Reclaimingaboriginal Justice, Identity and Community (Purich Publishing, 2003).

[61] Raymond Atuguba, *Access to Justice, Formal and Informal: Definitions, Experiences, Ideas, Convergences and Non-Convergences*. Paper Presented at a CUSO International Seminar under the theme: *Experiences of Improvements in Access to Justice – Inter-legality, Restorative Justice, Multicultural Societies, Legal Pluralism, Gender and Human Rights*. (Copy on file with author).

expensive and therefore tends to privilege the rich over the poor.[62]

Specific challenges faced by the formal justice system in the case of Ghana include the presence of under-resourced public protection institutions such as the Department of Social Welfare and the Commission for Human Rights and Administrative Justice (CHRAJ). There is also the problem of high hospital bills during the examination of victims and delays in the hearing and enforcement of cases in the courts. Additionally, there is lack of institutional presence in some remote areas of the country.[63] The law and its application is also said to be beyond the reach of understanding by the ordinary person. They therefore feel estranged from the process of litigation.

These weaknesses in the formal system of justice occasioned the introduction of access to justice as an important means for the majority of people who are denied the opportunity to use the courts on an equitable basis to obtain justice, particularly through ADR.[64] Thus, a legal commentator notes:

> We are living in a time of social and legal evolution and it appears as if a single civil adversary court style process will not be adequate to satisfy all of the desiderata of a good justice system. With specialisation in some areas…and varying claimant preferences in others… it certainly appears that a modern civil justice system ought to permit some menu of choices for particular kinds of processes.[65]

Thus, with time, ADR did not only take stronghold in the justice system of Western states but also became an exportable product to developing countries to help promote access to justice, as a means of fostering the rule of law, human rights and ultimately peace and development.[66]

ADR IN AFRICA

In Africa, ADR mechanisms have been incorporated within the courts and tribunals.[67] They are now "standard in contemporary African legislation."[68] As noted by Bernard, "[i]f English is the lingua franca of commerce, then arbitration is the procedure franca."[69]

[62] *Ibid.* Also, Albert Fiadjoe, Alternative Dispute Resolution: A Developing World Perspective (Cavendish, 2004). See also, Paragraph 196 of Ghana's Combined Third, Fourth and Fifth Periodic Reports to the Committee on the Elimination of Discrimination Against Women (CEDAW/C/GHA/3-5).

[63] Senyo M. Adjabeng, *Gender Justice in Ghana through Court-Connected ADR* (July 2009), available at www.mediate.com/articles/adjabengs4.cfm (last visited October 2012)

[64] UNDP, *Access to Justice: Practice Notes* (2004), available at http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/PracticeNote.pdf (Last visited: October 7, 2012).

[65] Carrie Menkel-Meadow, *Institutions of Civil Justice*. Paper prepared for the Scottish Consumer Council Seminar on Civil Justice (15 December 2004), available at www.scotconsumer.org.uk/civil. cf Law Reform Commission *supra* note 25. Also, Miller & Sarat, Grievances Claims and Disputes: Assessing the Adversary Culture, 15 Law & Soct'y. Rev. 525 (1980-1981); Genn & Paterson, Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law (Hart, 2001).

[66] Cappelletti, *Alternative Dispute Resolution Processes within the Framework of the World Wide Access to Justice Movement*, 56 The Mod. L. Rev. 287(1993); and Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 Harv. Negot. L. Rev, 295 (Spring 2006).

[67] E. Uwazie, *supra* note 3; Bernard *supra* note 48; A. Cohen, *supra* note 64.

[68] P. Bernard, *supra* note 38 at 339

[69] *Ibid.*

A few examples would suffice. In Rwanda, for example, the *gacaca* concept, though not without controversy, was used to settle less contentious cases related to the genocide which the country experienced in 1994.[70] Originally, *gacaca* was used to settle village or familial disputes. They were informal means of solving disputes around issues such as theft, marital issues, land rights and property damage. The *gacaca* were constituted as village assemblies presided by the elderly which allowed for the entire community to contribute to providing evidence or voicing out their opinions. The trials were meant to promote reconciliation and justice of the perpetrator among family, friends and neighbours.[71]

Also, Rwanda's post-genocide Constitution recognises the creation of Mediation Committees.[72] Following the enactment of the Mediation Committee Act, 2004, the Ministry of Justice of Rwanda focused ADR on civil and family cases, misdemeanours and some felonies not directly identified with genocide. This is particularly applied where traditional values and traditional reconciliation methods might lead to an acceptable resolution, including in particular those involving the land and property rights of women and children.[73]

In Nigeria, the Constitution and other laws recognise ADR. Among others, section 19(d) of the Nigerian Constitution provides among its foreign policy objectives, respect for international law and treaty objectives as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication. Also, there is the Arbitration and Conciliation Act, Cap. A18.[74] One can further mention the Federal High Court Act, Cap. F12, LFN 2004 section 17 of which stipulates: "[i]n any proceedings in the Court, the Court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof." Further reference can be made to the Matrimonial Causes Act, Cap. M7, LFN 2004, among others.[75] Also, with reference to environmental matters, where an environmental impact assessment is likely to have a negative effect on the environment and public concern is raised on the subject, the issue will be subjected to mediation, among others.[76]

One can make further reference to Ethiopia. Among others, the 1960 Ethiopian Civil Code (Civil Code) provides for conciliation,[77] compromise[78] and arbitration[79].

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[70] *Human Rights Watch, Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts, May 2011*, available at http://www.hrw.org/sites/default/files/reports/rwanda0511webwcover.pdf

[71] Jeevan Vasagar, "Grassroots justice". *The Guardian* (London) (2005-03-17).

[72] Rwandan Constitution Title IV, Ch. Five, art. 159. The Mediation Committee Act, ch. III, section one, article 7 and Section Two, art. 8. Rwandan Constitution envisions mediation and arbitration to help re-articulate, rebuild the family around traditional values that have been overlooked, trampled over during the years of violence and civil strife. P. Bernard, *supra* note 48.

[73] P. Bernard, *supra* note 48.

[74] Laws of the Federation of Nigeria (LFN), 2004.

[75] United Nations Office on Drugs and Crime, *Training Manual on Alternative Dispute Resolution and Restorative Justice*, (October 2007), available at http://www.unodc.org/documents/corruption/publications_adr.pdf (last visited: January 24, 2013).

[76] Environmental Impact Assessment Act, Cap. E12, LFN 2004, Section 29:

[77] See eg., articles 3318 (1), 3319 and 3320 of The Ethiopian Civil Code.

[78] Once a compromise is properly drawn and accepted by the parties, the Civil Code declares that "[a]s between the parties, the compromise shall have the force of res judicata without appeal" (see Article 3312(1)) thereof.

[79] The Civil Code recognizes the procedure of arbitration to resolve cases out of the formal courts of law. The provisions of the Civil Code (Articles 3325—3345) provide the details on arbitration.

Furthermore, the Labour Proclamation No.377/2003, a law enacted by the federal government that recognizes and protects the rights of employees and employers and governs their relationship, provides for the possibility of conciliation between parties in a labour dispute. Also, the Institution of the Ombudsman Establishment Proclamation No.211/2000 engages in amicable settlement of disputes through informal means.[80] The Ethiopian Bar, on its part, has set up the Ethiopian Arbitration and Conciliation Center as an independent non-profit organization to provide, among others, ADR services for the settlement of disputes business, labor and family relations.[81] In the pre-colonial era, Ethiopians turned to the traditional *shimangele* (elder) for conciliation of most civil or family matters.

GHANA AND ADR

In the case of Ghana, the ADR programme was officially launched following the creation of an ADR Task Force in 2001 by the then Chief Justice, Justice Wiredu, to identify the parameters for incorporating ADR into the court adjudication process.[82] In August, 2005 the programme was institutionalized as part of the justice delivery system. It is administered by a National ADR Desk under the Judicial Reforms, Project Development and Implementation Unit of the Judicial Service.

The ADR programme is now given formal legislative recognition with the enactment of the Alternative Dispute Resolution Act, 2010 (Act 798). The Act recognises the following forms of ADR processes – arbitration, mediation and customary arbitration as well as other voluntary ADR procedures. It also establishes the ADR Centre whose functions are provided under section 115(2) of the Act to include providing facilities for the settlement of disputes through arbitration, mediation and other voluntary dispute resolution procedures; and, a list of arbitrators and mediators to persons who request for the services of arbitrators and mediators.[83] An award by an ADR process shall be honoured and enforced in the same manner as the decision of a court.[84]

The ADR programme is currently active in most district courts and is expected to reach all district, circuit and high courts across the country by 2013. It is also part of the *modus operandi* of the fast track courts system in Ghana, provided for under order 58 of the Courts Act, 1993 which, among others, requires the court to conduct mandatory pre-trial conferences within 30 days of written arguments. Mediation is handled by judges who are trained mediators. They would recues themselves if mediation fails and the case is referred to trial. According to Cofie, mandatory mediation has proven successful in keeping the caseload low. For example, she provides statistics to show that "between March 1, 2005 and July 31, 2006, of 403 cases were referred to pre-trial conference, more than one in five (86) was resolved

[80] Also, S. M. Gowak, *Alternative Dispute Resolution in Ethiopia - A Legal Framework*, 2 African Research Review, 265-285 (2008).
[81] Girmachew A. Aneme, *Introduction to the Ethiopian Legal System and Legal Research* (August/September 2010), available at http://www.nyulawglobal.org/globalex/Ethiopia.htm (last visited: January 7, 2013)
[82] *Court-Connected ADR – Enhancing Access to Justice in our Communities*, available at http://www.judicial.gov.gh/index.php?option=com_content&task=view&id=141&Itemid=158 (last visited: July 22, 2012)
[83] Section 115(5)(a) and (d) of Act 798.
[84] See eg., section 82 and 111 of Act 798.

there, with 126 still pending. With more than 200 cases being disposed of at trial or with default judgment, this amounts to a clearance rate of more than 40% for the total 665 cases filed within 17 months.[85]

In Ghana, both the formal and non-formal processes of ADR are recognised. The former is connected to the courts, such as the court-annexed ADR employed by the Commercial Division of the High Court.[86] Also, quasi-judicial bodies like the Commission on Human Rights and Administrative Justice (CHRAJ),[87] the Judicial Committees of the Traditional Councils,[88] the Regional House of Chiefs[89] and the National House of Chiefs[90] engage in formal ADR.

The latter is connected with the non-formal, indigenous non-court-annexed ADR processes. Among the traditional mechanisms applied in Ghana is the family-based dispute resolution that seeks to resolve inter-personal disputes among family members using the family head (*abusuapanin*) or other family members as arbitrators. Another variant is the chieftaincy-based ADR where chiefs and other community leaders, as part of their general stewardship and superintendence over their people, resolve interpersonal disputes including divorce, child custody and land disputes.[91] These two types of traditional ADR have their origin and basis in the means adopted by traditional societies in the pre-colonial era to resolve disputes. Chiefs, therefore, informally, remain, the "tribunal of preference" for most citizens, especially in the rural areas.[92]

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[85] Sandra Cofie, *Ghana-Establishment of the Commercial Court*, Smart Lessons, December 2007, available at http://www.doingbusiness.org/~/media/FPDKM/Doing%20Business/Documents/Reforms/Case-Studies/Smart-Lessons/DB07-SL-Ghana-Commercial-Court.pdf (last visited: January 12, 2012)

[86] Under this arrangement Article 139(4) of the 1992 Constitution empowers the Chief Justice to create divisions of the High Court. A commercial court was thus created in March 2005.

[87] Set up under Chapter 18 of the Constitution, with its enabling act, the Commission on Human Rights and Administrative Justice Act, 1993 (Act 456). CHRAJ is set up to perform a three-fold mandate – to promote and protect human rights and fundamental freedoms as enshrined in the Constitution; to promote administrative justice and deal with corruption in the country. One of the functions of CHRAJ is to take appropriate action to call for the remedying, correction and reversal of instances specified in paragraphs (a), (b) and (c) of this clause through such means as are fair, proper and effective, including - (i) negotiation and compromise between the parties concerned" (Article 218(d)(i) of the Constitution.

[88] A traditional council is made up of chiefs in a traditional area in a particular region of the country and headed by the Paramount Chief of the traditional area.

[89] A Regional House of Chiefs is made up of the paramount chiefs in a region and other members as may be determined by an Act of Parliament. It is set up under the Constitution of Ghana to, among others, "advise any person or authority charged under this Constitution or any other law with any responsibility for any matter relating to or affecting chieftaincy in the region." (article 274(3)(b). The original and appellate jurisdiction of an RHC is performed by its Judicial Committee.

[90] The National House of Chiefs is made up of 5 paramount chiefs from each of the 10 regions of the country. Among its functions, as provided under article 272(a) of Ghana's 1992 Constitution is to "advise any person or authority charged with any responsibility under this Constitution or any other law for any matter relating to or affecting chieftaincy." The Judicial Committee of the NHC serves as the appellate jurisdiction to hear appeals from decisions by the RHC. It also has original jurisdiction to deal with other matters relating to chieftaincy (article 273 of the Constitution).

[91] *Ibid.*

[92] Department of Justice Republic of South Africa, *Draft Policy Framework for the Alignment of the Traditional Justice System with the Constitution*, at 16 (available at www.info.gov.za/view/DownloadFileAction?id=97257).

ADR AND JUSTICE FOR WOMEN: MERITS AND DEMERITS FOR WOMEN

i. The Formal System

Among the benefits of ADR is that it reduces the cost of dispute resolution for the parties and the public purse. ADR also leads to more harmonious relations and more varied and responsive settlements than the adversarial, winner-takes-all premise of civil litigation. Further, ADR has added attractions for the parties, such as confidentiality, flexible procedure, choice of decision-maker, focus on finding workable solutions to problems and fixed timelines for hearings and decisions.[93]

As a result of the benefits derived from ADR and the challenges embedded in the formal litigation process, it is not difficult to account for the dramatic rise of ADR, particularly among women.[94]

However, the ADR, both from the formal (court-annexed) and traditional perspectives, has its own inherent challenges, which bodes negative implications on access to justice for women in general and those in Africa in particular.[95]

Phyllis Bernard, for instance, is of the view that ADR has not proven suitable for women in poverty or those who are targets for domestic violence. The reason is that they are placed in a situation of vulnerability which affects their ability to negotiate their legal rights in any context, "whether in Rwanda or the U.S."[96]

Bernard further refers to Trina Grillo and writes that the latter saw palpable dangers for women when mediation "was rushed." That is to say, where the woman was unrepresented by counsel and where the mediator also had authority to make recommendations to the judge concerning child custody and the parents were unable to reach a mediated settlement.[97] Bernard further refers to Penelope Bryan who has also questioned the role of ADR in dealing with domestic violence, which invariably has the woman as the victim. To deal with this problem Bryan calls for power re-calibration between the sexes or allowing for attorneys to negotiate on behalf of their clients in such situations.[98]

It is also said that ADR stabilizes social relations by focusing on harmony and consensus and failing to provide coercive power to redress inequities experienced

[93] Dennis Otieno Oricho, *Understanding benefits of alternative dispute resolution (ADR) in the work place mediation,* 2 JOURNAL OF LAW AND CONFLICT RESOLUTION, 011-019 (January, 2010).

[94] Lorne Sossin, *ADR and the Public Interest*, available at http://cfcj-fcjc.org/docs/2006/sossin-en.pdf (Last visited August, 2010).

[95] See among others, Ann Cardillo, *Progressive or Repressive? An Analysis of Mediation from the Perspective of Feminist Legal Theory*, Paper presented at the annual meeting of the International Communication Association, Sheraton New York, New York City, NY, (2008) http://www.allacademic.com/meta/p12596_index.html (Last visited: April 12, 2008); Patricia E. Edwards, *Gender Issues in Family Law: A Feminist Perspective*, available at www.blackwell-synergy.com/doi/pdf/10.1111/j.174-1617.1997.tb00485.x?cookieSet=1, (Last visited: April 12, 2008); Sara Cobb, *The Domestication of Violence in Mediation,* 31 LAW AND SOCIETY REVIEW 397-440 (1997).

[96] P. Bernard, *supra* note 48 at 329.

[97] Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545 (1991).

[98] P. Bernard, *supra* note 48 at 329 and Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992). See also P. E. Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 DENV. U. L. REV 931 (1997); and *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV, 1153 (1999).

by the disadvantaged.[99] Further, it is observed that mediation unassumingly reduces the threat to patriarchy by returning men to their former dominant positions.[100]

Another weakness with the ADR process is that while judicial decision-makers are public officials who are accountable to the people they serve on the principles of judicial independence and integrity, ADR may involve a variety of public and private adjudicators with a wide spectrum of interests and motives. As a result, the rulings passed are likely to reflect biases and beliefs of a gendered society and yet some of these actors may remain largely unaccountable for their actions.

Again, there is the problem with power imbalances in relation to settlement through ADR.[101] In relation to that, while justice is supposed to be transparent, with the ADR process, dispute resolution is removed from the public view. The lack of transparency in most cases work injustice against women who are more often than not coaxed into accepting settlements that may not work in their interests.

ii. Traditional/Informal Context

Like the formal, in the traditional ADR system, advantages and disadvantages exist in the use of ADR to enhance women's rights or promote access to justice for women.

In terms of the advantages, generally, the informality of traditional chiefly tribunals "makes them user-friendly and public participation makes the process popular in the sense of people regarding the process as their own, and not something imposed from above."[102]

In addition, according to WilDAF, the introduction of a formal ADR mechanism by the Judicial Service of Ghana has helped to widen the scope of access to justice for women.[103] Women use the local justice mechanism because of its basis in their culture and the fact that it is a familiar and known concept to them. Its procedures also allow for flexibility. Proximity is another key factor as it saves particularly rural women precious time that they could use working on their farms.

In addition, Senyo notes:

> Many women and children have assessed [sic] justice through Court-connected ADR in District Courts across the country [Ghana] and have confirmed that the process is indeed helpful. Families have been reunited, marriages have been repaired, children have been saved and their future secured and Land Lords and their vulnerable tenants have patched up beautifully in unity, resolving to live together in peace. These examples have all been made possible by the introduction of Court-Connected Mediation in the District courts in communities to assist the vulnerable especially to access justice more speedily and affordably.

On the other side of the coin, however, it is noted, *inter alia*, that

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[99] Boaventura De Sousa Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, 267 (Richard L. Abel, ed., The Politics of Informal Justice: The American Experience (Vol. 1).

[100] P.E. Bryan, "Killing Us Softly" *supra* note 96 at 444; and, Richard Delgado, et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985). Also, see Owen M. Fiss, *Against Settlement*, 93 Yale L. J, 1073 (1984); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 Iowa L. Rev, 889 (1991); and, Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV, 494 (1986).

[101] Ann Cardillo, *supra* note 93.

[102] Department of Justice, Republic of South Africa, *supra* note 90 at 16.

[103] WilDAF, *supra* note 41 at 2.

> Although ADR programs can play an important role in many development efforts, they are ineffective, and perhaps even counterproductive, in serving some goals related to rule of law initiatives. In particular, ADR is not an effective means to ... redress pervasive injustice, discrimination, or human rights problems [and] resolve disputes between parties who possess greatly different levels of power or authority.[104]

Invariably, power imbalance affects women and therefore disadvantages them in the utilisation of ADR.

The challenges plaguing the traditional ADR system and the negative implications they create for women include the fact that the mechanism assigns a minimal and superficial role to women in justice hearings though, ironically, they happen to form the greater number of victims of abuse.[105]

Also, most often it is women who are accused of being responsible for committing 'spiritual crimes' relating to witchcraft, *juju* or *voodoo* and for causing diseases which the community is unable to find scientific diagnosis or answers to.[106] Due to their inability to provide evidence for such offences non-transparent and unscientific means are employed to determine liability. In most cases, the outcome is pre-determined to confirm the guilt of the accused woman.[107] Therefore, a woman going through an informal ADR process with respect to such issues becomes an unacceptable ordeal for her.

Another problem that the indigenous ADR process poses for women is that even in situations where a decision is made in favour of a woman, there are weak or ineffective enforcement mechanisms to compel payment of compensation. If paid at all, it tends to be slow or paid in instalments at the behest of the man.

In addition, often the principles of human rights are relegated to the background in the decision-making process at the traditional ADR level. And since a number of the traditional practices dehumanises women, utilizing such mechanisms can lead to serious rights violations. In relation to this issue, it is noted that in spite of the positive contribution of the Domestic Violence and Victim Support Unit (DOVVSU) of the Ghana Police Service[108] to control domestic spousal abuse it is accused of engaging in contradictory enforcement of the law. For example, it is observed that DOVVSU officers do not take a hard line in treating domestic violence matters as criminal offences, unless grievous bodily harm is caused the woman victim. This approach is probably informed by DOVVSU's philosophy of adopting counselling as a conflict management approach and attempting to reach an amicable settlement of the dispute.[109]

One may further note that application of the ADR process creates a two-tier legal

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[104] Centre for Democracy and Governance, *supra* note 4 at 21.

[105] Julius Ocen, *Can Traditional Rituals Bring Justice to Northern Uganda*? (ACR No. 123, 25-July-07) (Institute for War and Peace Reporting), available at http://iwpr.net/report-news/can-traditional-rituals-bring-justice-northern-uganda (last visited: February 15, 2013).

[106] See, eg., *When the Witches of Gambaga Came to Town*, available at http://afrikangoddessmag.com/2012/04/19/when-the-witches-of-gambaga-came-to-town/(last visited: January 2013).

[107] Franz Vanderpuye, *Traditional Beliefs Cost Women Their Freedom*, available at www.secularhumanism.org/library/aah/vanderpuye_8_3.htm (Last visited: April 1, 2008).

[108] Which also adopts ADR processes to resolve complaints of misdemeanor …

[109] WilDAF, *supra* note 41 at 18. Also, Lisa V. Martin, ed., Domestic Violence in Ghana: The Open Secret, 7 GEORGIA JOURNAL OF GENDER AND THE LAW, 531-597 (2006).

system that favours the rich against the poor and men against women.[110] Also, the relationship between the two systems, formal and informal, is not well established, a factor which is likely to cause confusion for women users in particular as well as for administrators of local justice and police.

Additionally, some police officers attempt to unofficially settle disputes between the accused and victim and in so doing take bribes and pervert the cause of justice. A more fundamental problem caused by this approach is that it deprives domestic violence victims of the opportunity to pursue state-sanctioned punishment for the crimes committed against them and risks placing victims in danger. The reason is that in most cases before women would have the courage to report domestic violence cases, they would already have attempted to informally mediate their problems within families, churches or traditional bodies. They only end up reporting the case to the police because mediation had failed to end the violence.[111]

In addition, community leaders such as Queen Mothers, church officials and traditional healers often respond to reports of abuse by investigating women's compliance with community expectations regarding gender roles and pressuring women to conform their behaviour to community standards. Also, in some situations, these community leaders compel women complainants to withdraw reported cases or even cases already in court for settlement at home through traditional mediation/ arbitration. The reason, most often, is attributed to the fundamental concern of community leaders to control and limit public disturbance and therefore work to ensure domestic violence is addressed outside the public sphere.[112]

For this reason, sometimes women are compelled, indirectly or directly, to succumb to traditional means of dispute resolution due to the reluctance of law enforcement officers and judges to intervene in instances of domestic abuse since "because of the extended family system there is always an avenue for reconciliation in the case of husbands and wives."[113] This way of seeking reconciliation and peace, however, violates Ghana's ADR Act, which demands that parties voluntarily submit to an ADR process.

Additionally, most times the remedies available through traditional mechanisms are not legally binding and typically result in payment of liquor or some minimal compensation to Chiefs and other community leaders, rather than payments to the victim. As a result, settlement through traditional mechanisms more often deprives victims of the opportunity to receive adequate compensation for injuries caused by physical abuse and fail to protect them from further violence.

Martin notes that some CHRAJ officials have admitted that though ADR creates a "win-win situation," sometimes resolutions through this means fail because, they say "[w]e have cases where women say it gets worse. Then we send them to WAJU."[114]

The negatives of the ADR process for women, when put together and assessed

[110] Sossin, *supra* note 92 at 4.
[111] L. V. Martin, *supra* note 107 at 537.
[112] *Ibid* 551.
[113] *Ibid* 545.
[114] *Ibid* 555. WAJU (Women and Juveniles Unit) is the predecessor institute to DOVVSU. Also, see *Women Slam CHRAJ and the Department of Social Welfare's Handling of Abuses*, available at http://www.ghananewsagency.org/details/Social/Women-slam-CHRAJ-and-Department-of-Social-Welfare-s-handling-of-abuses/?ci=4&ai=42314#.UJocfmdE6Jg (Last visited October 2012).

in the context of the African Women's Rights Protocol Charter, identify certain principal violations of the rights of African women. These include violation of social and cultural patterns of conduct that promote harmful cultural and traditional practices against women[115] and the right to the elimination of harmful practices. Others are violation of widows' rights, right to inheritance; special protection of elderly women and special protection of women with disabilities.[116] All these violations come about as a result of the breach of the right of these vulnerable women to their right of access to justice as provided under article 8 of the Protocol.

In sum, one can contend that the focus of the ADR process for Africa has been tailored more towards managing case-loads and safeguarding the economic rights of foreign investors than using it as a means to promote human rights, particularly the rights of women. As noted by Wanis-St. John:

> While the benefits of ADR to businesses, courts and governments are much-publicized, there are some calls for caution: in situations where there are litigants without representation, ... such parties are "vulnerable to the waiver of important rights in mediation;"... and "[p]roviding justice, rather than clearing the court's docket, must remain the primary goal of the mediation process."[117]

CONCLUSION AND RECOMMENDATIONS

Using Ghana as case-study, the paper has sought to discuss access to justice in the African context, and how it affects the opportunities available to women to attain qualitative justice through a resort to the ADR process. A historical review of the formal (foreign or transplanted) and indigenous justice systems indicated that both have failed to adequately and fairly deal with cases of gender-based abuses inflicted on women. From a feminist legal perspective, it was noted that both systems are inherently patriarchal in their attitudes towards women.

The resort to ADR is deemed a welcome opportunity that would expand the frontiers of justice for women and enable them attain a form of justice that is democratic, fair and accountable as well as sensitive, responsive and effective. However, it is noted that similar challenges that women confronted in the past through the indigenous system and presently through the formal justice system do persist.

It was also noted that ADR, though inherent in the African culture and having been the sole or predominant means of dispute resolution in the pre-colonial era was denigrated and ostracised by colonialism. However, it has been re-invented, adopted and incorporated into the Western adversarial justice system. Having been practised to cut down on caseloads, promote case management, efficiency, etc, it was touted as the new way to accessing justice, particularly for disadvantaged groups. For that reason, efforts have been made to globalise the practice and export it to developing countries.

This has been done sometimes without taking into account the weaknesses inherent in the practice, particularly as it affects women. Moreover, consideration

[115] Article 2(2) of the African Protocol on Women's Rights.
[116] *Ibid*, articles 20-23.
[117] Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned From Practice, Spring*, 5 HARV NEGOT L. REV., 339 (2000).

was not given to the fact that the ADR process is not necessarily new to developing countries. Therefore, the practice cannot be wholly adopted and incorporated into the legal system of developing countries and Africa in particular without recognizing the practice's historical antecedents in African culture; in particular, about how to ensure that the practice deals with some of the inherent weaknesses in the system that dealt injustice to women in the past. Therefore, resorting to ADR without addressing these fundamental stumbling blocks inherently pre-determined by patriarchal notions and biases will not augur well for serving as a useful means to promote access to justice for women.

It is proposed, in light of the above, that ADR laws in Africa give special attention to addressing the situations and contexts where ADR may not be applied, particularly where historical patterns of violations of women's rights are prevalent in the system. In other words, efforts must be made to ensure that violence is not and cannot be negotiated or mediated within alternative dispute resolution processes. Also, women should be trained to take active role in the whole ADR process and in the design of country-specific mechanisms in using ADR to promote access to justice.

In the case of Ghana, the 1992 Constitution provides some guide – it prohibits all cultural practices that dehumanize or are injurious to the physical and mental wellbeing of a person.[118] At the same time, the National House of Chiefs, as custodians of the nation's culture, are empowered by the Constitution to "undertake an evaluation of traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful."[119] It is hoped that, through the guidance and support of women's rights scholars and advocates, they will be able to undertake such an exercise with the particular focus and emphasis on promoting access to justice for women through the traditional ADR process. This exercise, in line with article 17 of the African Women's Rights Protocol, should involve women who have the right "to live in a positive cultural context and to participate at all levels in the determination of cultural policies."

Further, ADR practitioners should undergo social context education with particular attention being paid to gender sensitivity to enable women to meaningfully benefit from this mode of dispute resolution. That is to say, gender-sensitive training for mediators and other players in the ADR process need to occupy centre stage in ADR training. Particularly, efforts should be made towards training judicial officers, mediators, lawyers and the public on the place and relevance of international human rights law in general and women's rights in particular. Also, it is important to resort to some key recommendations in the Arusha Declaration[120], such as making the norm of equality and non-discrimination on the basis of sex the guiding and central principle in all judicial decisions; and, to create women- and child-friendly fora for dispute resolution] with the aim of promoting their greater enjoyment of their right to equality before the law.[121]

[118] Article 26(2) of the Ghanaian Constitution.
[119] Article 272, *ibid*.
[120] Arusha Declaration of Commitments on the Role of the Domestic Judge on the Application of International Human Rights Law at the Domestic Level adopted on 11 September 2003.
[121] Paragraphs 1-3 on the section on Declaration of Commitments.

Also, it is proposed that the judicial service and the Attorney-General Departments and/or Ministries of Justice make serious efforts to formalize the relationship between the formal and ADR systems.

In conclusion, the paper quotes Wanis-St-John: "On the other hand, to the extent that an ADR program is well-designed, results in enforceable agreements that are linked to courts, protects the rights of parties and helps weak parties efficiently resolve disputes, it may help traditionally marginalized or weak parties."[122]

[122] Wanis-St. John, *supra* note 115.