

2014

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Recommended Citation

Jacqueline M. Nolan-Haley and James Kwasi Annor-Ohene, *Procedural Justice Beyond Borders: Mediation in Ghana*, 2014 Harv. Negot. L. Rev. Online 1 (2014)

Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/516

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PROCEDURAL JUSTICE BEYOND BORDERS: MEDIATION IN GHANA

*Jacqueline Nolan-Haley and James Kwasi Annor-Ohene, Rev.**

I. INTRODUCTION

Ghana enacted comprehensive alternative dispute resolution (ADR) legislation in 2010¹ (“The Act”), with the specific goals of providing access to justice and promoting domestic and foreign direct investment.² A significant aspect of the Act was the inclusion of customary ADR processes in the legislation along with statutory ADR. As a result, customary arbitration and mediation were mainstreamed into Ghana’s civil justice system.

While commentary on the Act has focused generally on the significance of codifying customary arbitration,³ the focus of this Article is on mediation. The

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¹ Alternative Dispute Resolution Act, Act 798, 2010 (Ghana) *available at* <http://marianrc.org/wp-content/uploads/2011/09/Alternative-Dispute-Resolution-Act-2010-Act-798.pdf> [hereinafter The Act].

² Chief Justice Georgina T. Wood, Keynote Address at the Catholic University, Fiapre, Sunyani: The Inauguration of the Marian Conflict Resolution Center (Aug. 1, 2011), *available at* http://marianrc.org/wp-content/uploads/2011/09/MCRC_openingKeynote.pdf. Another impetus for increasing the use of ADR has been the perception of judicial corruption in Ghana where litigants may be required to give bribes before attention is paid to their cases. Senyo M. Adjabeng, “Using ADR to reduce judicial corruption and the cost of accessing justice in Ghana,” EFFECTIVE JUSTICE SOLUTIONS (2010), *available at* http://effectius.com/yahoo_site_admin/assets/docs/Using_ADR_to_reduce_judicial_corruption_and_the_cost_of_accessing_justice_in_Ghana7020052.16763145.pdf.

³ See, e.g., Kwadwo Sarkodie, *Arbitration in Ghana: The Alternative Dispute Resolution Act 2010* (Oct. 2011) *available at* http://www.mayerbrown.com/files/Publication/5ee12231-1295-4559-8167-89d93cdf2a06/Presentation/PublicationAttachment/91e048fe-67d4-4e3f-9d10-8bbf9861e753/ArbitrationGhana_Sarkodie.pdf; Paul Kirgis, *Customary Arbitration in an Evolving Africa* (Aug. 2011) *available at* <http://www.indisputably.org/?p=2592>; Funke Adekoya, *LCIA and Ghana Arbitration Centre symposium: the new Alternative Dispute Resolution Act 2010* (Dec. 2010) *available at* <http://us.practicallaw.com/2-504-1004>. See also Emilia Onyema, *The New Ghana ADR Act 2010: A Critical Overview*, 28 ARBITRATION INTERNATIONAL 101 (2012) (discussing both arbitration and mediation provisions in the new act).

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Act's provisions on statutory ["modern"] mediation are noteworthy as this is the first time that mediation has been included in a statute in Ghana. The statutory definition of mediation reflects an understanding of the mediation process based upon individual autonomy and party self-determination,⁴ principles that represent a significant departure from the more communal values of customary ADR under which mediation is practiced in Ghana.⁵ The individualist orientation of modern mediation challenges what has traditionally been considered a collectivist culture.⁶

Whether the new ADR law has been successful in achieving its goals is too soon to determine. However, it may be possible to assess one aspect of the access to justice goal by examining the parties' experiences using ADR processes pursuant to the Act. One yardstick for measuring success in achieving access to justice is the degree to which parties experience procedural justice or fairness when they participate in dispute resolution processes. Studies show that procedural justice can foster perceptions of legitimacy.⁷ Where parties report positive experiences of procedural justice, they are generally satisfied with the process and tend to comply with outcomes.⁸

During the summer of 2013, the authors conducted a preliminary study of parties' experiences participating in modern mediation and their perceptions of the process. In this article, we report the findings of that study.⁹ Using a procedural justice framework, we consider whether parties believe that their mediation experience was fair, whether they had an opportunity to express themselves during the process, whether they felt they were treated with respect, whether, overall, they felt that the process was fair, and whether they were satisfied with the outcome. Our findings, based on a limited sample, show that with respect to the issues of ability to express one's views, respect, and fairness, that parties experienced high levels of procedural justice. However, on the issue

⁴ The Act, *supra* note 1, Sect. 63-88, 135. There is a provision, however, for the courts to refer parties to mediation. *Id.* Sect. 64(1)(A).

⁵ However, as my colleague Professor Elayne Greenberg has observed, to the extent that self-determination is shaped by the integrated values that the individual considers important, the Ghanaians participating in the survey may have conceived of a variant of self-determination that is shaped by their collectivist values and looks somewhat different from a U.S. participant's interpretation of self-determination.

⁶ See Walter A. Wright, *Cultural Issues in Mediation: Individualist and Collectivist Paradigms*, Mediate.com (Jan. 2000) <http://www.mediate.com/articles/wright.cfm> (n. 9 citing Ghana as a predominantly collectivist country). See also Joseph Blocher, *Building on Custom: Land Tenure Policy and Economic Development in Ghana*, 9 YALE HUM. RTS. & DEV. L. J. 166, 179 (2006).

⁷ See e.g., Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution* 1 J. DISP. RESOL. 1 (2011).

⁸ See *infra* text accompanying notes 38-47.

⁹ This study is a project of the Marian Conflict Resolution Center in Ghana. See *infra* text accompanying notes 49-86.

of satisfaction with the outcome of their mediations, parties experienced a slightly lesser degree of procedural justice.

II. ADR DEVELOPMENT IN GHANA

A. Customary Dispute Resolution

Ghana has a legally pluralistic justice system where customary law co-exists with common law.¹⁰ There is a long history of arbitration and mediation [“customary ADR”] use in Ghana that dates to pre-colonial times.¹¹ Parties who live in remote areas of the country without access to the courts are more likely to use customary dispute resolution processes than the formal court system to resolve their disputes.¹² The main actors in customary dispute resolution are family heads/elders, tribal chiefs and queen mothers, who resolve conflicts¹³ through arbitration, mediation and other settlement processes.

B. Modern Dispute Resolution

Today, Ghana is considered a leader among other African countries in promoting modern ADR processes,¹⁴ and in institutionalizing the mediation process.¹⁵ The development of modern ADR in Ghana began with the passage of the Courts Act of 1993 (ACT 459) which encouraged the use of ADR in the courts.¹⁶ A series of ADR events following in rapid succession established a firm foundation for Ghana’s ADR leadership. The Ghana Arbitration Centre was

¹⁰ Customary law in Ghana is defined in section 11(3) of the Ghana Constitution as “the rules of law, which by custom are applicable to particular communities in Ghana.” CONSTITUTION OF THE REPUBLIC OF GHANA, Sec. 11(3), (1992).

¹¹ Wood, *supra* note 2, at 2.

¹² In many remote areas of Ghana, there are no roads to facilitate transportation to the courts.

¹³ See K. A. BUSIA, THE POSITION OF THE CHIEF IN THE MODERN POLITICAL SYSTEM OF ASHANTI (1968); Louise Mueller, *The persistence of Asante chieftaincy under colonial rule: explanation of an enigma*, *Africana Studia* No. 15, pp. 61-85 (2010).

¹⁴ Commercial Law Development Program U.S. Department of Commerce, *Alternative Dispute Resolution Services in West Africa: A Guide for Investors*, (2003) at page 17 available at <http://www.fdi.net/documents/WorldBank/databases/benin/westafricaguide7212003.pdf>.

¹⁵ There have been parallel developments in advancing the mediation process to resolve political conflicts. Ghana established a National Peace Council in 2006 to develop mechanisms for conflict prevention and resolution. Emmanuel Kotia & Festus Kofi Aubyn, *Sustainable Peace in Africa: Understanding the Role of the National Peace Council in Ghana*, Kennesaw State University (2013) at page 3 available at http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=emmanuel_kotia. In 2011, it passed legislation formalizing the council. Republic of Ghana, *National Peace Council Act*, Act 818, (2011) available at <http://www.i4pinternational.org/files/191/7.+ghana.pdf>.

¹⁶ Senjo M. Adjabeng, *Alternative Dispute Resolution in Ghana* (2007) available at <http://www.mediate.com/articles/adjabengs3.cfm>

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created in 1996 to deal with commercial cases.¹⁷ In 2001 the Lord Chief Justice established an ADR Task Force to make policy recommendations for implementing ADR in the judicial system.¹⁸ Court-connected ADR programs followed in 2002.¹⁹ The Labour Act was enacted in 2003 to facilitate the resolution of labor disputes through ADR processes²⁰ and in 2005 the Lord Chief Justice issued a policy directive to institutionalize ADR in the judicial system.²¹ The Ghanaian judiciary responded by establishing a five year “Strategic Plan for ADR Program,”²² and in 2009, the Chief Justice established a separate National ADR Directorate to coordinate all ADR activities within the Judicial Service.²³ All of these efforts culminated in the passage of The Alternative Dispute Resolution Act, Act 798 (The Act) in 2010.²⁴

C. Merger of Customary and Modern Dispute Resolution

A significant aspect of The Act is the inclusion of customary arbitration and mediation in the legislation,²⁵ thereby elevating these processes into the formal civil justice regime. Whether the term “negotiation” is included in the Act is debatable.²⁶ Customary arbitration is defined in the Act as “the voluntary submission of a dispute, whether or not relating to a written agreement for a final binding determination under . . . this Act.”²⁷ Unlike modern arbitration, customary arbitration does not focus on writing. It is guided by the rules of “natural justice and fairness” rather than specific legal rules.²⁸

Customary mediation is referred to in the Act as negotiation for settlement,²⁹ and customary mediated settlement agreements are non-binding.

¹⁷ The Ghana Arbitration Centre, *Background Information*, <http://www.ghanaarbitration.org/about-us/background.html> (last visited Oct. 22, 2013).

¹⁸ ADR Resources, *Ghana Commits to Strengthening a Wider Use of ADR to Resolve Disputes*, (2008), available at <http://adrresources.com/adr-news/608/arbitraje-mediacion-ghana.pdf>.

¹⁹ Commercial Law Development Program U.S. Department of Commerce, *supra* note 14, at 18.

²⁰ Labour Act of 2003, Act 651, (Ghana), available at <http://www.refworld.org/pdfid/44bf88234.pdf>.

²¹ ADR Resources, *supra* note 18. See also National ADR Programme: Inputs for annual report for May 2012-May 2013, The Judicial Service of Ghana (Jul. 8 2013), <http://www.judicial.gov.gh/index.php/2013-01-28-08-11-41/strategic-plan>.

²² National ADR Programme, *supra* note 21. In 2013 the Ghanaian Judiciary updated the Strategic Plan and reported on the success of the initial plan. See *id.*

²³ Judicial Service embraces Alternative Dispute Resolution (August 24, 2006), available at <http://www.ghanadistricts.com/news/?read=28254>.

²⁴ For a general discussion of the Act, see Onyema, *supra* note 3.

²⁵ The term “alternative dispute resolution” explicitly includes arbitration, conciliation, and mediation. The Act, *supra* note 1, at Sect. 135.

²⁶ See Nene A. O. Amegatcher, *A Daniel Comes to Judgment: Ghana’s ADR Act, A Progressive or Retrogressive Piece of Legislation* (September 20, 2011) paper delivered at the Ghana Bar Association Annual Conference (on file with the authors).

²⁷ The Act, *supra* note 1, at Sect. 135.

²⁸ *Id.* at Sect. 93(1).

²⁹ *Id.* at Sect. 113.

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Modern mediation is understood in the Act as a “facilitative process in which the parties discuss their dispute with an impartial person who assists them to reach a resolution.”³⁰ Although it is a process based on party consent, the court can also refer parties to mediation.³¹ If the parties reach a settlement in mediation, their agreement has the same status as an arbitral award.³²

D. Responses to the Act

Reactions to the Act have been generally favorable. Retired Justice Edward Torgbor has commented that it should be viewed with “celebration.”³³ A leading ADR practitioner and President of the Ghanaian Bar Association has described it as “indeed a Daniel come to judgment, solving what was once the predicament of Ghanaians who had to resort to the expense, delay and adversarial nature noted with the normal court process.”³⁴ The Chief Justice of Ghana, Georgina T. Wood, has promoted The Act as an all purpose “stand alone” law that will promote ADR as a method of dispute resolution, enhance access to justice and promote domestic and foreign direct investment to stimulate economic growth.³⁵

Since the passage of the Act, there has been significant energy expended towards developing public awareness of ADR processes. The Judicial Service of Ghana has been active in supporting mediation training, public education, and in fostering court-connected programs. To date, 47 district and circuit courts have been involved with the Court Connected ADR [CCADR] program and there are plans for mediation to be mainstreamed into all courts in the country by 2017. The available data for the year May 2012-2013 shows that of the 4918 cases that were mediated in various court-mediation programs throughout the country, 2,248 cases were successfully settled, representing a 46% settlement rate.³⁶ This is slightly lower than the settlement rate of 52.3% for cases mediated between 2007 and 2012.³⁷

³⁰ *Id.* at Sect. 74(1) & 135.

³¹ *Id.* at Sect. 64 (1).

³² Noting the differences between mediation and arbitration under the Act, one scholar has questioned whether such an award may be enforceable in jurisdictions outside Ghana. Onyema, *supra* note 3, at 121.

³³ Hon. Justice Edward Torgbor, *Ghana Outdoors: The New Alternative Dispute Resolution Act 2010 (Act 798): A Brief Appraisal*, 77 THE INTERNATIONAL J. OF ARBITRATION, MEDIATION AND DISPUTE MANAGEMENT 211 (2011).

³⁴ Amegatcher, *supra* note 26.

³⁵ Wood, *supra* note 2.

³⁶ See National ADR Programme, *supra* note 21.

³⁷ See Modern Ghana News, *Judicial Service expands Alternative Dispute Resolution*, (Mar. 13, 2013), <http://www.modernghana.com/news/453363/1/judicial-service-expands-alternative-dispute-resol.html>.

III. WHY PROCEDURAL JUSTICE MATTERS

Over the last 20 years, there has been a considerable amount of research on the salutary effects of procedural justice³⁸ generally, with “dispute resolution processes” in particular,³⁹ and more recently in judicial settlement processes.⁴⁰ Empirical research shows that if parties believe that they have been treated fairly both in third party decision-making processes, as well as in negotiation⁴¹ and in mediation,⁴² then they view the outcome of those processes as fair even if the outcome is not in their favor.⁴³ To the extent that parties believe that the process has been fair, there is likely to be compliance with the outcome.⁴⁴ This perception has spillover effects with organizational and institutional ADR providers. Perceptions of fairness about the process lead to perceptions of provider legitimacy.⁴⁵

As a general matter, researchers have found that the degree to which parties experience procedural justice depends upon four critical considerations: (1) whether they had an opportunity to express their feelings and tell their view of the situation (referred to as “voice”); (2) whether they believe they were treated respectfully; (3) whether they believe that they were treated even-handedly, i.e. in the same manner as others and (4) whether the decision-maker acted fairly and could be trusted.⁴⁶ Procedural justice advances the perception of legitimacy,⁴⁷ produces party satisfaction with the process, and ensures greater compliance with the outcome.

³⁸ See Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH U. L. REV. 381, 385 (2010); Nancy Welsh, *Perceptions of Fairness in Negotiation*, MARQUETTE L. REV. 753, 763-765 (2004). See also Nancy Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEG. L. REV. 71, n. 83 (2013) (citing studies on procedural fairness); Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 645-48 (2014).

³⁹ Welsh & Schneider, *supra* note 38, at n.96.

⁴⁰ Nancy Welsh, Bobbi McAdoo & Donna Stienstra, *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, in THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin & Archie Zariski, eds., 2013).

⁴¹ Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, (2008); Hollander-Blumoff, *supra* note 38, at 384.

⁴² See e.g., Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got To Do With It?*, 79 WASH. U. L. Q. 787 (2001).

⁴³ See E. A. LIND & T. R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 66-70, 205-206 (1988); see also JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

⁴⁴ See e.g., T. R. Tyler, *Social Justice: Outcome and Procedure*, 35 INTERNATIONAL JOURNAL OF PSYCHOLOGY 117, 119 (2000).

⁴⁵ See e.g., LIND & TYLER, *supra* note 43, at 209; TOM R. TYLER, WHY PEOPLE OBEY THE LAW 93-108 (1990).

⁴⁶ Welsh, McAdoo & Stienstra, *supra* note 40, at 69.

⁴⁷ Hollander-Blumoff & Tyler, *supra* note 7, at 7.

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We wondered about the extent to which the conclusions from research on procedural justice would hold true in the sub-Saharan country of Ghana, given the legal and cultural differences between Ghana and the western countries where much procedural justice research is sourced.⁴⁸ When a developing and emerging democratic country such as Ghana introduces new forms of dispute processing such as statutory mediation in the formal legal system, possibly challenging or disrupting customary mediation practices, perceptions of procedural justice are critical for purposes of user buy-in and ultimately, of legitimacy.

IV. THE SURVEY AND FINDINGS

A. *Background to the survey*

For the last three years, the authors have been engaged in a collaborative project with Fordham Law School, Saint John's School of Law, the Giving to Ghana Foundation and two professors from the Ghana School of Law to establish a conflict resolution center in an area of Ghana where parties have limited access to the formal court system. Towards this end, the Marian Conflict Resolution Center (MCRC) opened in August 2011 in the central part of Ghana located in Sunyani. During the summers of 2011 and 2012 approximately 150 individuals were trained in mediation skills under the auspices of the MCRC. The training took place at the Catholic University College of Ghana, Fiapre, located at Sunyani. Participants in the mediation training came from a wide range of backgrounds and included tribal chiefs, members of the clergy, legal aid officials, attorneys, physicians and university students.

A questionnaire was distributed in July 2013 to mediators who had been trained in mediation skills at the MCRC. They were asked to give them to parties who had participated in mediation. Fifty-four individuals completed the questionnaire.⁴⁹

The questionnaire aimed to learn about how parties actually experienced the mediation process. Our particular concern was with the parties' perceptions of fairness. The survey, which appears in Appendix II, focuses on questions related to procedural justice.⁵⁰

⁴⁸ See Nancy Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQUETTE L. REV. 753, 763 n. 41 (citing cross-cultural studies); LIND & TYLER, *supra* note 43, at 129-145 (citing several studies with Chinese, German and American subjects to show that procedural fairness maintains its importance across different cultures.).

⁴⁹ There were 31 responses from Sunyani and 23 from Accra, the capitol city of Ghana.

⁵⁰ Mediation Questionnaire (July 2013), *infra* Appendix II. The authors are very grateful to Professor Bobbi McAdoo of Hamline Law School for providing us with a questionnaire developed

B. Findings

Our preliminary findings suggest that parties experienced high degrees of procedural justice in mediation on the issues of voice, respect and fairness, and lesser degrees of procedural justice on the issue of satisfaction with the outcome of their mediations.

The Decision to Use Mediation

Most parties decided to use mediation either because a friend recommended it (Sunyani)⁵¹ or because the Legal Aid office invited them to use mediation (Accra).⁵² A few parties participated in mediation at the suggestion of a court (5%) or at the suggestion of a court and with the agreement of both sides (4%). The majority of survey respondents were originally plaintiffs in lawsuits (53%).

Attorney Representation

Few parties were represented by an attorney at the mediation (9%). In most cases, the parties either did not have an attorney (47%) or did not have an attorney present at the mediation (44%). The percentage of parties who appear without attorneys in general civil litigation is generally consistent with findings in the U.S.⁵³

Procedural Justice/Fairness

The majority of parties reported that they were able to talk about all of the issues that were most important to them (76%), that the mediator understood “very well” what was important to them (91%), that the mediator treated them fairly (93%), with respect (98%), and did not put too much pressure on them to

by the Court Committee of the ABA Section on Dispute Resolution and the Resolution Systems Institute. Most of the questions in Part I of the survey come from that questionnaire.

⁵¹ From a comparative perspective, Professor Roselle Wissler found that litigants in the U. S. are unlikely to use ADR without their attorney’s recommendation and encouragement. Roselle L. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys’ ADR Recommendations*, 2 PEPP. DISP. RESOL. L. J. 199, 218 (2002).

⁵² The Legal Aid scheme in Ghana has a community mediation department to compliment the actual legal services offered to the poor. See Senyo Adjabeng, *Alternative Dispute Resolution in Ghana*, (Aug. 2007), <http://www.mediate.com/articles/adjabeng3.cfm>. Generally, at the intake of cases, the first step is to advise applicants whose cases are amendable to mediation to take up that option. However, it is not mandatory.

⁵³ See American Bar Association et al., Task Force on Access to Civil Justice, Report to the House of Delegates 3 (2006). See also Roselle L. Wissler, *Representation in Mediation: What We Know From Empirical Research*, 37 FORD. URBAN L. J. 419, 420 (2010).

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settle (96%). Overall, a majority of parties felt that the process was “very much fair” (80%). There was a somewhat lesser degree of satisfaction with the mediation outcomes with 58% reporting that they were “very satisfied,” 35% reporting that they were “satisfied,” and 2% reporting to be “unsatisfied.” These findings generally parallel empirical research in the U.S. which shows that litigants and attorneys generally feel that ADR processes are fair and that they are satisfied with both the process and the outcome.⁵⁴

Differences Experienced with Customary ADR

There is little empirical evidence on how parties experience procedural justice under customary ADR processes.⁵⁵ Very few respondents in our survey had been involved in a customary ADR process before a tribal chief (15%) or queen mother (11%).⁵⁶ When asked how they would compare that customary ADR experience with mediation, their responses varied from a somewhat inconsistent view--“It was not fair as compared to the private mediation process,”⁵⁷ “almost the same,”⁵⁸ to more positive views of mediation-- “There is more room to express yourself freely in a mediation process than a customary process.”⁵⁹ “Mediation process is fair.”⁶⁰ “The [Mediation]Center did not impose any decision on us.”⁶¹ “The parties are allowed to decide how they want to settle.”⁶²

When asked, if they had a problem to resolve in the future, whether they would prefer a customary ADR process before a chief or queen mother, or

⁵⁴ See e.g., Wissler, *supra* note 51, at 201.

⁵⁵ See Richard C. Crook, *Alternative Dispute Resolution and the Magistrate’s Courts in Ghana: A case of practical hybridity*, (Africa Power and Politics Programme, Working Paper No. 25, July 2012) (popular opinion survey conducted by the author showing that in settling disputes Ghanaians valued an impartial judge who could ensure that the truth would be revealed and that all parties be given the opportunity to tell their version of the story). See generally Richard C. Crook, Kojo Asante & Victor Brobbey, *Popular concepts of justice and fairness in Ghana: testing the legitimacy of new or hybrid forms of justice*, (Africa Power and Politics Programme, Working Paper No. 14, Oct. 2010). For a general understanding of litigants’ experiences with justice see Richard C. Crook, *Access to Justice and Land Disputes in Ghana’s State Courts: The Litigants’ Perspective*, 50 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (2004) (examining litigants’ experiences in three courts in Ghana with respect to land disputes).

⁵⁶ One explanation could be that the individuals who responded to our survey were not drawn from remote areas where customary ADR is most prevalent. An alternative explanation could be that these parties had been involved in customary ADR processes before family heads/ elders who are generally the first point of call to resolve disputes, especially if the parties involved come from the same family.

⁵⁷ Results from the Mediation Questionnaire, Response 1 (July 2013) (on file with author) [hereinafter Survey Results].

⁵⁸ *Id.* at Response 20.

⁵⁹ *Id.* at Response 19.

⁶⁰ *Id.* at Response 37.

⁶¹ *Id.* at Response 44.

⁶² *Id.* at Response 51.

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mediation in court or a private center, one respondent replied that out of respect he would first approach the queen mother.⁶³ Another party responded that he would prefer a private or court mediation.

Reasons for Favoring Modern Mediation

Some of the parties' reasons for favoring mediation⁶⁴ suggest that it offered a significantly different experience than the directive and oracular nature of customary mediation. Parties liked "the neutrality of the mediator,"⁶⁵ "the process,"⁶⁶ the "documentation of our agreement,"⁶⁷ "our power to determine the outcome"⁶⁸ and "not the mediator[s],"⁶⁹ and the ability "to talk freely. Nobody forced me to understand something against my will."⁷⁰

Other responses ranged from efficiency-- "It was short and simple,"⁷¹ "fair and fast"⁷² to the benefits of receiving advice⁷³ or insight on a particular issue.⁷⁴ Most of the responses, however, focused on the common characteristics of procedural justice: the ability to express one's views, being treated respectfully and evenhandedly, and perceptions of fairness.⁷⁵

What Parties Did Not Like About Mediation

When asked to describe what they did not like about mediation, the respondents offered objections both to process, --"not given the opportunity to invite other people who know much about the case,"⁷⁶ the "liberal nature of the process"⁷⁷ "too much liberty for the parties" as well as objections to structure-- "The other party was allowed plenty of time to speak,"⁷⁸ "my lawyer did not get the chance to speak as much as I expected."⁷⁹ These responses reflect a lack of understanding about the mediation process and how it differs from customary ADR or court processes where lawyers conduct the case. In a customary ADR

⁶³ See Mediation Questionnaire, *infra* Appendix II, at Question 21.

⁶⁴ *Id.* at Question 17.

⁶⁵ Survey Results, *supra* note 57, at Response 10.

⁶⁶ *Id.* at Response 35.

⁶⁷ *Id.* at Response 47.

⁶⁸ *Id.* at Response 35.

⁶⁹ *Id.* at Response 45.

⁷⁰ *Id.* at Response 9.

⁷¹ *Id.* at Response 4.

⁷² *Id.* at Response 12.

⁷³ *Id.* at Response 36.

⁷⁴ *Id.* at Response 40.

⁷⁵ See *Id.* Responses to Question 15 are also excerpted *infra* Appendix I.

⁷⁶ Survey Results, *supra* note 57, at Response 39.

⁷⁷ *Id.* at Response 42.

⁷⁸ *Id.* at Response 35.

⁷⁹ *Id.* at Response 38.

process, parties are allowed in most cases to bring witnesses, but are not given too much liberty or freedom to express themselves.

Other negative perceptions of mediation also reveal in part a misunderstanding of the mediation process as one party had “wanted the mediator to pronounce judgment,”⁸⁰ and another was concerned that “the respondent was not punished enough.”⁸¹ Finally, behavioral concerns affected the perception of mediation. Parties had a negative perception of mediation based on a mediator’s behavior “allowing my husband’s insolence,”⁸² and also based on a plaintiff’s behavior due to an “inability to compromise.”⁸³

Two comments regarding the caucus continue to reveal a lack of understanding about mediation and also are consistent with empirical evidence that the use of the caucus can affect parties’ understandings of procedural justice in a positive or negative fashion.⁸⁴ Again, in responding to the question—“What did you not like about the mediation process?” parties responded: “The part that the mediator asked us to leave. She and the respondent talked but nothing was said to us. The mediator explained that she cannot say anything because the other party does not want us to know”⁸⁵ and “When the mediator did not disclose what went on during caucus.”⁸⁶

V. CONCLUSION

Given the significance of procedural justice in establishing legitimacy, and based on these preliminary findings with a limited number of participants, it appears that the modern mediation provisions in the Act are perceived as legitimate. It also appears that the common characteristics of procedural justice in Ghana are consistent with the findings on procedural justice in western countries. The opportunity to express oneself (voice), being treated fairly by the decision-maker and feeling assured that she listened to them, and experiencing respect in the process are as highly valued aspects of mediation in Ghana as they are reported to be in many western cultures.

Questions for future mediation research in Ghana will include a focus on the cultural implications of procedural justice research. Given the general collectivist culture of Ghana, how will traditional Ghanaian conflict resolution practices be affected by statutory mediation’s emphasis on individual autonomy

⁸⁰ *Id.* at Response 20.

⁸¹ *Id.* at Response 24.

⁸² *Id.* at Response 43.

⁸³ *Id.* at Response 40.

⁸⁴ See Nancy Welsh, *Stepping Back through the Looking Glass: Real Conversations with Disputants About Institutionalized Mediation and Its Value*, 19 Ohio St. J. on Disp. Resol. 573, 647-51, 551, 669-71 (2004).

⁸⁵ Survey Results, *supra* note 57, at Response 50.

⁸⁶ *Id.* at Response 51.

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and party self-determination? What is the relevance of customary mediation practice to modern conflicts and how should customary values be respected? For future mediation research, we hope to expand the number of survey participants and identify the types of cases that were mediated, e.g., land, family, negligence, etc.

Appendix I

Question 15: "Please describe the things you liked about mediation."

Responses:

"I was given the opportunity to express myself." (1)

"I did not pay any money." It was also fair." (2)

"It is fair." (6)

"The mediators were very friendly. They gave us the opportunity to talk about the issue." (7)

"The mediators treated us with respect." (11)

"Everyone was given the opportunity to express himself." (13)

"The mediation process was very impressive." (14)

"The mediator treated us fairly and gave us equal time to present our case." (15)

"I was not intimidated or frightened." (16)

"Ability to express myself very well." (20)

"The mediators gave much respect to me and allowed me to express myself freely." (22)

"I was impressed with the warm reception given me." (24)

"The patience of the mediators to allow disputants express themselves." (25)

"The fact that the mediators had time to listen." (26)

"I like everything about the mediation. I had the opportunity to talk about my issue." (27)

"that mediators treated parties with respect." (28)

"I was pleased with the way the mediation was done." (29)

"I like the way the mediators handled the issue. They gave us equal opportunity to talk about the issue." (30)

"I was impressed about the way the mediators received us." (31)

"It gave everyone the chance to speak." (34)

"The process was fair and transparent." (38)

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“The education we received concerning our late father’s property.” (39)

“The whole process, especially the ground rules.” (42)

“The counseling that was given to my husband and me.” (43)

“The explanation of the ground rules. My right to terminate the session if I didn’t wish to continue.” (44)

“Fairness. Respect.” (46)

“The mediator created a relaxed environment which made me feel at home.” (49)

“The patience the mediator had for us and the explanations given to my questions.” (50)

“The way the intestate laws was explained to us by the mediator.” (51)

“Each party was [given] enough chance to speak his/her mind.” (52)

“Very fairly treated and respected both opinions.” (53)

Appendix IIMediation Questionnaire

Please place a circle around your answer:

Section A

Please answer all of the questions below.

1. What led you to use mediation?
 - a. The court suggested mediation and I agreed. (5%)
 - b. The court suggested mediation and both sides agreed. (4%)
 - c. The court required me to go to mediation. (0%)
 - d. I or my lawyer proposed using mediation and the other side agreed. (7%)
 - e. The other side suggested mediation and I agreed. (22%)
 - f. Other 51%⁸⁷

2. What was your role in the mediation?
 - a. Plaintiff (person filing lawsuit) (53%)
 - b. Defendant (person being sued) (36%)
 - c. Other _____ (11%)

Unanswered (11%)

3. Was your lawyer present with you at the mediation?
 - a. Yes (9%)
 - b. No (44%)
 - c. I did not have a lawyer. (47%)

The following questions ask about your experience during the mediation session.

4. Were you able to talk about the issues and concerns that were most important to you?
 - a. I was able to talk about none of the issues that were important to me. (2%)
 - b. I was able to talk about some of the issues that were important to me. (5%)
 - c. I was able to talk about most of the issues and concerns that were most important to me. (16%)

⁸⁷ Many parties responded that a friend had recommended mediation. 11% of the parties did not respond to this question.

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- d. I was able to talk about all of the issues and concerns that were most important to me. (76%)
5. Was the mediator active enough in helping you to work out the issues in the dispute?
 - a. No (0%)
 - b. Yes (93%)Unanswered (7%)
6. How well did the mediator understand what was important to you?
 - a. Not at all (0%)
 - b. Somewhat (7%)
 - c. Very well (91%)
7. Did the mediator treat you with respect?
 - a. Not at all (0%)
 - b. Somewhat (2%)
 - c. Very much (98%)
8. Did the mediator treat you fairly?
 - a. Not at all (0%)
 - b. Somewhat (5%)
 - c. Very much (93%)
9. Did the mediator put too much pressure on you to settle?
 - a. Yes, the mediator pushed too hard. (4%)
 - b. No, the mediator did not push too hard. (96%)
10. What was the outcome of the mediation?
 - a. We reached settlement on all the issues in the case. (64%)
 - b. We reached settlement on some of the issues in the case. (25%)
 - c. We didn't reach settlement on any issues. (7%)Unanswered (4%)
11. With respect to the mediation session, please indicate whether
 - a. The time you had to mediate was too short. (13%)
 - b. Mediation occurred too soon in the case. (35%)
 - c. Mediation occurred too late in the case. (33%)Unanswered (20%)

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If you reached settlement, please answer the following questions:

12. Did the settlement

- a. Favor you (44%)
- b. Favor the other party (13%)
- c. Favor neither you nor the other party (18%)

Unanswered (25%)

13. How satisfied were you with the outcome of the mediation?

- a. Very unsatisfied (0%)
- b. Unsatisfied (2%)
- c. Satisfied (35%)
- d. Very Satisfied (58%)

Unanswered (5%)

14. Overall, was the mediation process fair?

- a. Not at all (0%)
- b. Somewhat (13%)
- c. Very much (80%)

Unanswered (7%)

15. Please describe the things you liked about the mediation?

16. Please describe the things you did not like about the mediation?

17. Have you been a party to a customary dispute resolution process before a chief (i.e. in a chief's palace)?

- a. Yes (15%)
- b. No (85%)

18. Have you been a party to a customary dispute resolution process before a queen (i.e. in a queen mother's palace)?

- a. Yes (11%)
- b. No (89%)

19. If you have been a party to a dispute in a customary dispute resolution process before the court of the chief or the queen mother, how was the dispute resolved?

- a. The chief/queen mother gave a ruling. (11%)

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b. The chief/queen mother helped us to reach an amicable settlement/resolution. (5%)

c. I spoke with the other person and we were able to resolve our problem before we appeared before the chief/queen mother. (0%)

Unanswered (84%)

20. If you have been a party to a dispute in a customary dispute resolution process before a chief or queen mother, how does that experience compare to your experience mediating in court or at a private mediation center?

21. If you have a problem to resolve in the future, would you prefer a customary dispute resolution process before a chief or queen mother or mediation in court or at a private mediation center?