



# AFRICA SECURITY BRIEF

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## Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability

BY ERNEST E. UWAZIE

- ◆ Backlogged court dockets in Africa, often requiring claimants to wait years, are common. The resulting perception that justice cannot be attained through official channels is a potential catalyst for intergroup violence and political instability.
- ◆ Alternative Dispute Resolution is an increasingly popular complement to official legal channels to resolve less serious disputes in a timely manner through mediation while enhancing claimants' sense of justice.
- ◆ Establishing legislation supporting Alternative Dispute Resolution as well as broadening the number and caliber of mediators can expedite the adoption of this mechanism.

### HIGHLIGHTS

*We have decided to take another measure since government has failed to address our case. . . . Yes, the only system I can try now to work is violence to carry on hostility, organize my brothers because we are hurt and the government is not sensitive to our feeling. We will go and jump on the perpetrator and kill him in the same way.<sup>1</sup>*

—Brother of victim of alleged ritual killing in Liberia

Many African citizens have lost faith in the ability of their nations' courts to provide timely or just closure to their grievances. A 2009 survey in Liberia found that only 3 percent of criminal and civil disputes were taken to a formal court. Over 40 percent sought resolution through informal mechanisms. The remaining 55 percent went to no forum at all. This includes cases where claimants felt the need to take justice into their own hands, often with violent consequences.

In postconflict and fragile contexts, where societal tensions are already high and justice systems

typically do not function, the need for prompt resolution of disputes is particularly critical. Without timely, accessible, affordable, and trusted mechanisms to resolve differences, localized disagreements or crimes can degenerate into broader conflict. This contributes to cultures of violence and vigilante justice.

In a southern Nigerian community in May 2006, for example, approximately 100 organized, angry youth confronted village-hired armed watchmen after several months of complaints that the watchmen repeatedly harassed villagers, beat them with ropes,

extorted money, and sexually assaulted some young girls. During the confrontation, one of the youth was shot by a watchman. The police responded by arresting a number of other young men. This further aggravated the sense of injustice in the community, stoking fears of retributive violence. As the village leadership was seen as siding with the watchmen in order to cover up the leaders' complicity in the affair, respect for village authorities and elders among the youth plummeted, further weakening social stability. The incident simultaneously exacerbated a lingering chieftaincy dispute in the community that had been pending in court for 10 years.

Even when courts are involved—while they may address the legal question, since they are not focused on conflict resolution or mitigation—they may miss the underlying catalyst. At times, court judgments can escalate disputes. As one Nigerian lawyer noted, “when the judge proclaims a winner, *that* is the beginning of the real conflict.”<sup>2</sup> Formal litigation, grounded in an adversarial process, is limited in ensuring fairness and satisfaction for disputants.

Lack of confidence in the justice sector has a profound impact on governance in a society. According to a recent survey conducted in 26 African countries, respondents who expressed confidence in their judicial systems were more than three times as likely to say that they have confidence in their national governments. Indeed, the relationship between confidence in national government and confidence in the judicial system was the strongest among any other institution surveyed—including the military, electoral systems, and religious authorities. In other words, trust in the judiciary is often a litmus test of citizens' judgments of their governments.<sup>3</sup> The lack of predictability in the legal environment, furthermore, undermines private sector investment and development.

Despite numerous attempts at modernization, many African countries are still struggling to establish functional, timely, and trusted judicial systems. Most

courts in Africa are fraught with systemic problems, such as antiquated structures. Countless judges still take notes by hand, as there are no stenographers. Records are archived manually and a reliable computer in an African court is rare, especially at the magistrate courts that handle most cases. The biggest problem, however, is overcrowding. Many judges or magistrates have over 100 cases per day on their dockets, a number impossible to adjudicate. It can take many years to get to trial and months to have a motion heard. Disputants often express frustrations at the “come today, come tomorrow” syndrome and mounting legal fees for professional representation with each futile court appearance. It is not uncommon in African countries for a dispute to take a decade or more to reach resolution. As a foreign diplomat in East Africa once joked, “it is easier for one to pass through the mouth of a lion than go through the . . . legal system.”

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These lengthy delays, in turn, open the court system to manipulation. The chairman of Nigeria's Independent Electoral Commission lamented in 2010 that “our courts have been overburdened and sometimes overwhelmed,” enabling litigants to exploit the system's dysfunction to “delay or frustrate the course of justice.”<sup>4</sup>

In many cases, this ineffectiveness reflects the “in-between” state of African justice structures. The formal legal system is overloaded and cannot provide timely and effective closure. It is also more costly in time and money for disputants. Meanwhile, the sphere of influence of the traditional justice system has been greatly diminished with modernization, especially in urban areas. The average Ghanaian disputant would prefer the indigenous chief's arbitration, just as an Ethiopian would prefer to turn to the traditional *Shimangele* (elder) for conciliation of most civil or family matters. However, these options are not available for many citizens.

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## ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution (ADR) encompasses a series of mediation mechanisms for resolving conflicts that are linked to but function outside formal court litigation processes.<sup>5</sup> Whereas trials are formal affairs governed by strict rules, mediation involves third-party neutrals facilitating negotiations between disputing parties.<sup>6</sup> The focus of mediation is usually on the interests of the parties themselves as opposed to their negotiating positions. It is designed to provide an opportunity for claimants to have their views heard and undertake a process that satisfies all sides in a way that a court proceeding cannot.

Mediation is most effective and appropriate for conflicts that have multiple parties, have ongoing or long-term relationships that the parties wish to preserve, require confidentiality, or are driven by underlying issues rather than the immediate facts or events being disputed. Well-trained mediators know that the process itself is as important as the outcome. When disputants believe that their positions have been seriously considered, it increases their buy-in to settle and comply with resolutions—as they primarily value the integrity of and the opportunity to participate in the process.<sup>7</sup> In this way, mediation allows parties to feel they have received their “day in court” in a way that trials commonly do not.

Mediation revolves around the help of an independent facilitator or mediator who has developed finely honed counseling and resolution skills through training and life experience. An initial mediation training curriculum of 40 to 60 hours includes practical exercises on the anatomy and analysis of conflicts, theory, mediation ethics and strategies, communication dynamics, active listening techniques, cross-cultural competency, consensus-building, and bringing the parties to closure, among others. Trained facilitators guide the mediation process to ensure trust, confidence, and productive communication between parties. Outcomes may range from the parties’ gaining a better understanding of each other’s points of view to the parties’ arriving at a written and even binding agreement.

The process usually begins well before the parties meet in mediation. The mediator makes sure that the parties understand what the process entails, that it is voluntary and resolution-seeking, and that the parties agree to participate. Wrongs are also acknowledged

and recommended future behavior is emphasized. Mediation assumes that the parties are willing, rational, able, and motivated to settle. Motivation of the parties to settle is weighed against the consequences of an imposed judgment, stalemate, or “self help” (that is, parties taking matters into their own hands).

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Mediation—and ADR more generally—has helped courts around the world reduce delays and costs to litigants, deliver justice faster and fairly, and allow parties to exercise control over their case resolution without feeling alienated.<sup>8</sup>

## THE ADR TRACK RECORD IN AFRICA

The notion of ADR fits comfortably within traditional concepts of African justice, particularly its core value of reconciliation. Pioneering ADR projects in Ghana, Ethiopia, and Nigeria have generated positive results and illustrate the suitability of ADR in African contexts.<sup>9</sup> Under these arrangements, ADR was used as the default resolution method. Formal court litigation, or instances where the judge actually *judges*, are reserved for cases of 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.

As part of a project on judicial reform, for example, Ghana held its first mediation week in 2003 in which about 300 cases pending in select courts in Accra were mediated over 5 days. The effort was a major success, with 90 percent of surveyed disputants expressing satisfaction with the mediation process and stating that they would recommend it to others. The achievements of this initiative led to a followup ADR round in 2007 where 155 commercial and family cases from 10 district courts in Accra were mediated over 4 days. Almost 100 cases were fully mediated or concluded in settlement agreements. Eighteen cases reached partial agreement and were adjourned for a later mediation attempt. A total of 37 cases were returned to court. The 2007 program was expanded through 2008,

and over 2,500 cases in seven district courts in Accra were mediated, with over 50 percent of the cases completely settled. This demonstrated both the scale and potential reduction in backlog that ADR can generate. More than 40 district courts in Ghana have since initiated court-connected ADR programs. In the ADR Center in the town of Ashaiman, for example, a group of five mediators settled 476 of 493 cases considered between January and June 2011. By 2013, all district, circuit, and high courts in Ghana will have functioning mediation programs, with a projection of 10,000 case mediations annually—significantly reducing the pressure on Ghana’s court system.<sup>10</sup>

Ghana’s positive experience with ADR greatly influenced the creation of the country’s landmark ADR legislation in 2010—finalized after nearly 10 years of consultations, consensus-building, bill drafting, and multiple changes in government leadership and in the judiciary. ADR Act 798 is the most comprehensive ADR legislation in Africa. Under Section 82 of the law, mediation agreements are recognized as binding and enforceable as court judgments. The Ghana experience provides potentially useful lessons for other African countries contemplating ADR, especially regarding the importance of gaining official support and funding, establishing relationships between mediators and traditional chiefs to maximize the complementarity of their efforts, and instituting the enforceability of out-of-court settlements or mediation agreements.

During an initial ADR project in Ethiopia in August 2008, 31 cases from the civil and family court dockets from the Ethiopian Women Lawyers Association (EWLA) in Addis Ababa were referred for mediation. During the 3 days of the pilot, all cases or complaints were handled by newly trained mediators, 17 of them resulting in full settlements, 6 in partial agreement or adjournment, and 8 returned to court or the EWLA. As in Ghana, over 90 percent of disputant survey respondents expressed satisfaction with the mediation process, an intention to use it in the future, and a willingness to recommend it to others.

Since the creation of the pioneering Lagos Multi-door Courthouse and its ADR Center in 2002, disputing parties now have the option of choosing among court-connected alternative methods to resolve their disputes, including the Lagos State Ministry of Justice’s

Citizen Mediation Centers (CMC). Similar multidoor courts and CMCs either currently exist or are emerging in a dozen other locations in Nigeria, with an average of approximately 200 cases mediated monthly and resolution or settlement rates ranging from 60 to 85 percent. This represents a significant portion of case-loads in Nigeria where it is not unusual for judges to add up to 50 new cases to their docket each day.<sup>11</sup>

In November 2009, in an effort to elevate and expand the use of ADR as well as generate publicity and educate the legal profession, Lagos State held its first mediation week. About 100 medium-scale commercial disputes were selected from the Lagos Island High Court docket with the consent of disputants, lawyers, and judges and scheduled for mediation over 5 days. Using lessons learned from earlier experiences, nearly 60 percent of the mediations resulted in agreement. Over 98 percent of disputants surveyed expressed satisfaction with the process, and nearly 70 percent said they preferred mediation to court litigation. Most of the participating lawyers also found the process satisfactory and indicated that they would recommend it to their clients.

## THE FUTURE OF ADR IN AFRICA

ADR can contribute to building an effective dispute settlement system and bridge the gap between the formal legal system and traditional modes of African justice. The institutionalization of ADR in African legal systems should also bolster security and development. While some conflict is inevitable in any society, its effective resolution directly hinges on the availability of trusted processes and skilled personnel. ADR is a practical tool to foster peacebuilding and conflict resolution at both the interpersonal and community levels. By reducing disaffection with the lack of access to justice—and the perceived need for disputants to take justice into their own hands—the potential for violence and rebellion is reduced.

ADR is also a potentially valuable mechanism for stabilization and statebuilding efforts. From land disputes in Liberia, to reconciliation in Côte d’Ivoire, and competition for resources aggravated by widespread displacement in Africa’s Great Lakes region, ADR can deliver quick (though not immediate) relief to some recurrent conflict triggers in fragile contexts, while more complex and long-term judicial sector

restructuring and capacity-building unfolds. In the newly emerging state of South Sudan, for instance, studies of intercommunal disputes found that conflicting parties sought an “organic mechanism for the court members to advise one another and improve their capacity to handle changing and interethnic cases, rather than necessarily to produce binding agreements or fixed definitions of law.”<sup>12</sup> With a view to meeting this need while fostering longer term judicial development, one of the first public acts of South Sudan’s first Chief Justice of the Supreme Court, Chan Reec Madut, was to call for wide use of ADR mechanisms in the still inchoate judicial system.<sup>13</sup>

Notwithstanding these benefits, ADR programs in Africa face key challenges, including inadequate political support, human resources, legal foundations, and sustainable financing. Many governments are slow to understand or recognize the need for ADR, hence ADR programs are often donor initiated. The lack of national or local government support constrains institution-building that will in turn spur the development of personnel and create an enabling legal framework. Furthermore, some lawyers view ADR as a threat to their income, especially among those without any ADR exposure. Some judges may also resist ADR for fear of losing “control” over nonlitigation processes of resolution or out-of-court settlements.

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Any effective ADR system must have a flexible design structure that is rooted in satisfying the interests of the parties in dispute and professionally administers fair justice in a dynamic yet culturally appropriate manner. To integrate ADR as a popular and effective tool in building a stronger culture of justice in Africa, several steps by governments and donors are required:

**Enact robust ADR legislation.** While most African court rules or policies permit the judge to encourage parties to settle out of court, enacting legislation would elevate the status of ADR before a skeptical disputant, build public confidence, and further increase ADR utilization. Legislation would

also provide a framework for reference, review, and reform as well as institutionalize much needed education and professional training.

**Invest in broad capacity-building.** National and local governments and international partners should invest in training and infrastructural support for ADR networks comprised of mediators and advocates who can continually advance best practices. In addition to legal professionals, capacity-building efforts should include training of local and religious leaders, traditional authorities, election officials, police and security personnel, human rights organizations, public complaints bureaus or offices of ombudsmen, and women and youth leaders. This would increase the country’s conflict mitigation and prevention capacity as well as reduce the number of cases that burden court dockets. Particular emphasis should be given to supporting ADR networks in Africa’s conflict-prone and postconflict countries and communities. Given the high levels of community participation and legitimacy achieved in ADR experiences thus far, ADR could also play a vital healing and trust-building role in transitional justice contexts.

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

**Measure progress.** To maximize the efficiencies and complementarities of ADR with the official judicial process, a systematic monitoring process should be established. This includes measuring key qualitative and quantitative data that would then lead to adjustments in the scope and focus of ADR efforts. Indicators include ADR usage, percentage of cases filed and processed through ADR vs. court litigation, the average time spent on a case, the number of successful ADR settlements with agreements reached, the number of qualified ADR practitioners and trainers, the number of ADR institutions and services in the country, community acceptance, and level of service satisfaction by disputants

and practitioners. The ultimate test of an ADR system will be how much it affects a country's conflict vulnerability and mitigation capability.

**Target youth early.** With nearly 70 percent of the African population 30 years old or younger, a substantial rate of youth restiveness is inevitable and poses a major challenge to the already strained criminal justice systems that cannot afford excessive incarceration. The ADR technique of victim-offender mediation for low-level offenses, such as fights, vandalism, and petty theft, could serve as a more effective alternative to more costly and punitive approaches. Likewise, ADR techniques to address youth unrest and violence based on peace education and restorative justice principles should be integrated into school programs. One pilot project in the Niger Delta region of Nigeria in which schools launched peer mediation programs demonstrated reductions in acts of school indiscipline (fights, drug use, bullying, cheating) and gender biases, an increase in school attendance and critical skills (communication, problem-solving, leadership), and popularity among teachers, principals, students, and participating communities.<sup>14</sup>

## NOTES

<sup>1</sup> Deborah H. Isser, Stephen C. Lubkemann, and Saah N'Tow, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*, Peaceworks No. 63 (Washington, DC: United States Institute of Peace, 2009), available at <[www.usip.org/files/resources/liberian\\_justice\\_pw63.pdf](http://www.usip.org/files/resources/liberian_justice_pw63.pdf)>.

<sup>2</sup> Kekarias Kenneaa, at an Alternative Dispute Resolution (ADR) training in Addis Ababa, December 29, 2007.

<sup>3</sup> Magali Rheault and Bob Tortora, "Confidence in Institutions," *Harvard International Review* 32, no. 4 (Winter 2011), available at <<http://hir.harvard.edu/india-in-transition/confidence-in-institutions>>.

<sup>4</sup> Jacob Segun Olatunji, "How INEC'll resolve election disputes—Jega," *Nigerian Tribune* (Ibadan), November 12, 2010.

<sup>5</sup> Stephen Goldberg, Frank Sander, and Nancy Rogers, *Dispute Resolution*, 2<sup>d</sup> ed. (Boston: Little, Brown, 1992).

<sup>6</sup> Kimberlee Kovach, *Mediation: Principles and Practice* (St. Paul, MN: West Publishing Co., 1994).

<sup>7</sup> Wayne D. Brazil, "Court ADR 25 years After Pound: Have we found a better way?" *Ohio State Journal on Dispute Resolution* 18, no. 1 (2002).

<sup>8</sup> David B. Lipsky and Ronald L. Seeber, "Appropriate Resolution of Corporate Disputes: The growing use of ADR by U.S. Companies," Cornell/PERC Institute on Conflict Resolution, 1998.

<sup>9</sup> The ADR projects in Ghana and Ethiopia were implemented between 2003 and 2008 with funding from the U.S. Department of State with Ernest Uwazie as the Principal Investigator/Project Director. The Nigeria project was implemented from 2008-2009 and was funded by the World Bank with Ernest E. Uwazie as the social scientist consultant and trainer. References to the ADR experiences in these countries are drawn from these projects.

<sup>10</sup> "Strategic Plan for Judicial Service ADR Programme 2008–2013," The Judicial Service of Ghana, available at <<http://www.judicial.gov.gh/>>.

<sup>11</sup> Abdulwahab Abdulah and Tosin Adejuwon, "ADR Will Decongest the Courts—Fashola," *The Vanguard* (Lagos, Nigeria), November 3, 2009.

<sup>12</sup> Cherry Leonardi et al., *Local Justice in Southern Sudan* (Washington, DC: United States Institute of Peace, October 2010), 82.

<sup>13</sup> Ngor Arol Garan, "Chief Justice Calls for Speedy Dispute Resolution," *Sudan Tribune*, September 13, 2011.

<sup>14</sup> The author was project director of the initiative, which was funded by the JAMS Foundation.

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