Paper presented to the 4th European Conference on African Studies, Uppsala, Sweden, 15-18th June, 2011

The state and local justice in Ghana: hybridity, legitimacy and popular values

Richard C Crook, Institute of Development Studies at the University of Sussex, UK

Introduction

The main hypothesis of the Africa Power and Politics Programme (APPP) is that more developmental forms of governance are unlikely to emerge from the application of universalist notions of 'good governance', but should be sought in institutions and ways of doing things which draw on established cultural repertoires, and can solve collective action problems in the local context (Booth, 2011). In this perspective, state institutions remain at the heart of the governance agenda, but, in contrast with so much established theorising on African states, the incorporation of indigenous social values into their functioning is seen as a potential strength rather than a destructive or contradictory force. In other words, we are looking at the extent to which the formal and informal can be combined positively by the state into effective hybrids .

The provision of justice at the local level is undoubtedly one of the key points at which the state, through the application of law and the resolution of disputes, is present in the daily lives of its citizens. But the situation of legal pluralism which exists in most African states means that state justice institutions, even more than other state services, are not necessarily the dominant source of authoritative dispute resolution or enforcement of social norms. It is therefore especially important for the reputation and legitimacy of the state that justice institutions are able to provide a service which is not only accessible and trusted but also capable of drawing upon local norms or codes. In this way they can combine the benefits which should be associated with the state—authority and enforceability, legal remedies—with a form of justice which is socially acceptable and sought after. Otherwise they are likely to be ignored or sidestepped .

This approach, which emphasizes the importance of having state institutions which can respond to and articulate with social norms and local institutions, challenges a powerful strand of current policy discourse which advocates giving priority to non-state and customary or informal forms of justice. In this discourse, it is argued that not only do non-state institutions provide justice for the majority of the population but also that state justice is irredeemably formal, inaccessible, corrupt and alien to local cultures (see e.g. Scheye, 2009; DIIS, 2010; Wojkowska et al, 2010). This agenda draws upon an anthropological literature which asserts that dispute settlement in African societies is primarily concerned with restorative justice and social harmony, a process in which individual parties are considered not as individuals but as members of social groups.

Customary law is therefore inherently a negotiated and flexible order embedded in social group relationships (see PRI, 2000; Berry, 1997, 2001; Chauveau, 1997; Juul and Lund, 2002; Lund, 2008). Critics of this view warn against the romanticisation of traditional or customary institutions and stress that 'negotiability' may conceal a reality of deepening social inequalities and expropriation of the poor (Peters, 2004; Amanor, 2008; IDEA, 2008, 8).

Building on this critique, the APPP research into local justice adopted an empirical approach, eschewing any *a priori* assumptions about the legitimacy or effectiveness of non-state as opposed to state institutions. By studying how state or state-supported justice institutions in an African state actually perform, we sought also to correct the attempt to marginalise the state as a key factor in governance for development.

In recent years many African states have attempted to reform judicial institutions or provide new forms of dispute settlement which are more user-friendly and accessible. The search for alternatives has included 'popular justice' (e.g elected Local Council courts in Uganda), revival of 'traditional' forms of dispute settlement and chiefs' tribunals, and various forms of Alternative Dispute Resolution (ADR) ranging from court-attached ADR to state support for paralegals, NGOs and other quasi-state agencies.

In Ghana, two especially interesting new dispute settlement institutions have emerged since the 1990s: the District Offices of the Commission on Human Rights and Administrative Justice (CHRAJ), which offer ADR-type mediation of complaints brought primarily by individual parties, and the land dispute resolution committees of the neo-traditional Customary Land Secretariats (CLSs), which are based on traditional chieftaincy authorities. The research project compared the kind of justice they offer with the lowest level of the formal state judicial system, the District or Magistrates' Courts, which have also introduced a Court-connected ADR service.[1]

The paper concentrates primarily on analysing the kinds of procedures used, codes of law or norms applied to disputes and the remedies offered by the three institutions, and then assesses the extent to which they were congruent with locally-rooted beliefs and expectations about how to settle disputes fairly. How legitimate and accessible were they? And to what extent have they become hybrids which blend popular values and local cultures with their statist characteristics?

It is argued that the Magistrate's Courts and the CHRAJ were in fact quite successful in providing justice which was congruent with the popular belief that fair dispute settlement requires a 'balanced process for establishing the truth'. It was also found that their procedures were sufficiently informal to reflect local cultures and their remedies responded to popular

[1] The research was a collaboration between Richard Crook of IDS and CDD-Ghana researchers under the leadership of Professor Gyimah-Boadi, Kojo Asante and Victor Brobbey. We gratefully acknowledge the contributions of other CDD staff including Daniel Armah-Attoh and Sewor Aikins who worked on the questionnaires and data entry, and Kwabena Aborampah-Mensah (Programme Manager and mass survey supervisor).

demand. The neo-traditional CLSs, on the other hand, were in practice more formal and hierarchical, less congruent with popular values, and less likely to be seen as impartial.

The Ghana case-studies

The District or Magistrate's Courts are the lowest-level courts of first instance operating with a single, legally qualified or trained judge and applying formal state law (which in Ghana includes customary law). They have been in existence for over 150 years, since the time of the Gold Coast colony. Since 2005 they have also become venues for the Judicial Service's national 'Court-connected ADR' programme, using paid para-legal mediators. After pilots in the Accra region, the programme has been rolled out to 45 District and Circuit Courts across all ten regions, although all Magistrates are encouraged to experiment with it where they can. In practice, Accra and Tema still account for 60% of the ADR cases heard in 2009. The official purpose of the ADR programme is to tackle the enormous backlog of pending cases in the state system and improve accessibility for the 'poor and vulnerable'.

The Commission on Human Rights and Administrative Justice (CHRAJ) is a constitutional body under the 1992 Constitution and its autonomy and independence are constitutionally guaranteed. Its principal mandate is to investigate abuses of power and maladministration, whether by government or other agencies, which infringe citizens' human rights as guaranteed by the Constitution. It is, however, unusual compared to other national human rights commissions in that it has a network of District Offices in 99 of Ghana's 170 Districts and 10 Regional Offices which also cover the regional capital districts. These District Offices offer a free mediation or Alternative Dispute Resolution (ADR) service to complainants. The service has attracted increasing numbers of individual citizens seeking resolution of disputes, ranging from matrimonial and family disputes including childrens' rights, to inheritance, land and property cases, landlord-tenant relations and employer-employee cases. In fact over 90% of complaints are against private individuals and organisations, and in 2009-10 57% concerned women's and childrens' rights. (CHRAJ, 2005, 2010).

The Customary Land Secretariats (CLSs) are new 'hybrid' institutions set up by the Ministry of Lands from 2003 onwards. They are still at a pilot stage – 10 were created in 2005 and another 29 have been added since 2007-8. They are administered by chiefs and staff employed by the Traditional Councils, but their function is a modern one: to record and demarcate the full range of local lands held under customary tenures and to record and formalise the allocation procedures (sale, leasing and other tenures) which are under the control of customary authorities – chiefs, family heads or 'land priests'. (About 80% of all land in Ghana is held under customary tenures). The intention is to improve the transparency and accountability of customary land administration, and to develop land use planning and new revenue sources. The CLSs are mandated to deal with disputes which arise – particularly over demarcation and definition of rights – by setting up 'land dispute resolution committees' called Land Management

Committees. These bring together representatives of the customary authority with local government and community interests. The Committees are led by the chiefs and basically follow customary procedures and conventions relating to land, although officially they have been enjoined to offer 'ADR'.

The main focus of the research was to assess and explain the extent to which these dispute settlement institutions (DSIs) were providing public dispute settlement which was 'legitimate, accessible and effective'. The empirical focus was on civil cases, consisting mainly of land disputes, inheritance and property, but also including family matters, debt, landlord-tenant relations and 'defamation'. All three of the DSIs dealt with land or inheritance cases (unofficially and only infrequently in the case of CHRAJ), while the CHRAJ and Magistrate's Courts covered all of the other matters. This paper focuses mainly on reporting our findings on the kinds of procedures used in each of these institutions, the codes which they applied to the settlement of cases, and the remedies they offered. These elements of their performance are used to assess their legitimacy, defined as the extent to which the codes of justice, procedures and remedies offered by each of the DSIs were congruent with the beliefs, expectations and demands of both the general public and of the litigants who used them.

A mixed set of methodologies was used to collect the data. First, three case-study Districts were selected for intensive study: one in a peri-urban area of Accra (the capital city); the second a rural cocoa-growing District in the Brong-Ahafo Region and the third the capital of the Northern Region, Tamale.[2] The primary method was anthropological observation of proceedings in the three DSIs over a period of six months, on a daily basis for the CHRAJ and the Magistrate's Courts and whenever cases came up in the CLSs (which was very infrequently). 413 cases were observed. Observation was combined with a representative sample survey of popular opinion (800 respondents) in the first two Districts, together with interviews with 300 litigants in the three DSIs over a five-month period using a structured questionnaire, and elite semi-structured interviews with judges and officials.

Procedures in the DSIs

The Magistrate's Courts

At first sight, a Ghanaian Magistrate's Court seems a very formal place; the physical layout is that of a conventional courtroom with a raised desk for the judge, officials (an interpreter and clerk) sitting at a table in front, and a witness stand. Although the judges do not wear wigs, as in

[2] The choice of Districts was severely constrained by the need to find Districts where there were functioning CLSs alongside the other two justice institutions. Within that constraint the basic comparison was between rural and urban settings, while Tamale provided an example of an Islamic cultural zone very different from that of southern Ghana.

the High Court, they dress smartly (both men and women) and demand respect. The court rises when the judge enters, parties and witnesses swear oaths and the police are on hand to deal with any disturbance (although this is rare). Proceedings can be slow as the judge has to record the case in handwritten notes, in English. In spite of this, courts are always crowded with large numbers of people—parties waiting for their cases, relatives and friends and curious bystanders; this gives them a popular atmosphere. The presence of the public is partly a function of their massive volumes of business but they are also 'open' or public spaces, particularly in rural districts where the court can be a central focal point and source of public entertainment. And their apparent formality is in fact mitigated by a range of practices and informal procedures, which reflect the extent to which the original English common law model has been 'Ghanaian-ised'.

First, although all the courts employ an interpreter to translate to and from English into local languages, in practice local languages were used for a large part of the proceedings observed (see also litigants' survey results). This was especially marked in the rural Brong-Ahafo District, where the judge spoke what is in practice the *lingua franca* of southern Ghana, Twi, and virtually all the litigants spoke Twi. In Accra and Tamale the judges used English more frequently because litigants spoke a greater variety of languages, which the judge did not necessarily understand. In Tamale, English was often the only common language of the parties and the officials. The switch to local languages can be attributed to an unofficial (and unapproved) change in the role of judges which has clearly grown up over a number of years. The official role of the judge, as inherited from the English common law tradition, is to preside like an 'umpire' over an adversarial contest between the parties and their lawyers. But in practice they have started to behave more like an inquisitorial judge in a civil law system.

Thus a second feature of the procedural informality was that in their inquisitorial role the judges routinely intervened to directly question the parties or witnesses, either in their language or in English, and to conduct cross- examinations. These interventions were aimed at facilitating disclosure of facts, clarifying stories or offering advice. Sometimes they would question the credibility of witnesses, and where a case had been decided, get involved in agreeing terms for settlement of judgement debts. They also issued what were in effect injunctions to order a party to desist from certain conduct such as cutting down cocoa trees, building on land or occupying premises. Mostly the exchanges were conversational or informal and even jokes were made; in one case for instance, when the defendant claimed that 'God Himself' had appeared in a dream to tell him not to marry the plaintiff but take a different woman, the judge asked him: 'do you mean God Himself, God the Son or the Holy Spirit?' This provoked laughter in court, especially when the defendant replied 'God Himself'. At other times, the judge was clearly irritated by parties who were taking too long and digressing from the facts of the case; and in some cases harsh questioning by the judge suggested that he had little sympathy with that party's case. The judges themselves were clearly aware of the dangers of seeming to be biased as a result of these

interventions, but the procedures have undoubtedly developed out of the realities of the situation in which they find themselves, and have become routinised.

Another reason for the move to direct interventions in the local languages is the unexpected impact of lawyers on the proceedings. Only a minority of litigants were represented by lawyers in the courts observed; but when lawyers were present there were two contradictory consequences. On the one hand, in some cases the judge and counsel engaged in exclusive conversations amongst themselves in English, especially over points of law or procedure. This created a more formal atmosphere. On the other hand, (and this was more common effect) the judge was frequently moved to intervene in the leading of a party's statements by their counsel, or cross examinations, because of the incompetence of the barristers. It was painfully obvious that barristers regularly turned up to the Magistrate's Courts with their briefs completely unprepared; or, they seemed incapable of eliciting a clear and relevant statement from a witness or party. In fact the general role of the barristers was disruptive and unhelpful; many of the large number of adjournments which characterised the daily proceedings of these courts were caused by barristers coming late or absenting themselves. In fact even when they did turn up, their main contribution was to ask for an adjournment, which the magistrates normally granted because they feared the accusation of 'denial of fair hearing'. But the judges generally have a low opinion of the lawyers and blame them for time-wasting and for contributing significantly to an ever-increasing backlog of cases. This was especially obvious in the Accra courts, where the judge was overwhelmed with a case-load which often reduced her to skimming through the files for each case, quickly granting adjournments to avoid lengthy arguments with lawyers.

Court-connected ADR

ADR is currently offered only in Accra and the regional capitals, and was observed in two further Accra courts in addition to the original case-study districts. It should be noted that Magistrate's Courts also sit as Family Tribunals; when dealing with these cases, the court adopts an ADR procedure, meeting with the parties in the judge's chambers with social workers present. Referral to the ADR or mediation service is triggered by the judge when the parties first appear and are asked whether they wish to try an amicable settlement. If they accept this option, the court ADR coordinator explains the system to the parties, stressing that it is voluntary and depends on a willingness to agree, but that once an agreement has been reached it will be ratified by the Magistrate in Court and enforced as a court 'consent judgement'.

The service is provided by a specially recruited corps of trained, non-legal mediators, paid by the Judicial Service at the rate of 5 Ghana cedis per case settled , with normally a maximum of 3-4 per day. The mediators have to be 'retired professionals' (mainly social workers, police officers

or teachers) under the age of 65 or 'self employed', although in Accra the pool was boosted with a number of specially recruited younger social workers.[3]

The ADR hearing is supposed to be conducted in private, in an informal setting, with only the parties and perhaps a relevant witness or relative in attendance. But only one of the three Accra Magistrate's Courts observed had adequate private rooms available; in one, cases were being heard in the corner of a main office which contained the cashier's desk and a constant queue of litigants causing interruptions; in another, they were conducted in the full court room, vacated for the purpose, but with many members of the public present. The sessions were all conducted in the local languages of the parties.

At the outset, the best mediators explained carefully that the purpose of the session was to achieve a compromise agreement between the parties, on the basis of what was mutually acceptable. Others began more rapidly, after a cursory look at the file, asking the complainant to state what their problem was. The process was informal in the sense that the mediator attempted to get each party to state freely how they saw the issues, using conversational exchanges aimed at clarifying details and facts. But the mediators often struggled to maintain a calm atmosphere since many of the cases aroused high emotions, either between members of the same family or between those involved in bitter battles over fraudulent land sales or broken business relationships. In some of the most complicated cases, the mediator had to act almost like a cross-examining lawyer, extracting facts and exposing lies as well as having to expel disruptive relatives. Mediators were not supposed to intimidate the parties, but some of the more forceful characters were clearly quite determined to get an agreement and more or less pushed and cajoled the parties into agreeing, even using the threat of returning to Court as the alternative to agreeing. In cases which were actually of a minor criminal nature, this was a real threat.
A frequent –and quite effective -- technique when the parties seemed unable to agree was to take each one aside in a private meeting, the aim being to establish what their real or minimum position was, which they often found difficult to express in front of the rival party.

When an agreement was reached the parties had to sign a consent form on which the mediator briefly stated the details of the agreement, before returning to the Magistrate for adoption. If there was no agreement, this was stated, with no further details given. The proceedings of the mediation are not supposed to be admissible in court, so if the mediation fails, the case is heard *ab initio* by the Magistrate.

The CHRAJ

[3] In practice many of the mediators are older than 65—one in Tamale was 77. Recruitment has proved increasingly difficult as the ability of the Judicial Service to pay even the small fees has come into doubt, with serious backlogs of payment and consequent demoralisation.

The free mediation service offered by the CHRAJ District Offices corresponds closely to an ideal model of ADR: it deals primarily with disputes between private individuals, settled in private in a friendly, non-coercive and informal atmosphere by an impartial mediator who is a 'stranger' in local society. The hearings were triggered by the filing of a complaint to the office; if the District Director certified that it was within CHRAJ's competence, a notice was immediately sent to the respondent and a date agreed. The mediations were conducted in the Director's office, with normally the District Director presiding and another officer –usually the Registrar – taking notes. The Directors all appeared well trained in ADR and personally committed to 'human rights' values.[4] The District Offices observed were spending between three and four days a week dealing with complaints, so that this had in effect become their main activity aside from public educational work. The Tamale Regional Office received 690 complaints in 2009-2010, of which 84% were human rights issues (76% of those being women's and children's rights); the District in Greater Accra Region received 287 in 2007-8, while the Brong-Ahafo District received 354 (2008).

At the beginning of each mediation the CHRAJ Director began by explaining the principles upon which they operated: these were that the proceedings were confidential, and whatever the parties said would not be held against them at a later date (i.e. in legal terms they were 'without prejudice'). The mediator would stress that they were looking for an agreement which they were both happy with, and the parties were asked to sign a consent form before the proceedings could begin. He or she then emphasised that the proceedings had to be calm, everybody should feel comfortable and feel free to say what they wanted to say. The parties were told that everybody should speak softly and not raise their voices or use abusive language about the other party; and they were encouraged to address each other by name. Usually only the parties were present, although in the matrimonial and child custody cases a parent of one of the parties was frequently allowed to attend. The CHRAJ also used the technique of 'caucusing' seen in the Court-connected ADR—taking parties aside for a private discussion when it seemed as though agreement was going to be difficult to reach.

Generally, the CHRAJ mediators were very successful in maintaining an informal and relatively calm atmosphere, using conversational techniques or dialogue with each party in the local language to clarify the facts and to draw out a basis for agreement. But given that the majority of the cases concerned matrimonial or child custody issues, the mediators frequently had to deal with very distressing and emotionally charged conflicts, in which the parties were very hostile to each other (often egged on by a relative) and there was shouting, rudeness and threats. In some cases (e.g. when a man threatened to kill the baby for which he was being asked to pay maintenance) mediators had to threaten reporting to the police or court action against especially obstreperous parties. Unlike the court system, the CHRAJ officers were very persistent in

[4] There was only one exception to this, when the Director of the Accra district was absent for some time and a less well trained investigating officer began taking cases.

pursuing respondents to ensure that they turned up for meetings, and following up on the implementation of agreements. (Maintenance and compensation payments were usually paid through the CHRAJ office account).

The Customary Land Secretariats

The Land Management Committees (LMCs) of the CLSs were officially set up to offer ADR-type settlement of land disputes, on the assumption that their rootedness in customary institutions would make them accessible and informal. In practice their basis in the Traditional Councils led to them being dominated by the more formal protocols of the Paramount Chiefs.

In the Accra district, the CLS was a narrowly restricted Ga 'family land' institution with a membership of purely customary officials and run in a very personal way by the Chief of the Traditional Council. The dispute settlement committee rarely met and the chief indicated that he dealt with most disputes through informal personal intervention. The seriousness of land conflict in the District had in fact led to the setting up of a hybrid committee called the District Land and Chieftaincy Disputes Resolution Committee, funded and administered by the District Assembly (DA) with the help of the Peace Building and Conflict Resolution Programme of the German Development Service. This body was chaired by the Paramount Chief together with three representatives of the Traditional Council as well as the Queen Mother and two other traditional chiefs.[5] But it also included the District Police Superintendent, the Director of the CHRAJ, the Presiding Member of the DA, the Chair of the DA Development Committee and two other DA members. The presence of the police was justified on the grounds that in this District land or chieftaincy disputes frequently presented security issues and a danger to peace and order. In fact, the Committee was in many respects an aspect of the District security apparatus. But it met infrequently, dealing with only around 6 cases during over a year of field work. Its procedures varied according to the type of case and its importance. In some the chief chaired like a modern bureaucrat, using informal ADR-type discussions; in others, involving chiefs and family heads, formal traditional protocols and language were used ('high' or idiomatic Ga, comprehensible only to indigenous citizens of high status), whilst in cases involving conflict between communities the public hearing in the Assembly Hall resembled more of a traditional chief's court with large numbers of people in attendance.

The CLS office in the Brong-Ahafo case-study was situated in the palace of the Paramount Chief of Dormaa-Ahenkro and its LMC was chaired by his Krontihene (the second-in-command in the Akan traditional hierarchy). But it also included a representative of the District Assembly (e.g. the Town Planning Officer or District Surveyor) and a representative of one of the state land

[5] Note that the chief himself straddles traditional and modern roles: he is an appointed member of the DA, Chair of the DA Works Sub-Committee, Director of the District National Council for Civic Education, (NCCE) (a salaried government post) and Chair of the 'Ga West Association of Chiefs and Queen Mothers'.

sector agencies, such as the Office of the Administrator of Stool Lands. This CLS heard more cases than the Accra committee but still only a handful (12) over six months compared to the 350 per year in the local CHRAJ office.

The Dormaa LMC held its sessions in the courtyard of the palace; the cases were initiated through a written summons in English and both parties had to pay a fee, which was treated as stake money. Losing parties forfeited their fee and were also in effect fined through awards of quite substantial 'costs' against them. Witnesses had to swear oaths by 'stepping on the money' which had been paid in. Proceedings combined formal elements of the state court system (taking of evidence, studying of documentation, cross-examination of parties without the witnesses present, written records of the cases) with formal customary protocols which served to uphold traditional hierarchies and the dignity of the chief.[6] Litigants who were family heads, elders or chiefs, were given chairs and allowed to wear their sandals. Ordinary 'subjects' had to stand, and were reminded sternly to remove their sandals if they approached the chiefs with them still on.[7] Such a format also made the panel relatively unfriendly to women and to strangers or migrant farmers. In one case a defendant who was a stranger sharecropper suggested to the panel that he was not expecting to be treated fairly, and was immediately disciplined for contempt of court—although the chairman had earlier openly disparaged his claims, saying 'how could he, a stranger, know the boundaries of the land better than his landlord'? The decisions of the panel were made in a private meeting at which all the evidence was reviewed, without the parties present, and then announced formally to the waiting participants. No appeals against this decision were allowed, although in one case the chairman did permit some negotiation over the terms of the award against the defendant.

In Tamale the process was even more opaque and embedded in the traditional hierarchy. The CLS was run by the Gulkpe Na, one of the sub-chiefs of the King of Dagbon (the Ya-Na) and apparently worked in close liaison with the District Assembly Planning Department and District Surveyor. Any disputes over customary land allocations or registrations were in practice dealt with by the Secretary of the CLS, a loyal servant of the chieftaincy who had held the post for over 37 years. There were no real 'hearings' in the sense of a formal mediation; the Secretary had delegated powers to sort out any problems through meetings with the parties, which he then

[6] The Paramount Chief's ceremonial stool is placed in the hearing, facing backwards, to signify the authority of the chief.

[7] On his return from a training session in Accra one of the key members of the panel reported that they had been advised not to hold hearings in the chief's palace as this could be considered intimidating. But the other senior chiefs rejected this notion, saying that the support of the *omanhene* was crucial to the survival of the institution. It has to be remembered that in Ghana the superior chiefs continue to wield a political authority which until recently was a formal part of the governmental system of Native Authorities (NAs) and Native Courts (NCs) created by the British. The NAs created a powerful 'neo-traditional' elite of wealthy and western- educated chiefs who were a major bulwark of colonial society. Since independence they have (in spite of the loss of many formal powers) remained an institutionalised and important part of the national political elite (Crook, 2008).

referred to the chief for formal decision. In one case involving a woman who had been cheated out of her purchase of a piece of land through a fraudulent alteration of the allocation note by a village chief and one of his elders, the case was remitted up to the Ya-Na so that he could agree to order the sub-chief to find her an alternative plot. This decision was relayed back down to the woman, who did not appear before the chief because 'women are not allowed in the Ya-Na's palace'. No minutes were kept of any of the disputes; according to the Secretary of the CLS, this was in accordance with 'Dagomba culture' which abhors public recording of a dispute.

What kind of justice? Codes of law and principles of settlement

The Magistrate's Courts

The codes or concepts of justice underlying the work of the judges in the Magistrates Courts derive quite strongly from their professional self-identity, based on their common law training and socialisation into the traditions of the Ghanaian judiciary. The judges proclaimed their belief that they must be impartial and that the purpose of the judicial process was to 'establish the truth' in relation to the facts of a case, and to apply the principles of law including customary law where appropriate. This classic common law view, embodied in the adversarial court system, sees justice primarily in terms of 'due process' (Dowrick, 1961). Hence one Magistrate felt fairness derived from an assessment of the arguments put forward by the parties in court; the truth emerges from letting the parties make their cases. In Court, they routinely reminded litigants that they must tell the truth. But they also used the language of rights – ironically, more so than the CHRAJ officials – saying that compromise cannot be allowed to prevent people getting their legal rights. In some of the land cases, the judges specifically rejected bids by lawyers or defendants to divide contested lands, saying that their job was to establish who had the rightful title.

In terms of the way particular cases are settled, the judges are obliged to apply the provisions of statute law, the principles of Anglo-Ghanaian common law (based on precedent) and customary law, which has been judicially recognised in Ghana for over a century and is now embedded in the Constitution. In practice a much wider variety of principles was used, although generally the judges did enforce what they saw as rightful claims based on the law, e.g land title, landlord's rights to evict tenants.

In many of the land and inheritance cases heard in the Magistrate's Courts, the judges used principles of Akan matrilineal inheritance, and respect for 'customary successors', often in ways which got around the provisions of the Intestate Succession Act, 1985 (a measure intended to protect the rights of widows and children). For instance, one case involved a young man whose father had died 30 years previously. His father's land had been inherited by the father's matrilineal nephew now in his 60s. The young man, feeling that he was 'owed' something from

his father's estate, decided to start cultivating a piece of the farm saying he needed the money to pay for his training as a mason. But he did it without asking the permission of his father's successor. In the judge's view, the young man was in the wrong because he should have treated his father's successor as his new father, even though it would have been right to expect some provision to have been made for him. But he showed disrespect by not going and asking for permission to cultivate the land. In many other cases, parties were admonished to treat the customary successors to their father's property (in fact their father's brothers or maternal-side nephews) as if they were their new fathers. In cases involving disputes within families over the rights of particular members to rent out land or dispose of property, the judges invariably upheld the rights of the family 'collective'. [8] Land disputes also regularly featured issues over customary forms of boundary marking (planting of special trees and flowers) which the judges would go to inspect if necessary, and arguments over the rights of parties in the well-established customary sharecropper tenancies of *abusa* and *abunu*.[9]

The principle of respect for the elderly – a cultural norm rather than a legal principle -- also featured in many discussions in court, and in actual decisions. A notorious and long-running case in the Accra court had begun with an accusation of witchcraft made by an older woman of around 27 years old against a younger one, aged 19. The young woman had answered the accusation by quipping: 'it takes one to know one'. The older woman then took the younger one to the local chief's court, and the chief ordered the younger woman to be punished for daring to insult the older one, even though she had not started the quarrel. The younger woman and her family were ordered to apologise and pay a fine, upholding the principle of 'respect for elders' (it was clear that plaintiff also had other kinds of support in the community). The chief later took pity on the girl's family and suspended the fine. This enraged the older woman who in a spirit of vindictiveness sued in Court for 'defamation'. The court decided in favour of the older woman, awarding her damages and costs, although afterwards the judge spoke to both parties in private, trying to encourage reconciliation whilst urging the basic need to respect older people. It was noticeable that the judges routinely protected more elderly parties and witnesses in court, especially if they were illiterate or lawyers were trying to bully them.

The Court-connected ADR mediators also used these 'pro-elderly' norms. One particularly serious case of violent dispute between a mother and her son had led to criminal assault charges against the son, who had spent a week in the police cells after his mother called the police. The mother wanted to evict her son, who ran his clothing design business in a shop in front of her house, claiming he didn't pay his electricity bills, and had too many drunken parties. The mediator did not really attempt to ascertain the truth or otherwise of the accusations and counter-accusations flying between them; instead, sympathising with the mother's plea that she 'just wanted him out', he sought an agreement that involved the son moving out. The mediator

[8] Note that there is also now a statute which upholds the rights and duties of family heads
[9] *Abusa* means the tenant has to give one-third of the harvest to the landlord; *abunu* provides for a half share.

advised the son (a man in his mid-30s) to accept that 'his mother could do no wrong' and that he should apologise and show her respect. This he did, and then agreed to the terms of the settlement because he just wanted to get out of the situation and not face police charges.

This case also illustrated the importance of another set of norms now widely spread in Ghanaian popular culture: those of evangelical Christianity. As the agreement was being worked out, the mediator argued that the son's behaviour was due to his possession by the Devil. The son thereupon brought in as his witness and supporter his Pastor, who confirmed that he had now accepted Jesus Christ. The mediator was very pleased by this and argued that his agreement to the 'terms suggested' would be a living proof that he had changed his wicked ways and escaped the Devil's influence. These kinds of references were quite frequent in the mediations and Family Tribunals, although less so on the part of the judges. Some mediators felt it was a moral duty to find not just a workable agreement but to promote reconciliation. It is interesting that even in Tamale – a Muslim area—the Court staff began each day with a prayer meeting led by the Magistrate. One of the ADR mediators in Tamale (a retired policeman) claimed that he invited parties to pray in 'either the Christian or Islamic way' and to recognise that 'we are all under one God and so we should love one another [i.e. make peace]'.

The CHRAJ

When asked to reflect on the principles they used in their mediations, and what they considered to be a fair settlement, the CHRAJ officers offered the most consistent picture of the values they worked by. This undoubtedly reflected their training and their professional commitment to 'human rights'. For many this was also a deeply felt personal or moral commitment. The principles of CHRAJ mediation put a heavy emphasis on the impartiality of the mediator and the search for compromise and mutual agreement between the parties. All used the phrase 'win-win' to describe what is being sought in a 'fair' settlement. And they were also aware of the potential conflict between observing legally defined human rights standards, as embodied in the Constitution and in relevant statutes such as the Children's Act, 1998, and the emphasis on negotiated compromise which could deprive one of the parties of their full rights. Particularly in Tamale, where forced marriage, underage marriage (with consequent deprivation of education for girls) and harassment of widows were common practices, the officers were confronting a very real (and familiar) conflict between human rights norms and the need to respect local cultures. They said that their strategy was not to attack these practices directly or publicly but to deal with cases on an individual basis, using negotiation and education, whilst at the same time not shirking from referring violent abuses to the police. They saw the educational campaign as a long term process. It was nevertheless significant that the local nickname for CHRAJ in Tamale was 'the ladies' parents' (meaning 'guardian of women').

The vast majority of the cases in the observed CHRAJ District Offices were in fact complaints brought by women against men for maintenance of children, disagreement over custody of children, breaches of promise to marry, and maintenance after separation or divorce, often mixed

with accusations of domestic violence and abuse. Many of the child maintenance cases involved very young women—schoolgirls and students-- who had been abandoned immediately after getting pregnant, and were seeking support for their education or training as well as child maintenance. Others involved failed relationships after some years of cohabitation; these were often presented as disputes over property or land which they had worked together. Very few of the couples were married, either customarily or through a civil licence.

In practice, the CHRAJ mediators did tend to take a stance which was sympathetic to women, unless their obligation to protect the rights of the children overrode this. (The Children's Act puts a legal duty on parents to support and care for their children, and gives children a right to live with their natural parents). In one case, for instance, a couple with 4 children (the eldest 16) had been separated for 9 years, after the wife had left, leaving the children in the care of the husband and his sister. It was clear that she had suffered serious abuse, to the extent that she was still suffering from a chronically infected caesarean birth wound dating from 2000, caused by his assaults. The children had been brought back to her by the husband's sister and now refused to return to their father's house. The husband was trying to get them back. The mediator tried to resolve the case by arguing that the children needed to return to their father's place for the sake of their education, but that they could visit their mother during the school holidays. The two eldest children, who were present outside, refused this solution, saying the father beat them and did not look after them well. Although the wife was not very happy with this solution, it was left that the CHRAJ mediator would try to 'convince' the children to go with this arrangement.

Another very typical custody case also turned on the principle of securing the child's education. An ex-husband was trying to take back custody of a 9 year old boy who had lived with his ex-wife since he was born, and for whom he had not paid any of the agreed maintenance. As the unfortunate mother lived a poor life in a shop kiosk, the mediation revolved around the argument that the father would assure the child's education better. On these grounds, there was an attempt to persuade the mother to allow the child to go the father.

In most of the maintenance and compensation cases, however, the duty of men to compensate women they had abandoned or abused was always the subject of negotiation and compromise over what was appropriate and the nature of the economic resources involved. In one case of domestic violence, for instance, the assault was a serious one which had caused the young woman to miscarry her second child (fathered by the ex-partner), suffering as a consequence a prolapsed womb. The hearing at CHRAJ dealt only with her request for help with medical expenses, in the form of drugs, not a gynaecological operation. CHRAJ persuaded the 'husband' to accept responsibility for the medical bills. There had been no reference to the Police Domestic Violence and Victim Support Unit (DOVVSU), and no suggestion that a civil action for damages in Court would have produced a much larger compensation.

Underlying most of these negotiated compromises over women's and children's rights were, therefore, legal principles. In Tamale, these could be used to prevent girls being removed from

school to undergo arranged marriages. But mediators often couched them in terms of the moral obligations of parents, or customary beliefs. In custody and child maintenance cases, for instance, references to the obligation of a father to 'name' his child were frequent, since this signals a recognition of paternity and an obligation to support. One mediator was clearly referencing Christian ideas about the desirability of reconciliation between marriage partners, and others often fell into the role of 'marriage counsellors'. Unfortunately for women who wanted a divorce, usually customary, CHRAJ routinely had to tell them that 'CHRAJ did not have a mandate to handle divorce', and that they therefore could only deal with the compensation or maintenance claims as property matters.

CHRAJ officers also shared the norms of respect for the elderly seen in the Magistrate's Courts. In one case a tenant, who was furious that his landlord (an old lady) had doubled the rent even after he had carried out agreed renovations, insulted her in public, calling her 'dirty' and the mother of bad children. The mediator found in favour of the landlord and told the tenant to move out, although a legal examination of the tenancy agreements might have supported the tenant's position. The code being applied was that it was wrong to insult the elderly lady, so in practice an 'agreed' settlement meant that the tenant had to 'agree' with this moral stance.

The CLSs

When asked about their principles of adjudication the chiefs and CLS officials routinely invoked the language of ADR and said that they promoted 'win-win' settlements based on compromise and restorative justice. But these commitments seemed more reflective of the official language of government policy than what happened in practice. Whilst in some cases there was reference to the importance of restoring social harmony or peace, other aspects of the procedures differed considerably from ADR – e.g. the resort to documentation of local histories and formal land claims, the concern with the rights of Stools, and consultation with local opinion leaders and other chiefs on the broader aspects and merits of the case while it was in progress. And many panel members were more clearly concerned with establishing who the winning party was, arguing 'there is only one truth'. The idea that the hearing should produce a winner, the one with the rightful claim, was clearly shared by the litigants; in one case observed the winners were doused with white powder by their supporters, a traditional sign of jubilation.

The dominant approach to settlement of the LMC cases was in practice to focus on examination of the land documents and written contracts, and assessment of witness statements. There was an emphasis on 'fact finding', although the ultimate intention was to establish a legally justifiable claim. In one case involving an *abusa* tenancy, the landlord complained that the tenant had not produced any cocoa after 8 years on the farm. But the case was decided on the basis that the written agreement did not provide for 'non-compliance' and there was in any case an error in the document on the dates, so that the tenancy in fact still had two years to run. In the case where the winners had jubilated, the defendant was accused of encroaching on the complainant's maize

farm; in her defence, she argued that she had been given this land by her late father. She submitted in evidence a written inventory of the stool land where the farm was situated, listing the owner and signed by the chief and eight elders, and a tape recording of an elderly witness known to the panel. The panel also visited the site to identify the markers mentioned by the defendant. The case was decided in favour of the defendant, citing the number and reliability of the witnesses and the quality of the documentary and on-site evidence. It was considered significant that the complainant could not get many witnesses to attend the hearings to testify on his behalf.

'Reliability of witnesses' was a factor which of course depended to some extent on the local knowledge and attitudes of the panel members, and it was here that the power of the local hierarchy in such a system can become significant. In the case involving the stranger sharecropper, it was obvious that the LMC preferred to believe the local landowner on the issue of where the boundaries were. The chair of the panel nevertheless tried to soften the blow by allowing the sharecropper to harvest his crops, whilst the complainant agreed to forego his award of costs.

Overall, therefore, and somewhat surprisingly, the CLS dispute resolutions tended not to refer very much to the rules of customary land law as decisive factors, although they were clearly assumed in the way the investigations were conducted. Although a retired High Court judge had been retained by the Dormaa CLS to give advice on land law issues, he confessed that his input had rarely been sought. What seemed to matter was local knowledge and determination of the reliability of evidence concerning which party was correct in their assertions. And the fact that financial penalties were imposed on 'losers' was a strong confirmation of the idea that identifying a justified winner was deeply embedded in the process.

The legitimacy of the three DSIs

To what extent were the procedures and codes of justice used in the three DSIs congruent with locally-rooted beliefs and expectations about how to settle disputes fairly? Establishing the nature of such locally rooted beliefs required empirical investigation. It cannot be assumed that the everyday norms which are effective in particular local communities in Africa are coincident with so-called 'traditional' norms, inherited unchanged from a pre-colonial past (IDEA, 2008; and cf. Olivier de Sardan, 2008).

The popular survey, the interviews with litigants and observation of cases show that when people in Ghana find themselves involved in a conflict or dispute, or are asked to think about such a situation, they have particular sets of ideas about what they want and value from any dispute settlement process.[10] These are ideas which we may describe as 'popular concepts of fairness and

[10] The popular survey used open-ended questions to probe these ideas, which were then post-coded.

justice', and they applied to all kinds of case, whether they involved disputes over property or land, business, landlord-tenant relations or matrimonial and sexual relations.

What our respondents seemed to value most strongly was a judge or arbitrator perceived to be impartial and competent, who can ensure that the true facts come out and the disputing parties are given a fair chance to present their stories.[11] *In short, the local concept of 'fairness' is identified with the idea of a 'balanced process'.* This does not mean that people necessarily accept the 'adversarial' view of due process embedded in the state courts applying Anglo-Ghanaian common law. Ghanaians want to see both parties to a case given an equal hearing, but do not necessarily see justice as emerging from a contest, like a debating society competition. The emphasis of most of our respondents was on the 'truth' coming out, and also on the need for the parties involved to acknowledge or accept the truth, once established. If one of the parties was at fault, people thought this should be publicly accepted by that party (14%). This was a view which emerged most strongly from those who had had personal experience of a case[12], and litigants in the Magistrate's Courts (40%) .

The evidence also shows that a substantial minority of people saw justice as best served through reconciliation and peaceful or amicable settlement. In some respects, 'mutual acceptance' of the truth of the findings can be seen as elements of a process which may ultimately make reconciliation possible. But it is not the same as compromise, where the parties simply agree to 'split the difference' for the sake of a settlement, or restoration of harmonious social relations. In this sense, amicable settlement may be seen as a kind of remedy, a way of avoiding going to court.

The remedy which people seek or expect was in fact an important determinant of how the justice process was perceived, and was clearly linked to the subject matter and the history of the case. Thus many disputants had used informal or non-state DSIs initially (family, respected community leaders, village chiefs, religious or political leaders, individual state officials including the police), perhaps believing that they offered the kind of balanced and impartial justice they respected, but hoping for an amicable private settlement in which the matter could be resolved.[13] But with land cases, as well as intra-family property disputes or contract and debt cases, the level of hostility and even violence is often such that this kind of dispute resolution fails. Yet, as the experiences of those who used the CHRAJ show, compromise is not always

[11] 68% of respondents gave these kinds of answers. See (Crook et al, 2010) for a full account of the survey results.
[12] 20% of the respondents had actually been parties to a dispute, and 38.4% had witnessed a case being settled.
[13] In the popular survey, 67% of those who had been parties to a case, although note that only 25% of those had used a chief's court, and state courts accounted for the largest single group- 33% ; 44% of litigants in the Magistrate's Courts had used an alternative DSI first.

what people want nor is it even in their best interests. It is highly significant that 53% of litigants in the Magistrate's Courts had come straight to the Court without first using an informal DSI.[14] Thus by the time the disputants arrive in court, the plaintiffs are resolutely seeking a clear and enforceable remedy which will give a declaration of title, enforce specific actions on the defendants, pay what is owed or award damages. The strong interest in establishing fault and certainty of enforcement is vividly confirmed by the extraordinarily low rates of 'out of court' settlement in Ghana (see Crook et al., 2007). It is possible that the numbers of respondents expressing a belief in amicable settlement may in fact be a result of current policies emphasising ADR and the availability of Court-attached ADR, although the extent of their impact should not be exaggerated.

Comparing the performance of the three DSIs, it can be argued that the Magistrate's Courts do offer a form of justice which corresponds with popular understandings of justice and fairness (due process and impartiality). They are relatively accessible in terms of the language used and the informality of their procedures, and they also offer the certainty and enforceability of remedies which people want if attempts to find amicable settlement have failed. Their popularity is reflected in the ever-increasing numbers of cases which are filed each year, which they are struggling to clear.[15] The vast majority of litigants in our survey were satisfied that the facts had been properly heard, and said they understood the proceedings. The majority also felt that the judges had behaved impartially, been patient and helpful. Overall, the satisfaction score of litigants was the second highest of the three DSIs: 54% said it was 'definitely worthwhile' bringing the case to court (and a further 10% 'to some extent').

The congruence of the CHRAJ procedures with popular understandings of justice is very strong: the District Offices provide an impartial mediation which does give all parties a real (and unrushed) opportunity to put their case in a friendly, non-coercive atmosphere. Interviews with those who had taken their cases to the CHRAJ revealed that they were primarily concerned to get the person who they felt had wronged them to acknowledge the truth and 'do the right thing' – even if they had to accept a compromise which they didn't necessarily feel was adequate. The accessibility of the CHRAJ mediations can also be rated very highly: not only are they informal, and speedy, they are free. This has made the CHRAJ very attractive to poorer, younger people and especially to women. These are people who would not normally go to Court because they are ashamed or afraid, or feel they cannot afford it. CHRAJ had the highest overall satisfaction score for its litigants: 71% thought it was 'the best way to settle disputes'.

[14] Previous research on the Courts in Kumasi and Asunafo, Brong-Ahafo Region found a similar percentage- 47% (Crook et al. 2007).

[15] In 2009-10 although clear-up rates for civil cases improved from 40% to 53% and for criminal cases from 30% to 56%, the total number of civil cases dealt with increased from 43,100 to 56,696 (32%) and criminal from 20,563 to 43,595 (112%) (Ghana, 2008; 2010).In our Accra case-study court in 2008, 264 civil cases were cleared up (21% of the total pending) and in the Brong-Ahafo court 240 civil cases out of a much lower total, representing a clear up rate of 47%

The justice offered by the Land Management Committees of the neo-traditional CLSs was perhaps the least congruent with popular values and expectations. Given the formal role of the CLSs in the management and registration of customary lands, it is probably unrealistic to expect them to offer an ADR-type mediation in which an impartial stranger focuses on balancing the claims of two individuals without use of unequal power resources. Their embeddedness in the power relations of local land ownership and social hierarchies means that the social position of disputants is inevitably going to play a part, even if individual chiefs may be respected as people who can adjudicate wisely. And because their procedures are derived from the rituals of a superior chief's traditional court, they are quite formal and intimidating; indeed in Tamale, they were kept remote from the parties. They are quite different from the kind of informal justice which a village chief or family elder might offer. It is important to note, however, that their emphasis on finding a rightful 'winner' is one aspect which could still be popular; the stereotype of traditional justice in Ghana as being mainly concerned with reconciliation or restorative justice is actually quite misleading, as any re-reading of the anthropology of Akan societies will reveal (see Rattray, 1969, 388). It was not surprising to find that 70% of the litigants in the CLSs were older men with generally high levels of education; they tended to be those who already knew how the local system worked and anticipated that their claim would be dealt with favourably. The overall satisfaction score of litigants using the CLS was the lowest of the three-47.5% saying it was the 'best way of settling disputes'.

Conclusion

Overall, the research shows that state or state-supported justice institutions can and do offer a form of dispute settlement that is informal, accessible and legitimate, in the sense that they draw upon and respond to local values and expectations about justice. The main explanations for the relative success of the Magistrate's Courts and the CHRAJ are to be found in their hybridity. On the one hand, the local institutions are part of nationally coordinated and disciplined state organisations which produce and sustain the professionalism and commitment of staff, and enable rules and authoritative remedies to be enforced. On the other hand, they combine a commitment to formal codes with informal behaviours, assisted by official policies for encouraging Alternative Dispute Resolution (ADR). This hybridity means that the formal and informal are mutually supportive, instead of the one undermining the other.

References

Amanor, K. (2008) 'The changing face of customary land tenure' in Ubink and Amanor (2008) Chapter 3

Booth, D. (2011) 'Introduction: Working with the Grain? The Africa Power and Politics Programme', IDS Bulletin, 42, 2, 2011, 1-10

Berry, S. (1997) 'Tomatoes, Land and Hearsay: Property and History in Asante in the Time of Structural Adjustment', *World Development* 25(8): 1225-41.

Berry, S. (2001) *Chiefs Know Their Boundaries: Essays on Property, Power and the Past in Asante*, 1896-1996. Portsmouth, NH: Heinemann.

Chauveau, J. P. (1997). 'Jeu foncier, institutions d'accès à la ressource et usage de la ressource. Une étude de cas dans le centre-ouest ivoirien', in: Le modèle ivoirien en questions, crises, adjustements, recompositions, B. Contamin and H. Memel-Fotê (eds) Paris, Karthala/Orstom.

Commission on Human Rights and Administrative Justice (2010) *Annual Report 2009-10*, CHRAJ: Accra, Ghana

Crook, R.C., Affou, S., Hammond, D.N.A., Vanga, A.F. and Yeboah, M.Owusu (2007) *The Law, Legal Institutions and the Protection of Land Rights in Ghana and Cote d'Ivoire: Developing a More Effective and Equitable System.* Research Report 58. Brighton: Institute of Development Studies.

Crook, R.C. (2008) 'Customary Justice Institutions and Local Alternative Dispute Resolution: What Kind of Protection Can they Offer to Customary Landholders?' in: Ubink and Amanor (2008) Chapter 6

Crook, R.C.; Asante, K. and Brobbey, V. (2010) *Popular concepts of justice and fairness in Ghana: testing the legitimacy of new or hybrid forms of state justice*, Working Paper 14, London: Africa Power and Politics Programme http://www.institutions-africa.org/filestream/20101026-appp-working-paper-14-crook-et-al-popular-concepts-of-justice-fairness-in-ghana-oct-2010

DIIS (2010) 'Justice and security- when the State isn't the main provider', *Policy Brief*, December 2010, Copenhagen: Danish Institute for International Studies, www.diis.dk

Dowrick, F.E. (1961) *Justice According to the Common Lawyers*, London: Butterworths

Ghana, Republic of (2008) *Judicial Service Annual Report*, 2007-8, Accra: Judicial Service

Ghana, Republic of (2010) *Judicial Service Annual Report*, 2009-10, Accra: Judicial Service

IDEA (2008) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, Stockholm: International Institute for Democracy and Electoral Assistance

Juul, K. and Lund, C. (eds.) (2002) *Negotiating Property in Africa*. Portsmouth, NH: Heinemann

Lund, C. (2008) *Local Politics and the Dynamics of Property in Africa*, Cambridge: Cambridge University Press

Olivier de Sardan, J-P. (2008) *Researching the Practical Norms of Real Governance in Africa*, Discussion Paper 5, London: Africa Power and Politics Programme http://www.institutions-africa.org/filestream/20090109-discussion-paper-5-researching-the-practical-norms-of-real-governance-in-africa-jean-pierre-olivier-de-sardan-jan-2009

Peters, P.E. (2004) 'Inequality and social conflict over land in Africa', *Journal of Agrarian Change*, 4,3, 269-314

PRI (2000) *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems.* London: Penal Reform International

Rattray, R.S. (1969) *Ashanti Law and Constitution*. Oxford: Clarendon Press (first published 1929).

Scheye, E. (2009) State-provided service, contracting out and non-state networks, INCAF Discussion Paper, OECD June 2009

Ubink, J. and Amanor, K.S. (eds.) (2008) *Contesting Land and Custom in Ghana: State, Chief and the Citizen*. Leiden: Leiden University Press

Wojkowska, E. and Cunningham, J. (2008) 'Justice reform's new frontier: engaging with customary systems to empower the poor', in: Golub, S. (ed) *Legal Empowerment: Practitioners' Perspectives*, Rome: International Development Law Organisation, 93-111