

## The state and accessible justice in Africa: is Ghana unique?

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**T**he provision of legitimate and accessible justice for its citizens is one of the fundamental duties of a well-governed state. But throughout Africa the institutions of state justice are struggling to overcome problems of overload and delay, perceptions of corruption and popular distrust. Current policy prescriptions to improve access to justice are dominated by the belief that non-state, customary or informal 'alternative dispute resolution' (ADR) systems provide the best solutions. But research by Africa Power and Politics (APPP) in Ghana challenges this new orthodoxy. The findings suggest that the state can and does provide ADR-type accessible justice at local level that aligns with popular beliefs and expectations. The key lessons from the Ghana experience are that:

- Both formal justice and ADR need to be provided by institutions that can guarantee fair and impartial mediation at low cost with enforceable settlements
- The state can provide such forms of justice when it combines the authority and professionalism of a national institution with the informality of procedures as delivered by local officials
- Neo-traditional dispute resolution is not necessarily the most legitimate or popular solution.

### State vs. non-state justice: the search for alternatives

State justice in Africa is frequently criticised by commentators as exclusionary because it is too formal, based on 'alien' (i.e. colonial) concepts and too expensive. In some countries, the main problems are delay and enormous backlogs of cases; in others, there is politicisation of justice where administrative officials such as Prefects are the main sources of dispute resolution.<sup>2</sup> In more fragile, post conflict states the justice system has often lost all legitimacy or is perceived as hopelessly corrupt.<sup>3</sup>



Ghana Supreme Court, Accra  
Photo: by permission, Ghana Judicial Service

Policy responses to this litany of problems have included a variety of reform initiatives to improve access to justice. The idea that state institutions should start to offer ADR or consensual mediation has gathered wide acceptance, together with experiments with paralegals and the revival of customary forms of justice. In Uganda and Mozambique, the state supports 'popular' justice through elected local courts.

The most powerful trend in the development policy literature, however, is to argue that state institutions are so flawed and irrelevant that legitimate and effective justice is to be found mainly in non-state social institutions such as traditional chiefs, religious or community leaders and families. According to one commentator, even if the state was able to fully and correctly apply state law, it would 'not meet the needs and demands of users'.<sup>4</sup> This argument is based on two main assertions:

- that non-state institutions are by definition 'informal' and rooted primarily in African traditions that are supposed to privilege restorative justice and social harmony. They are, therefore, inherently more effective and in tune with popular beliefs and expectations

- that non-state dispute settlement institutions (DSIs) are in practice the most popular, and deal with '80% of all disputes'.<sup>5</sup>

The evidence from APPP research in Ghana challenges such assertions, particularly the characterisation of popular beliefs about justice, the assumption that so-called customary institutions necessarily offer 'informal' ADR and are more popular, and the assertion that the state cannot offer informal and accessible kinds of dispute resolution.

## **ADR, state justice and popular values in Ghana**

Since the late 1990s the Ghanaian government has been supporting the expansion of ADR and more informal kinds of justice, both in the state's first instance Magistrate's Courts through a programme of court-connected ADR, and in two new institutions outside the Judicial Service:

- the **Commission on Human Rights and Administrative Justice (CHRAJ)**, which offers ADR-type mediation of complaints in its 109 District or Regional Offices
- the neo-traditional **Customary Land Secretariats (CLSs)**, based on traditional chieftaincy authorities. These were set up by Ghana's Ministry of Lands with substantial donor support and are empowered to settle disputes arising over the ownership and demarcation of land held under customary tenure (80% of all lands).

APPP research compared the performance of the Magistrate's Courts (including the new ADR service), with that of the CHRAJ and the CLSs, focusing on civil cases – particularly land, inheritance and property, family matters, debt and landlord-tenant relations. Drawing on six months of ethnographic observation of hearings, a representative survey of 800 respondents and interviews with disputants, the findings cover three dimensions of performance: legitimacy, accessibility and effectiveness.

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### **Box: A CHRAJ domestic violence case**

A young woman complained that her ex-partner had assaulted her while she was pregnant, causing a miscarriage that led to a prolapsed womb. The man was persuaded to accept responsibility for the cost of drugs, although not for the costs of any gynaecological operation. There was no reference to the police, although the man was made aware that an action for damages in court would have resulted in much larger damages. The woman was reluctant to go to court, but was able to access some compensation quickly and cheaply albeit at the cost of forgoing her full legal rights.

### **Legitimacy**

Legitimacy was defined as the extent to which the procedures and codes of justice used by the dispute settlement institutions corresponded with citizens' values about what makes a dispute settlement fair and morally acceptable. One of the most significant findings of the research was the discovery that most ordinary Ghanaians see justice as essentially a 'balanced process' through which the truth is brought out, and the parties acknowledge fault (see Table 1). Both the CHRAJ and the Magistrate's Courts were rated as highly congruent with these popular beliefs. The CLSs scored less well because of their more formal and hierarchical procedures.

### **Accessibility**

The CHRAJ mediations scored very highly, offering a free, informal process run by full-time, professionally committed and trained officials. Nationally, nearly 60% of all complaints concerned women's and children's rights. In the Districts studied, complainants were mainly younger, less well-educated women seeking maintenance for themselves or children, compensation for domestic violence, or (in Northern Ghana) escape from forced marriage. Although CHRAJ mediators were always mindful of the need to uphold the legal rights of women and children, they generally sought to achieve mutually acceptable compromises, especially where the rights of children had to be balanced against those of women, or compensation was the main remedy sought (see Box). Magistrates also performed relatively well because of their informality, use of local languages and variety of codes including customary law and cultural principles such as respect for the elderly. CLSs, however, were regarded as intimidating to women and migrants and 70% of the litigants were older, higher status men.

### **Effectiveness**

CHRAJ also scored highly on this dimension because of the speed and cheapness of their procedures, although lack of legal enforceability was perceived as a weakness. The Magistrates

were undermined by the long delays and costs associated with legal proceedings, which often took many years. The sheer volume of cases filed in the courts means the number of cases pending continues to grow year on year. And court-connected ADR was unable to expand its very limited coverage because of lack of funds to recruit sufficient numbers of full-time, trained mediators. Nevertheless, the attraction of enforceable legal remedies meant that 54% of litigants felt it had been 'definitely worthwhile' bringing their case to court. And 53% of litigants had taken their case straight to court without even trying an informal dispute settlement first.

CLSSs were cheaper and speedier than the Magistrates but were dependent on the personal authority of the chief and could be delayed by lengthy consultations amongst chiefs, community representatives and state land sector agencies.<sup>6</sup>

**Table 1: Popular concepts of justice: what makes a dispute settlement 'fair'? (N=800)<sup>7</sup>**

|  | % of respondents |
|--|------------------|
| Establishing truth through due process                   | 36.1             |
| Impartial/honest judge or arbitrator                     | 14.8             |
| Other qualities of judge (competent, firm, God-fearing)  | 16.8             |
| Chief, elders involved, community expectations respected | 9.3              |
| Mutual acceptance of verdict, reconciliation             | 14.2             |
| Fault identified, law enforced                           | 5.2              |
| Efficiency issues (delay, cost etc)                      | 1.0              |
| Don't know   | 2.7              |

### Policies to promote more accessible justice in Africa: lessons from Ghana

Ghana is acknowledged as one of Africa's more stable multi-party democracies with strong state institutions and party traditions. And the power, wealth and political status of traditional authority in Ghana is very high compared to other African states, with the exceptions, perhaps, of northern Nigeria and central Uganda. But the institutionalisation of the legal profession and the common law courts over a period of more than 100 years is shared by most of the ex-British countries to varying degrees, again with Ghana and Anglophone West Africa ranking highest on this dimension. And Ghana is not alone in its commitment to constitutional



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democracy. These characteristics suggest that Ghana's experiences do have real relevance to other countries provided the comparisons are treated with due caution. Three main sets of policy implications may be identified.

#### Developing 'hybrid' state institutions

Any policy to provide more accessible justice through ADR, or other informal kinds of dispute resolution, must guarantee fair and impartial mediation that combines a user-friendly informality with the authority to uphold agreements. This is especially important for vulnerable people such as abused women who need compensation payments or other agreed arrangements to be assured. Where state institutions are sufficiently strong they can provide such guarantees, because they have the national structures within which standards can be regulated and professional training and commitment sustained. Policy should, therefore, focus on developing 'hybrid' institutions that can combine the legal authority and enforceable remedies of the formal system with more informal procedures for delivering justice, including ADR.

#### Making justice reflect real local values

Encouraging ADR is clearly an effective policy for promoting more accessible and effective justice. But any successful ADR scheme must reflect local values and expectations about how to settle disputes fairly. It should not be assumed, without empirical investigation, that popular beliefs about justice are based on what is often loosely called 'customary' or neo-traditional institutions inherited from the colonial period. There is little evidence that popular values in Ghana corresponded to the 'African' stereotype of restorative justice and community-sanctioned reconciliation. In other countries where the former colonial chieftaincy systems have been much weakened, the gap could be even greater.

## Taking critiques of traditional institutions seriously

It is very important not to romanticise the notions of restorative justice and social harmony that have been attributed to traditional institutions. Many scholars argue that such codes have, in practice, served to reproduce local elite dominance, dispossession of the poor, and discrimination against women and low status groups, particularly in Anglophone countries where superior chiefs were part of the formal colonial governmental system.<sup>8</sup> These problems need to be taken more seriously by policy makers.

Justice institutions based on the chieftaincy are usually so embedded in local power structures and formal protocols that it is not certain that they can offer genuine ADR, particularly for land disputes. It is recommended that informal justice that is genuinely accessible and impartial is best offered by state-supported, modern paralegal-type institutions, for which Ghana's CHRAJ can serve as an excellent model. The formal courts can also provide such a service whilst retaining the essential function of offering remedies based on legal rights.

## References

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