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Popular concepts of justice and fairness in Ghana: testing the legitimacy of new or hybrid forms of state justice

Richard C. Crook, Kojo Asante and Victor Brobbey*

The provision of effective, legitimate and accessible justice is one of the most fundamental public goods expected from a well-governed state. In this paper we compare the legitimacy of three state or state-supported Ghanaian dispute settlement institutions: the Magistrate's Courts, the Commission on Human Rights and Administrative Justice (CHRAJ) and the land dispute committees of the neo-traditional Customary Land Secretariats (CLSs). It was found that popular beliefs and expectations are predominantly focused on the notion that justice requires a 'balanced process for establishing the truth', and that the procedures, codes and remedies used by the Magistrate's Courts and the CHRAJ were more congruent with these beliefs than those of the CLSs. The findings challenge stereotypes of popular and traditional justice as being primarily about reconciliation or restoration of communal harmony, and suggest that state institutions should be supported in their current development of hybrid and informal kinds of dispute settlement.

1 Introduction

The provision of effective, legitimate, and accessible justice through judicial institutions and more generally through the 'rule of law' is probably one of the most fundamental of all public goods expected from a well-governed state. By 'rule of law' we mean more than just the current neo-liberal conception of a legal system which protects private property and facilitates the market economy. Rule of law refers to the provision of a justice system which sustains the security of all citizens, particularly the most vulnerable, protects against the exercise of arbitrary power by the state or the powerful, and provides for the public regulation of civil disputes in ways which are trusted. The idea that public officials are subject to legal and moral norms is particularly important in ex-colonial states where the state is often perceived as a tyrannical and arbitrary monster (cf. Young, 1994). In addition, state law is present in everyday life insofar as it uses the authority of the state to enforce, regulate or define social and economic relationships, from marriage and sexual behaviour through to economic exchange, the disposal of property and the power to command the services of others (Poggi, 1978; O'Donnell, 1999). In short, the degree of public trust in and the legitimacy of public judicial institutions directly underpins the legitimacy and trustworthiness of the state itself.

The 'local justice' research stream of the APPP was developed to undertake empirical investigation into what kinds of state or state-supported justice institutions in African states

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might provide such legitimate, effective and accessible dispute resolution – and if so, what might explain any positive outcomes.

Currently, the legal systems and courts of most African countries are widely condemned as inaccessible to ordinary citizens because of their formality, alien procedures and concepts derived from their colonial origins, corruption and inefficiency. In Anglophone common law countries in particular, there is a deep crisis caused by overload and backlog of cases which in effect amounts to denial of justice by the state. In recent years, however, many African states have attempted to address these crises of the public legal system through reform of judicial institutions, particularly at the local level. The search for alternatives has included ‘popular justice’, revival of ‘traditional’ forms of dispute settlement and chiefs’ tribunals applying customary law, and various forms of Alternative Dispute Resolution (ADR) ranging from court-attached ADR provided by lawyers to state support for paralegals, NGOs and other state agencies providing dispute settlement services.

The first phase of the research therefore looked at three different kinds of local justice institution in Ghana, comparing a conventional state court with a new state-sponsored ADR service and a land disputes resolution system based on the traditional chieftaincy authorities.¹

The District or ‘Magistrate’s’ Courts are the lowest level courts of first instance 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. Until 2002 they were called Community Tribunals and incorporated a lay panel of community assessors sitting with a legally qualified magistrate. They have now reverted to operating with a single, legally qualified or trained judge. Recent studies have suggested, however, that these courts have become more informalised and flexible in their procedures (Crook et al., 2007). 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 25 courts across all ten regions, although all Magistrates are encouraged to experiment with it where they can. Its official purpose 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. This includes unfair treatment of citizens by public agencies, corruption of public officials, and unequal recruitment practices. It is, however, unusual compared to other national human rights commissions in that it has a network of District Offices in around 110 of Ghana’s 170 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 family disputes (custody of

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-Attah and Sewor Aikins who worked on the questionnaires and data entry, and Kwabena Aborampah-Mensah (Programme Manager and mass survey supervisor).

children, maintenance of spouses and divorcees) to inheritance, land and property cases, landlord-tenant relations and employer-employee cases.

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 – only 39 have been established, of which only 10 have existed since 2005. 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 and 'allodial ownership' of customary authorities – chiefs, family heads or 'land priests'.² (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 CLS are mandated to deal with disputes which arise over their land administration – particularly demarcation and definition of rights – by setting up 'land dispute resolution committees' called Land Management Committees, which 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'. Their performance on these dimensions was judged using three main sets of criteria:

- Legitimacy: the extent to which the codes of justice, principles, procedures and remedies offered by the three DSIs were congruent with the beliefs, expectations and demands of both the general public and of litigants who used them.
- Accessibility: the extent to which ordinary citizens, and particularly the poorer and more vulnerable, were able to access and use their services, and not disproportionately excluded or disadvantaged by their procedures.
- Effectiveness: the efficiency of their services in terms of speed of settlement, affordability, and enforcement of settlements.

In this paper we focus primarily on our findings in respect of the legitimacy dimension, which depends fundamentally on finding out about what local beliefs and expectations of justice really are, and how people experience or perceive the institutions in question. It is a dimension which also relates most closely to one of the core concerns of the APP programme.

² In Ghanaian land law, the allodial title is the ultimate title to the whole territory of the political community, which in Akan societies is vested in the office of the chief (not the chief personally), known as the 'Stool' (similar to the concept of the 'Crown' in English law). The Stool is conceived of as a 'trustee' or custodian of the land and has to manage it on behalf of the community both present and future. Therefore all dispositions or uses of Stool land are subject to the approval of the chief (see Constitution of Ghana, 1992, Articles 36(8) and 267(1)).

2 Legitimacy, 'cultural repertoires' and local concepts of justice

One of the main hypotheses of the APP research programme is the proposition that public institutions are more likely to be effective at providing public goods if they are 'locally anchored' in ways of doing things which draw on established forms of moral obligation and collective action – in other words, local cultures and institutions (Booth, 2010). Those which successfully provide some kind of public good can be seen as 'problem solving in the relevant context'. What the causal link between such institutional resources and public good outcomes might be is subject to empirical investigation, but it is hypothesised that 'cultural repertoires' can provide an effective source of monitoring and sanctioning, sufficient to overcome collective action problems in associational life or compliance problems in more formal institutions (Kelsall, 2009).³ Because of the ideological baggage associated with the concept of 'tradition' in Africa, and the confusions surrounding its historical transformations during and since colonial rule, APP does not make any assumptions about the character of these cultural repertoires; they may well be historic, or reinventions using historic referents, or contemporary creations emergent from post-colonial society (Olivier de Sardan, 2008). They therefore need to be established empirically in each local context, not assumed, as is often the case with stereotypes of African tradition and popular culture.

Very few researchers have asked ordinary Ghanaians about their understandings of justice and the best way to settle disputes. Generally, a stereotypical assumption is made, drawn from anthropological literature, that popular understandings of justice correspond to 'traditional' or customary notions of restorative justice and social harmony, where the emphasis is on reconciliation and consensus between social collectivities.⁴ This view can be traced back to the classic works of social anthropologists such as Gluckman (1969), Fortes (1969) or Radcliffe-Brown (1952) and later legal scholars such as Allott (1968). Their insights into the importance of clan, kinship and negotiated social order particularly in so-called chiefless or segmentary societies have been taken up and simplified into given 'facts' about African society by successive generations of administrators and policy makers since colonial times. Lord Hailey, for instance, writing in 1956 cites anthropologists as defining the objective of African customary law as 'primarily designed to maintain the social equilibrium' – although he also notes that in segmentary societies without specialised judicial institutions, injuries would often be resolved through 'self-help' (i.e. revenge) unless a compensation could be negotiated (Hailey, 1957, 590) – a point also acknowledged by Lucy Mair who drew careful distinctions between societies with hierarchical monarchical rule and those with what she called 'minimal' government (Mair, 1962). Legal scholars in the 1960s and 70s continued to argue that 'the job of the [customary] arbitrator is to "restore harmony" not just find the facts', and to consider the relationship not just of the individual parties but of their social groups and the community as a whole: 'justice is derived from what society considers to be fair or just, not what is fixed by law' (Allott, 1968, cited in Penal Reform International, 2000: 24-25). A corollary of this notion is that a judge or arbitrator is not necessarily expected to be a formally neutral person; it is expected that he has intimate knowledge of the parties and the case already and so elaborate rules of evidence are not seen as necessary or even appropriate (Penal Reform International, 2000: 30).

³ The term 'cultural repertoire' is taken from Ann Swidler's seminal article (1986).

⁴ For a full review of this literature see Penal Reform International (2000: 24-34).

Some contemporary anthropologists continue to emphasize the key role of social group membership and negotiated rules and settlements in the context of land disputes (Berry, 1997, 2001; Juul and Lund, 2002). And perhaps even more significantly for policy discussions on reform of African judicial systems, the advocates of modern ADR, as it originated in North America and Europe, seem to have been inspired by what they understood to be the virtues of traditional dispute settlement in African or Asian societies – namely the concern to establish socially sanctioned consensus and reconciliation between the parties (Brown and Marriott, 1999; Silbey and Sarat, 1989). Hence ADR itself has become associated with what critics have called a ‘rhetoric of harmony law’ – the ‘idea that in a conciliatory model people do not fight but harmoniously agree on a common solution’ as allegedly existed in a ‘primitive and idyllic society’ (Grande, 1999: 69; cf. Nader, 2001).⁵ Our investigations challenge many of these stereotypes.

Cultural repertoires are of particular importance when discussing the concept of legitimacy, which has been defined as the belief by citizens in the ‘rightfulness’ of an authority, in this case a state-supported legal institution (Poggi, 1978: 101-2). In other words, it is a moralisation of legal – and hence political – authority which depends upon the theories which people hold about what is justice and due process, and hence whether the decision of a judge as an agent of public authority should be respected (Schaar, 1984: 111). As Merry has pointed out, the cultural context of institutions which deal with conflict and dispute is especially critical because

‘Disputing is cultural behaviour, informed by participants’ moral views about how to fight ... Parties to a dispute operate within systems of meaning; they seek ways of doing things that seem right, normal or fair, often acting out of habit or moral conviction’ (Merry, 1987: 2063).

The highest form of public good is when citizens believe that officials of the state and ordinary citizens are subject to the same codes and hence public authority is not arbitrary or lacking in moral worth.⁶

One of our primary research tasks was therefore to construct a picture of local beliefs and expectations about dispute settlement and justice and then relate that to how the chosen DSIs actually worked. We sought data on what users of the DSIs (parties to disputes) and local communities actually seek from the state and its judicial institutions. What theories did people hold about what is ‘just’ or correct and fair? What did they value? What were their experiences of these DSIs, either directly or indirectly? (It was of course recognised that overarching consensus around such beliefs might not exist, and they might differ by gender, class and other social differences).

⁵ It is curious that this understanding of African law, having been recycled through a ‘Northern’ legal reform movement, is now being advocated back into Africa as a new way forward.

⁶ It should be recognised that to find such a coincidence of popular and official ideologies of rightfulness is in fact quite difficult and rare even in ‘mature democracies’. In many African states, legitimacy may not extend beyond the narrow circles of the ruling military and bureaucratic elites (cf. Crook, 1987).

Secondly, did these local understandings correspond to the way in which the various DSIs were working, and the outputs they were producing? What codes, procedures and remedies were actually used by the various DSIs?

The data were collected using a variety of methods: two case-study Districts were selected, one in peri-urban Accra, and the other a cocoa-growing rural District of Brong-Ahafo Region.⁷ In each, a representative sample survey of popular opinion was conducted, together with interviews with litigants in the three DSIs over a five-month period using a structured questionnaire, and anthropological observation of the DSIs in action. Although the main purpose of the observation was to provide information on what kinds of legal or moral codes and procedures were actually used by the various courts or tribunals, it also provided useful insights into the relationships among litigants, judges and the public attending the hearings, and on the responses of members of the public to the proceedings they were watching.

3 Popular ideas: evidence of the mass survey

The survey of popular opinion on justice and dispute settlement interviewed 800 respondents selected randomly from the two case-study Districts (400 in each), using a multi-stage, stratified area sample with random selection of households and random selection of individuals within households.⁸ The questionnaires focused primarily on people's experiences of and opinions about dispute settlement, whether in court or elsewhere, paying particular attention to how people think about fairness, what they value in any dispute settlement process and who/what they find trustworthy. As far as possible, we attempted to avoid the expression of abstract opinions and sought to elicit responses within an action context. A large number of the questions were open ended, and were then post-coded. It is worth noting that respondents were generally willing to engage in quite substantial and serious discussion of the issues put to them, and we have, therefore, a high level of confidence in the robustness of the findings. Although our primary interest was in respondents' experiences of and opinions about dispute settlement and justice, it was nevertheless anticipated that only a minority of such a popular sample would have actually been parties to a formal 'case' or dispute. The questionnaire was therefore structured to divide the respondents (having been randomly selected) into three main groups: (1) those who had actually experienced (i.e. been parties to) a case; (2) those who had witnessed a dispute settlement in their community; (3) those who said they had neither been involved in nor witnessed a dispute settlement. These were not pre-selected but identified during the course of the interview. The actual sample produced the following proportions in each group or subset:

Subset 1 (parties to a case): 20.1%

Subset 2 (those who had witnessed a case): 38.4%

Subset 3 (those who had neither witnessed nor been parties): 41.4%

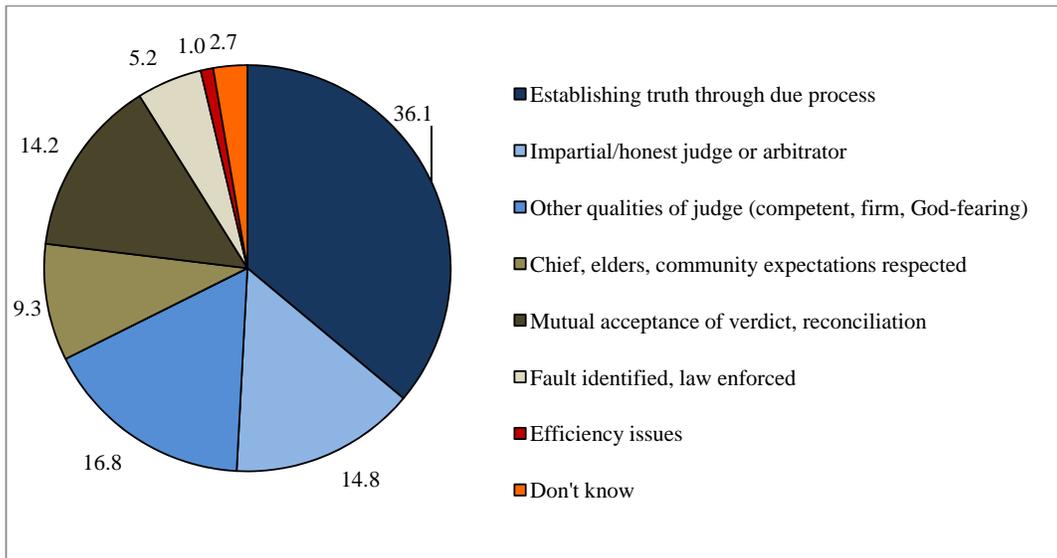
⁷ The choice of Districts was severely constrained by the need to find Districts where there were functioning CLSs alongside the other two justice institutions. Within that constraint the basic comparison was between rural and urban settings

⁸ See Annex Tables A1-A5 for the basic demographic characteristics of the respondents in the survey. The survey was carried out by CDD-Ghana using recent graduates from the University of Ghana and Kwame Nkrumah University of Science and Technology, Kumasi, trained by CDD and APP researchers. Interviews were conducted in the local languages (Twi or Ga) or English depending on what respondents found most comfortable.

3.1 Concepts of fairness and justice

The most significant findings of the survey relate to how Ghanaians define fairness and justice in the settlement of disputes (see Figure 1 and Table 1). Respondents in Subsets 1 and 2 were asked to explain *why* they thought a case they had been party to or had witnessed was handled fairly or unfairly.⁹ Those in Subset 3 were asked a more hypothetical question: ‘IF you ever got involved in a case, what are the most important things about a dispute settlement institution which would make you trust them to give a fair settlement of your case?’ Overall, the largest single group of respondents across all Subsets (36.1%) gave an answer which emphasized the importance of the truth (‘the true facts’) being established through what could be termed ‘due process’ – specified as both parties being allowed to speak freely and make their case to the judge.

Figure 1: Mass survey: popular understandings of fairness and justice (all respondents)



The second most important set of ideas related to the qualities required of a judge, particularly impartiality (expressed variously as ‘not biased’, ‘honest’, ‘respects the truth’, ‘listens to both sides’ – 14.8%) and other qualities such as ‘competence’, ‘reputation’, ‘experience’, or being ‘God-fearing’ (16.8%). It may be argued that the idea of an ‘impartial judge’ is very similar to the principle of allowing both sides to make their cases in order to establish the truth; both emphasise the necessity for balance in the way in which a dispute is dealt with, in order for the truth to come out. If the two views are combined to reflect this common underlying concept, then the combined percentages are very striking: 60.2% of those who had been parties to a case and 44.3% of those who had witnessed a case saw fairness in dispute settlement as associated with a balanced process for establishing the true facts, dependent on either the procedures themselves and/or an impartial judge. To what extent were these views the product of particular experiences, or were they a more generally shared mindset in the population at large? This can

⁹ The precise question was: ‘Do you think the dispute settlement procedure was fair?’

be gauged in the first place by comparing the results for Subsets 1 and 2 with those for Subset 3 – those who said they had no personal experience of a case.

Table 1: Popular understandings of justice, by type of respondent

	<i>Subset 1</i>	<i>Subset 2</i>	<i>Subset 3</i>	<i>ALL</i>
	%	%	%	%
Establishing truth through due process	44.7	31.6	33.5	36.1
Impartial/honest judge or arbitrator	15.5	12.7	15.4	14.8
Subtotal 1 +2	60.2	44.3	48.9	50.9
Other qualities of judge (competent, firm, God-fearing)	5.6	1.3	35.3	16.8
Chief, elders involved, community expectations respected	0.0	13.4	9.4	9.3
Mutual acceptance of verdict, reconciliation	14.9	28.0	0.0	14.2
Fault identified, law enforced	5.6	10.1	0.0	5.2
Efficiency issues (delay, cost etc)	3.7	0.7	0.0	1.0
Don't know	0.0	0.0	6.3	2.7

Note: For Subset 3, the question asked was ‘If you ever got involved in a case, what do you think are the most important things about a dispute settlement institution which would make you trust them to give a fair settlement of your case?’ This was slightly different from the question asked of subsets 1 and 2, who were asked to explain why they thought the procedure in a particular case they had witnessed or been a party to was ‘fair’ or ‘unfair’.

Although a much larger proportion of subset 3 saw the quality of the judge as being the most important factor for a fair settlement (50.7%), the second largest group (33.6%) gave answers which fell into the ‘justice as due process’ category – hearing both sides, getting a balanced judgement. If these are added to the ‘impartial judge’ answers, a very similar percentage of this group (49%) shared the views of subsets 1 and 2 on ‘justice as due process’.

Overall, therefore, over half of all respondents (50.9%) defined justice and fairness as ‘due process’ combined with an impartial judge. If those who emphasised other qualities of the judge which are related to impartiality, such as competence and honesty, are added then the proportion rises to 67.7%. It may therefore be argued that the notion that justice requires a ‘**balanced process for establishing the true facts**’ was very widespread in the general population of the Districts surveyed, regardless of people’s personal experiences – although it was clearly much more important to those who had actually been party to a case.

A substantial minority of respondents expressed other views but these were more fragmented and therefore formed a number of minority positions which could not collectively be seen as a coherent alternative to the ‘due process’ concept.

Thus, the third most important group of respondents overall saw fairness as requiring mutual acceptance of the result by both parties, expressed either as coming to an ‘understanding’ of each other or as some kind of reconciliation or peaceful resolution of conflict. This is an idea

which undeniably has importance and was found to resonate in many ways with the experiences of actual litigants, insofar as there seems to be a general longing on the part of people in dispute to attribute a moral quality to any settlement – perhaps motivated by the belief that subsequent hostility can be mitigated if there is mutual acceptance.¹⁰ Nevertheless, only 14.9% of those who had been parties to a case put forward this view, and none of those who had no experience of a case. Only those who had witnessed a case (Subset 2) held this view in substantial numbers (28%) – in fact, the second largest group after the combined ‘balanced process’ group. One explanation could be the different kinds of dispute settlement types they had experienced compared to Subset 1; much higher proportions of Subset 2 had witnessed informal, family and traditional forms of dispute settlements (see below).

A fourth category of views emerged from Subsets 2 and 3 alone: the idea that that the ‘fairness’ of a dispute settlement lay in the fact that it corresponded to what people in the community ‘expected the result to be’ (13.4% of Subset 2) or that it was necessary for chiefs or elders to be involved (9.4% of Subset 3). These views were combined into a category which we labelled ‘traditionalists’ or communitarians – those who were strongly influenced by community norms and traditional hierarchies. Here we see some (rather limited) evidence for the existence of a view of justice popularised by anthropological studies of African societies, according to which justice is not a product of abstract impartiality or formal law but an outcome linked to community expectations, the premium on social peace and local knowledge of the protagonists. But this view was limited to a small number of those who had witnessed a local dispute settlement, and in the case of Subset 3 the answer could well be explained by the formulation of the question, since they were not being asked to assess a particular case but only to give a general opinion on what kind of dispute settlement procedure they might trust in a hypothetical situation. Caution must also be exercised about the significance of the assertion that a fair settlement requires the involvement of chiefs or elders of the community. One cannot assume that DSIs run by chiefs or community elders are necessarily associated in peoples’ minds with the provision of community-based or restorative justice; they might well be admired for providing the kind of balanced or truth seeking justice seen as ideal by the largest groups of respondents. This kind of ambiguity in survey results can only really be resolved with the kind of detailed and action-based data which comes from observation of the courts in action and from surveys of actual litigants.

A fifth very small minority idea stressed a completely opposite viewpoint: namely the belief that justice means the identification of ‘wrongdoing’ or who was really at fault, and the enforcement of the law. This was the view of 5.2% of respondents overall (9.2% of Subset 2 respondents and 5.6% of Subset 1).

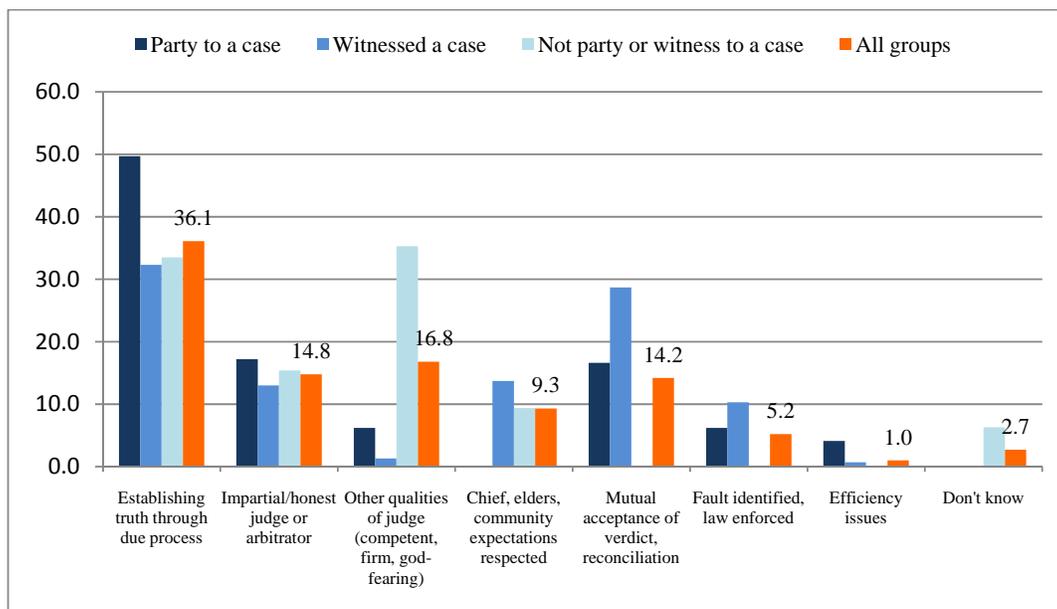
Finally it is perhaps significant that only very small numbers of respondents in any of the three subsets mentioned ‘efficiency’ issues such as cost and delay as being crucial to the provision of a fair or just dispute settlement. 1% of respondents overall (3.7% of Subset 1 respondents and 0.7% of Subset 2) spontaneously mentioned these kinds of issues. None of those in subset 3 raised them. This is not to say that people in Ghana are not concerned about them, particularly

¹⁰ Cf. Diehl’s observation that in a village community people are reluctant to go to court because they do not want to jeopardise social relationships – a fear which reminds us of the coercive elements which can underpin the pressure to accept ‘reconciliation’ (Diehl, 2009).

anybody who has to actually deal with judicial or other dispute settlement institutions as shown in the litigants' surveys. But they are clearly not concerns that spring to people's minds when asked to think about what they mean by saying a dispute has been dealt with or settled fairly.

How do we explain differences in conceptualisation of justice and fairness amongst the three types of respondents (see Figure 2)? It is clear that those who had actually experienced a case were most likely to espouse the view of justice as a balanced process for establishing the true facts, with an impartial judge (over 60% of the subset). Those who had only witnessed a case being heard were much more likely to mention the need for mutual acceptance and reconciliation and the idea of conforming with community expectations (although these were still minority views even within this group). The group who said they had neither witnessed a case nor been party to a case were even more strongly disposed to favour due process factors and the good qualities required by a judge – 84% altogether with 51% focusing on qualities of the judge. Of this latter group, only a small minority thought that fairness required chiefs to be involved (2.1%) or elders (7.3%).

Figure 2: Mass survey: 'fairness and justice' by subset of respondent

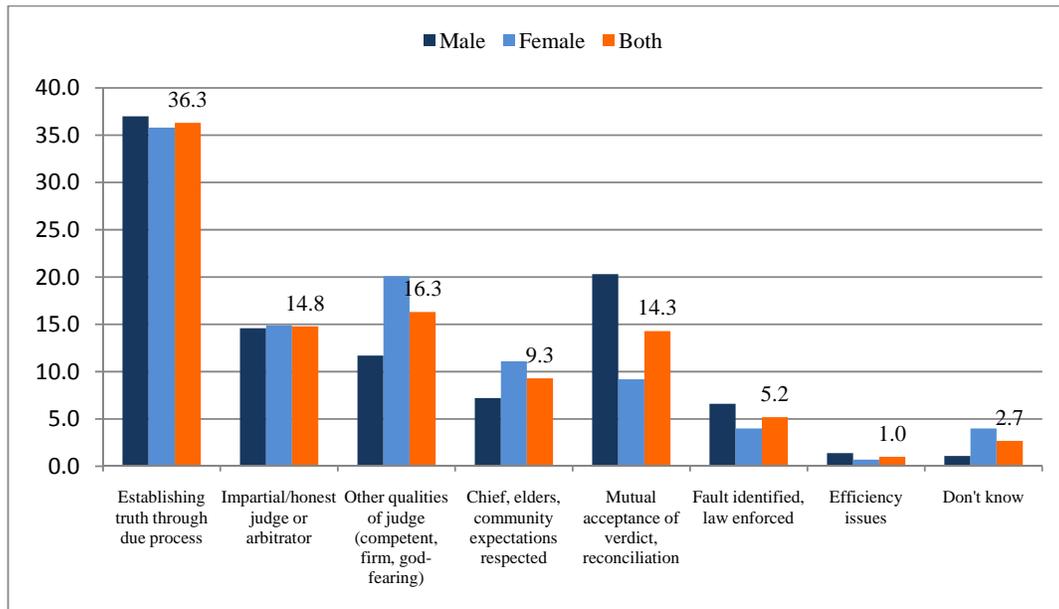


It may well be that the differences between Subsets 1 and 2 were a function of the kinds of DSIs which they had actually experienced. In the case of Subset 1, those who had experienced their case in a state court formed the largest single group (32.9%) followed by a traditional chief's court (24.8%), with the others fragmented amongst a wide variety of DSIs – family elders, the police, local government or elected officials, paralegals, and religious leaders. The experiences of Subset 2 were predominantly associated with more traditional and informal kinds of justice offered by village chiefs (48.2%) or family and community elders (13.7%) with state courts forming the other main group at 25.8%. It is possible, therefore, that Subset 2 respondents were influenced in their opinions by the tendency of informal dispute settlement, whether by a village chief or by family elders to focus on finding an amicable or agreed settlement. But this is by no means a full explanation given that nearly two thirds of Subset 1 had also experienced various forms of informal justice, including that offered by village chiefs. It may be argued that having

been involved in an actual conflict or dispute which ended up requiring a settlement in a DSI was the more powerful influence in predisposing this group to recognise the importance of due process, rather than the type of DSI they had used. Indeed the contrast with Subset 3 is perhaps the most powerful and telling element in the survey; those who claimed not to have any direct experience of any DSI gave an opinion which presumably drew upon a general set of values or attitudes prevalent in local society. This opinion resonated very strongly – indeed was an exaggerated version of – the predominant views of the other two groups, in its emphasis upon the need for due process and competent, balanced judges.

To what extent did social differences such as gender, age, educational level or occupation have an influence on people’s views about justice and fairness? The results show an extraordinary consistency across most of these differences, with only minor variations attributable to gender (see Figure 3). The age of respondents had virtually no impact on what kind of view they were likely to hold – there was particularly strong consistency on the ‘due process’ value – and levels of education seemed to make little difference either, except that respondents with a post-secondary education (a very small proportion of the sample) were less likely to suggest that an impartial judge was needed, but much more likely to suggest that other qualities such as competence and reputation were important. On occupation, few differences of any significance could be discerned.

Figure 3: Mass survey: ‘fairness and justice’ by sex



As mentioned, some minor differences attributable to gender did show up: women were much less likely to emphasise the importance of reconciliation or mutual acceptance than men – an indication perhaps of the extent to which getting involved in a public dispute is a last resort for women which makes them more determined to pursue a remedy to the bitter end. And women were slightly more likely to argue that a judge should be competent and ‘God-fearing, and that community expectations were important. But these were not major differences which could give rise to any strong sociological or policy finding on the significance of gender in local cultures of justice and dispute settlement.

3.2 Trust in DSIs

The kinds of answers which respondents gave to these contextualised questions about fairness and justice should be compared with their responses to the hypothetical question about trust which was asked at the beginning of the interview – ‘if you had a dispute, who would you trust to settle it?’ Respondents were given a closed list of possible choices and asked to rank each one from ‘trust a lot’ to ‘would not trust at all’. The most popular choice of the kind of authority people said they would ‘trust a lot’ was ‘village chief’ (77%) followed by a paramount chief (76.5%), and a family head (73.6%) (Table 2). But these ‘traditional’ choices were followed very closely by religious leaders (72%), court judges (69.4%) and lawyers (65.5%).

Table 2: Mass survey: trust rankings – ‘trust a lot’

<i>Rank (out of 17)</i>	<i>Type of DSI</i>	<i>% who say ‘trust a lot’</i>
1	Village chief	77.0
2	Paramount chief	76.5
3	Family head	73.6
4	Religious leader	72.0
6	Court judge	69.4
13	CHRAJ	45.0
16	CLS	42.6

The relationship between these ‘trust’ rankings and the way in which the majority of respondents defined what they saw as important in achieving a fair and just settlement of disputes raises some difficult interpretation issues and some very interesting possibilities. If most respondents with any experience of a dispute value impartial and balanced court processes which establish ‘the truth’, does this mean that they most trust chiefs or family heads to deliver this kind of justice? Or was there a disjunction between the kinds of people who respondents say they trust, at least hypothetically, and what they actually see as important for fairness and justice?

A simpler explanation might be that respondents treated this trust question as a ‘reputational’ question rather than a specific request to consider the content or context of any dispute settlement procedure. Hence the surprising fact that religious leaders were given trust ratings virtually indistinguishable from those of chiefs or family heads – a sign, perhaps, of significant recent changes in Ghanaian society. So the high ratings given to chiefs could be a reflection of the general respect for the institution and were a conventional response prompted by people’s knowledge of or familiarity with particular institutions or authority figures. That this was the case is supported by the results for this question at the other end of the scale.

The ratings for whether people trusted the new Customary Land Secretariats (chiefly institutions), or the CHRAJ, were low – 42.6% and 45% respectively, ranking 16 and 13 out of 17 possibilities. But very large numbers of respondents gave ‘don’t know’ answers in relation to

these two institutions – 35.4% in the case of the CLS, and 31.1% in the case of the CHRAJ. This suggests that a lot of respondents had simply not heard of them and therefore felt they could not ‘trust’ them (a very rational response). This is further confirmed by looking at the ‘don’t trust at all’ ratings – a response which can be taken as a definitely or strongly held negative attitude (Table 3).

Table 3: Mass survey: trust rankings – ‘would not trust at all’

<i>Rank (out of 17)</i>	<i>Type of DSI</i>	<i>% who say ‘would not trust at all’</i>
1	Fetish priest	87.8
2	School head teacher	26.7
3	Agriculture Department Officer	20.9
4	Police	18.7
15	CHRAJ	8.4
16	CLS	8.3

Here, the authority not trusted by the largest number of respondents was a ‘spiritual leader’ such as fetish priest (87.8% of respondents), followed a long way down the scale by school head teacher (26.7%) and Agricultural Department Officer (20.9%). Yet the CLS and the CHRAJ were bottom of the list, with only 8.4% and 8.3% saying they did not trust them at all – fewer even than village chief! In other words, respondents were not willing to say they trusted a chiefly institution such as the CLS ‘a lot’ because they hadn’t really heard of it; but because they knew little of it, they didn’t feel strongly enough about it to say they didn’t trust it ‘at all’ either. Their entirely reasonable response was a neutral one.

For these reasons, one can interpret the high trust rankings for village and paramount chiefs, family heads and religious leaders as responses to a hypothetical reputational question. It was only when asked to consider questions about fairness and justice in a more specific context that they gave answers which revealed what they really valued or understood about the fair settlement of disputes. Whether respondents actually saw particular DSIs as likely to offer the kind of justice they preferred cannot be deduced from the general trust question; this only emerged from the more detailed contextual questioning about particular cases, and of course from the survey of litigants’ behaviour, relating to why their case ended up in a particular DSI. (In this respect, the idea of ‘choice’ itself has always to be understood in the context of other determining factors such as the behaviour of the different parties (willingness to compromise, the issues at stake) as well as the remedies sought and purely practical questions of availability and proximity.

4 The litigants' experiences of dispute settlement

4.1 *The Magistrate's Courts*

199 respondents were interviewed in this purposive survey, all litigants with current cases in the Magistrate's Courts of the two case-study Districts. Respondents were chosen over a five to six month period focusing on covering all those with land or inheritance, property and breach of contract cases, with a small selection of others involved in matrimonial, theft and defamation cases. 58.7% of respondents were men and 41.3% were women. Compared to the general population of the two Districts, the litigants were an older group (48.3% aged over 40), and were much more highly educated than the average population (36.2% had a secondary or post-secondary education – the latter being 17.1% of the total) whilst only 9.5% were illiterate.¹¹

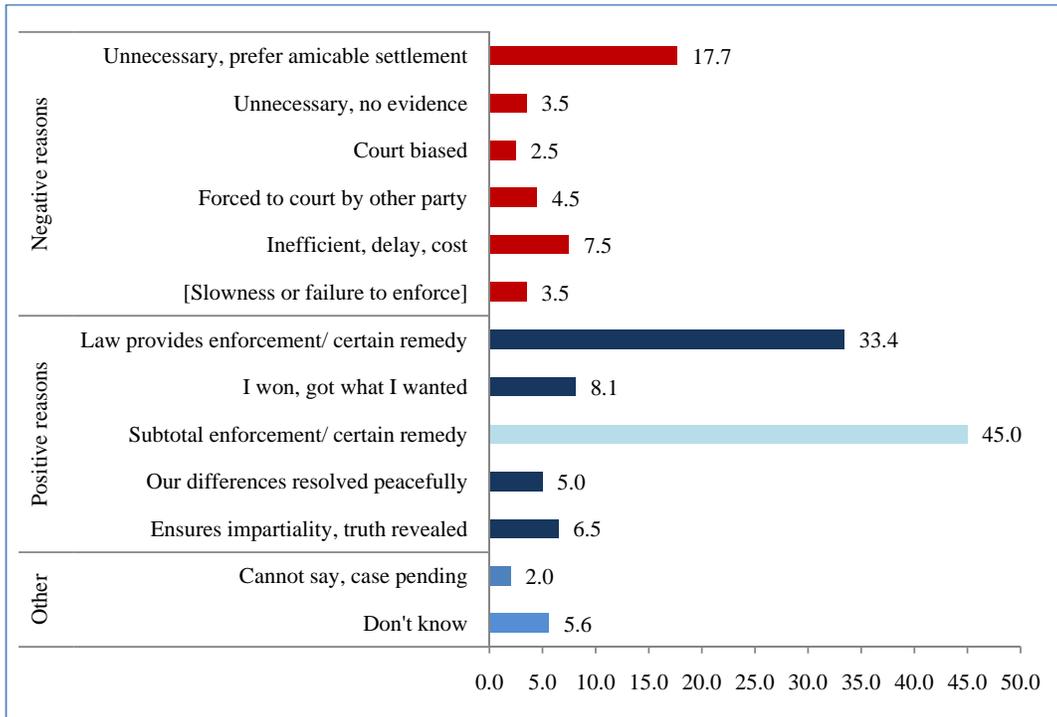
In assessing what kinds of expectations litigants had of the kind of justice they could get at the Magistrate's Court, we first tried to establish why they had chosen to use the Court, rather than any of the other possible DSIs which exist in the legally plural context of Ghana. The fact that 53.3% of the respondents had come straight to the Magistrate's Court without trying any other form of dispute settlement first, shows the powerful attraction of the kinds of legal remedies offered by these Courts. Of those who had tried another DSI first (44.2%), 56.8% had used family elders or community elders, and only 9.1% a chief's traditional court—much fewer than the number who had used Unit Committee or District Assembly officials or other bodies (12.5%) – another contrast with the conventional view that most people would prefer to go to their village chief first. When asked why they thought the Magistrate's Court was a better option than the initial DSI they had used, the largest group – 41% – said it was because it offered an 'applicable law' and /or enforceable judgement, whilst the next largest group focused on the attraction of an impartial judge and a procedure which would consider all the facts in order to reach the truth (10.2%).

How people really wanted their dispute to be settled was also revealed quite strongly by their responses to the question of whether, and for what reason, they considered it had been 'worthwhile' taking their case to the Magistrates Court. 53.3% gave an unequivocal 'yes', whilst another 10.6% said 'to some extent' – making a majority of 63.9% with a positive view; but 12.1% said they couldn't say, whilst 24.1% gave a definite 'no'.

In explaining their reasons (Figure 4), the most important perspective was again the concern with a certain remedy – 33.4% said that what made it worthwhile was the prospect of 'changing the behaviour' of the other party' through an enforceable judgement based on law. Some linked this to the failure of amicable settlement to produce a result. If those who made a negative point of this – namely that they were dissatisfied because of the slowness or even failure of the court to enforce the judgement – are added then the total giving this kind of reason was 36.9%. To this might be linked the smaller group who insisted that all they wanted was to 'win', which is a cruder way of saying much the same thing – making a total of 45% who felt that enforcement or getting a certain remedy were what they most valued from the court process.

¹¹ According to the 2000 Ghana census, 20% of the population aged over 15 in the Accra Region District were illiterate and 39% in the Brong-Ahafo Region District. The figures for those with a secondary or post secondary educational level were 25.6% and 11.5% although this included all those over the age of six, so somewhat overstates the level for the adult population.

Figure 4: Litigants survey (Magistrate’s Court): worthwhile going to court (reasons)?



Another much smaller group emphasised that what they thought was most important was the fact that the court had acted impartially and enabled the truth to come out (6.5%).

But opinion was clearly divided about whether it had been worthwhile going to court; a large minority (17.7%) felt that going to court had been unnecessary, and argued that it could all have been resolved through negotiation (i.e. an amicable settlement) although in many cases they blamed the other party for stubbornness. (A small group – 4.5% – complained that they hadn’t chosen to come to court anyway, but had been forced by a summons). A further 3.5% said it had been unnecessary because there had not been sufficient evidence, making a total of 25.5% who felt it had been unnecessary for some reason.

Some on the positive side also praised the court process for facilitating a ‘peaceful’ settlement, or enabling the parties to resolve their differences and to ‘understand each other’ (5%). So it is clear that there was an appetite amongst even formal court litigants for amicable or negotiated settlements, although still very much a minority.

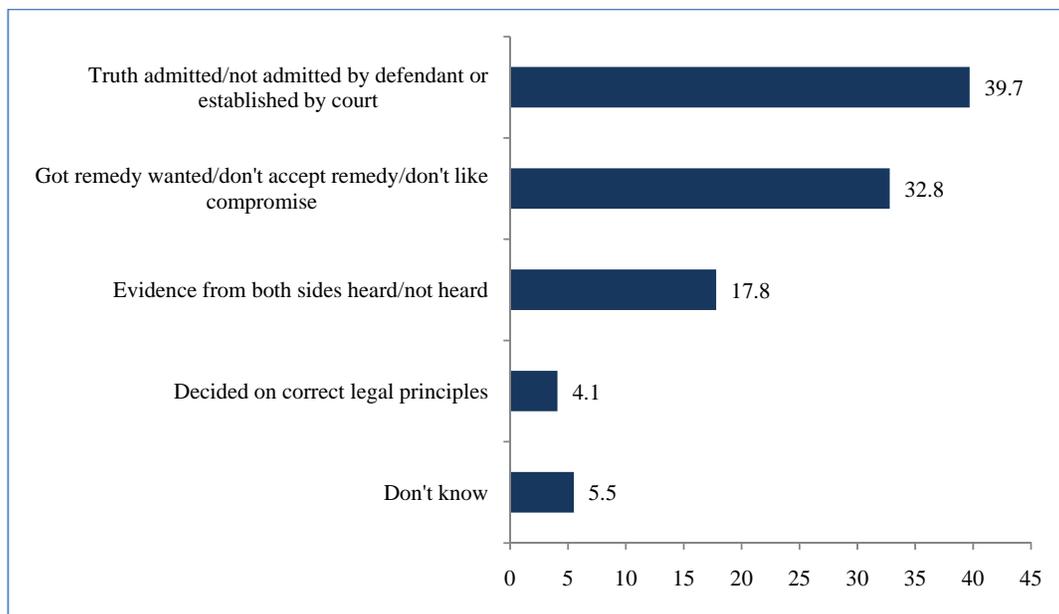
Finally, again it should be noted that only a few focused on cost or delay issues – 4% said the process was too slow, and 3.5% that it was too expensive or a waste of money.

How did the litigants relate their experience of the Magistrate’s Court to their idea of what makes a fair or just dispute settlement? We looked first at those whose case had been settled and asked how they viewed the verdict. Given that most respondents were currently involved in cases, the number whose cases had actually been concluded was inevitably quite limited – only 36.7% of the total, so their opinions cannot be taken as representative of the whole group.

Nonetheless, when asked to rate the verdict on a four point scale, from ‘not at all fair’ to ‘very fair’, 68.5% rated it ‘very fair’, and 20.5% ‘somewhat fair’, making a total of 89% of those who had got a verdict.

Respondents were then asked to explain WHY they rated the verdict fair or unfair, and the answers provide an interesting contrast with the popular survey (Figure 5). The litigants in the Magistrate’s Court were clearly interested in seeking legal remedies or a clear resolution of the case. So it is unsurprising that the most cited reason for saying the verdict was fair or unfair focused on the allocation and acceptance of fault or liability: 40% argued that what really mattered was that the ‘truth had come out’ and that the defendant (in some cases themselves) had – or had not – accepted the truth of the accusations or problems raised. Here we see some similarity with popular opinion, particularly those who had experienced a case, in that there was a concern to establish the ‘truth’ about the facts, but in a context of allocation of liability. Related to this, 17.8% said that the fairness or unfairness of the verdict was based on whether both sides had properly been heard. Thus nearly 60% saw fairness as either getting the truth to come out and be accepted by both parties, or (a related idea) the fact that both sides had been properly heard.

Figure 5: Litigants survey (Magistrate’s Court): why was verdict fair/unfair (%)



The second largest group (32.8%) focused on the remedy – either they had got the ruling they wanted or in fact they disagreed with it (e.g. didn’t agree with the amount of compensation). Most significantly, however, none made any mention of the idea that the verdict was good because a compromise had been reached; nonetheless, it is interesting that many litigants wanted the ‘guilty’ party to *accept* and understand their fault, and were not satisfied with just winning. They wanted to give the judicial process a moral dimension.

The litigants overall also had a generally positive view of the trial process; when asked to comment (in an open ended question) on how they thought the judge had conducted the hearings, the overwhelming majority (72.2%) made positive comments. In an echo of the views

expressed in the popular survey, they tended to focus on the extent to which the judge seemed to behave as a balanced, honest or helpful person. The largest single group (37%) used terms such as ‘helpful’, patient, polite or friendly, whilst the next largest group (18%) emphasised qualities such as professional competence, firmness and ‘correctness’ (following the law). But an almost similar proportion (17.4%) felt that the proceedings were fair and impartial – often using the same phrase as respondents in the mass survey, ‘seeking the truth’. On the negative side, there were complaints that judges did not listen to the parties, and worries by some that they were sometimes too angry or ‘strict’. But only a remarkably small number made accusations of bias or lack of impartiality (3.6%). Another small group made mixed comments, noting both good and bad points in the conduct of the trial (5.1%).

To what extent did litigants in the Magistrate’s Courts share any of the understandings and concerns about justice revealed in the popular survey? Clearly, these litigants were involved in a very specific experience, and perhaps the most important point to note is that when people go to a state court even at the first instance level, they are definitely seeking a clear legal remedy which is going to be enforced. This was the motivation of the largest single group of respondents (45%). Nevertheless there is some evidence that, amongst those who resort to a Magistrate’s Court, there is an acknowledgement that fairness requires the ‘truth’ to be established and recognised by all parties, or that due process (hearing both sides) is required (58% of those who had received a verdict). The perspective of these litigants on the trial process itself also echoed the popular view insofar as what they saw as most significant in the conduct of the judge were qualities of balance, helpfulness, patience and impartiality.

A substantial minority (17.7%), however, would have preferred an ‘alternative’ form of settlement based on negotiation or compromise, and some (5.5%) even saw the court as a method of providing a peaceful way of resolving differences. In fact, 17.1% of the sample had tried the Court-attached ADR. Here one sees some echo of the views expressed in the popular survey, particularly those in Subset 2 (those who had witnessed a case), 28% of whom spoke of the importance of mutual acceptance of a verdict and reconciliation.¹²

4.2 The Commission on Human Rights and Administrative Justice (CHRAJ)

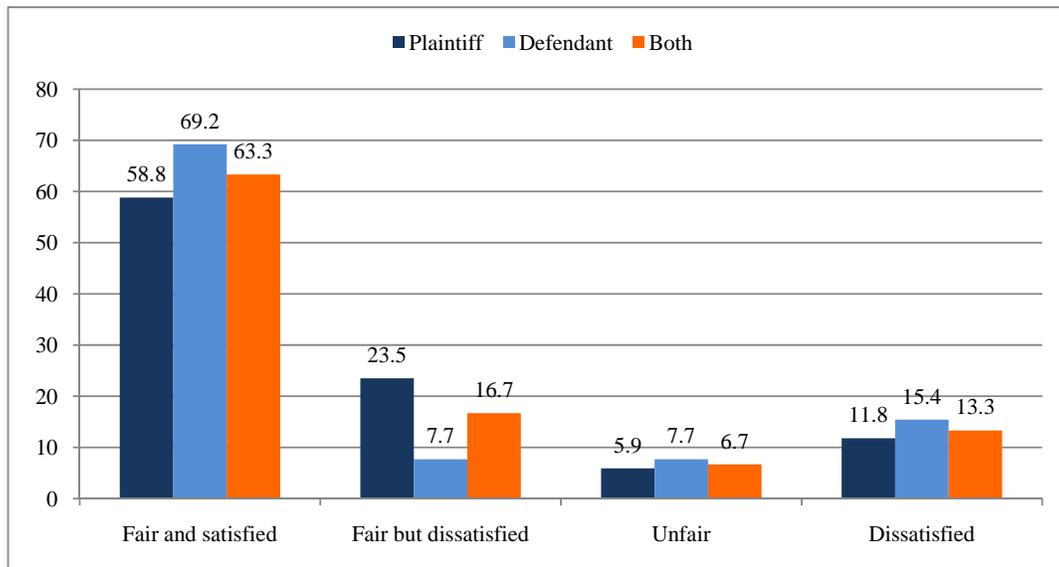
48 respondents who had disputes being heard by the CHRAJ in the two Districts over a six month period were interviewed. The sample deliberately included equal numbers of men and women and revealed a much younger profile compared to the Magistrate’s Courts and the CLSs: over 60% were under 40 years of age. Their modal level of education was also lower than the other two DSIs – 52% Junior Secondary or the old Middle School Leaving Certificate. But the District case statistics show that the majority of complainants going to CHRAJ were women bringing cases against men for maintenance of children, disagreement over custody of children (in some cases accusations of abduction 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

¹² It is important to distinguish this view from the idea of acceptance of the truth by both parties, in which what is sought is that the party found to be at fault accepts that the truthfulness of the verdict. This is somewhat different from the idea of reconciliation through compromise.

support for their education as well as child maintenance. Others involved failed relationships after some years of cohabitation, usually because the man had taken up with a new woman.

The choice of CHRAJ seemed to have been mainly determined by practical considerations relating to its location, and the fact that its services were free, although a fifth of respondents mentioned its ‘good reputation’. But half of the respondents – mainly the men – had been summoned anyway so had not really exercised any ‘choice’. Of those whose case had been settled, 61% felt that it had been fair and they were satisfied with the result; but one interesting aspect was that a small group were dissatisfied even though they acknowledged it was fair. Closer analysis revealed that defendants were in fact more likely to be satisfied that the verdict was fair and plaintiffs were more likely to say it was fair but they were dissatisfied. This shows very clearly the impact of a process which emphasises compromise – people can emerge feeling that they have not really got all that they wanted or felt entitled to, whilst the defendants feel that they have done a good deal (Figure 6).

Figure 6: Litigants’ survey (CHRAJ): overall satisfaction with decision, plaintiffs and defendants



In fact when discussing their cases, the CHRAJ respondents did not really emphasise compromise as the core value; the largest group (42%) saw the verdict as being a determination of facts (bringing out the truth) or even an application of ‘the law’. But another significant group saw the process as having a moral dimension – namely that it was about confirming duties to care for or provide for children (Table 4), particularly in maintenance cases. Yet the mediators, when questioned, saw this as a matter of law. These findings show how people who sought an ADR-type settlement through the CHRAJ 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. Overall, the outcomes were such that 71% of the respondents felt that the CHRAJ was the ‘best way of settling disputes’.

Table 4: CHRAJ: reasons for decision

	Valid Percent
Moral duty to provide, or care for children	34.5
Determination on facts	27.6
Compromise	17.2
Used applicable law	17.2
One party gave up/ admitted liability	3.5
Total	100.0

4.3 The Customary Land Secretariats (CLS)

Forty respondents who had or had previously had disputes heard by a CLS were interviewed. It should be noted however that in the Accra Region, the CLS in the District was a relatively restricted Ga ‘family land’ institution and most of the cases reviewed had been heard by a hybrid committee funded and administered by the District Assembly (DA): the Land and Chieftaincy Disputes Resolution Committee. This body was chaired by the local chief together with three representatives of the Traditional Council as well as the Queen Mother and two other traditional chiefs. 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 present security issues and a danger to peace and order which may require police involvement. In fact, the Committee was in many respects an aspect of the District security apparatus. The CLS in the Brong-Ahafo Region was situated in the palace of the Paramount Chief and chaired by the chief’s 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 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 majority of the litigants in the CLS were older men (70%), with generally quite high levels of education (47% with secondary or post secondary levels). When asked why they had chosen to go to the CLS, the majority (60%) said that they saw it as the most appropriate in terms of its jurisdiction (customary land), and its reputation or competence. But only 52% were both satisfied with the verdict and felt it was ‘fair’; and only 47.5% felt it was the ‘best way of settling disputes’. When asked what would be a better alternative, most talked about the need for special land courts, which would be more competent to deal with all the matters and enforce judgements – similar to the attitudes of those who used the Magistrate’s Courts.

When discussing the reasons for the verdict, the most interesting theme to emerge was the strong emphasis which the litigants put on ‘bringing out the true facts’ (74% overall); nearly half of those interviewed said that the verdict revolved around formal documentary evidence. The committee panels themselves tended to emphasise a ‘fact finding’ approach rather than applications of customary law or traditional norms. There was little or no interest in ‘compromise’ or reconciliation. Indeed, in many cases the ‘winners’ were observed being

doused in white powder by their entourage, a traditional way of celebrating victory. So they were clearly very interested in establishing fault. The idea that there was a winner and loser was encouraged by the practice of making only the losing party forfeit his 'advance against costs' to the CLS panel – in spite of the official rhetoric which portrays the CLS as a form of classic ADR.

5 Congruence between popular concepts of justice, and the procedures of the three DSIs

5.1 Summary of local values

The evidence from the mass 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. These are ideas which we may describe as 'popular concepts of fairness and 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. *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. This was a view which emerged most strongly from those who had had personal experience of a case, and litigants in the Magistrate's Courts.

The evidence also shows that a substantial number 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 used informal, non-state DSIs initially (family, respected community leaders, village chiefs, religious or political leaders), 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. 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. Going to a state-supported and free dispute resolution service such as that offered by the CHRAJ may be seen as the next alternative when informal or private settlement fails or is simply seen as inappropriate. Yet, as the experiences of those who used the CHRAJ show, compromise is not always what people want nor is it even in their best interests.

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 (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.

5.2 The legitimacy of the Magistrate's Courts

The codes or concepts of justice underlying the work of the judges in the Magistrates Courts seemed to 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, which is 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.¹³ In Court, they routinely reminded litigants that they must tell the truth. But they also talk 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 terms of the codes used in practice, these Courts used a variety of laws and principles, not just common law and statute. They applied established customary laws where the judge thought they were appropriate, e.g. Akan matrilineal inheritance or marriage custom, and in some observed cases used Ghanaian 'cultural principles' such as respect for the elderly. In some of the court-attached ADR mediations the mediators were even observed invoking evangelical Christian ideas which are now very widespread amongst the general population.

Although the Magistrates Courts retain the formal atmosphere of a state court in which strict order is kept, witnesses swear an oath, and the judge is an authoritative figure sitting on a raised platform, hybridity is clearly emerging in the use of various kinds of informal, non-legal procedures. Local languages are used in the vast majority of cases with English only used by the

¹³ Limited evidence from the behaviour of members of the public in court suggests that the role of lawyers in fighting for their clients is not well understood or appreciated; most people blame lawyers for what they see as prolonging cases and making life difficult. The judges themselves blame lawyers for many of the difficulties experienced by the state courts, although for more cogent reasons, predominantly their incompetence and disorganisation.

judge to record his or her notes. The judges frequently adopt inquisitorial or even conversational strategies in order to facilitate the disclosure of facts by parties and witnesses, especially in the absence of lawyers – or even *because* of the (frequent) incompetence of counsel! They give advice and suggest ways of settling. This is particularly the case when they are sitting as a Family Tribunal, and they are now routinely encouraging resort to ADR either to the official ADR service in Accra, or to informally commissioned arbitrators elsewhere. Official ADR settlements benefit from the fact that they have to be recorded as ‘consent judgements’ by the Court, and thus have enforceability.

The values of justice and the procedures used in the Magistrate’s Courts seem, therefore, to correspond very closely to the dominant view of justice and fairness put forward by the respondents in the popular survey and in the surveys of litigants. The only difference is that ordinary people put less of a premium on the adversarial process itself, seeing justice not as a competition to see who puts forward the best arguments, but a genuine search for the truth which comes from allowing both parties to fully bring out the facts. And more than the judges, perhaps, ordinary people want the truth to be confirmed by acknowledgement of fault and its acceptance by both parties. The Courts also offered the kinds of enforceable remedies sought by litigants.

5.3 The legitimacy of the CHRAJ mediation service

The CHRAJ District-level mediation service offered something rather unique and very different from both the CLSs/chiefs and more informal, community or family-based arbitration. In many ways, the CHRAJ mediations corresponded most closely to the ideal model of ADR, dealing primarily with disputes between private individuals, settled in private in a completely relaxed and informal atmosphere by an impartial mediator who is a ‘stranger’ in local society. What is of the greatest interest is that the CHRAJ mediators rarely made use of either customary or legal principles, particularly in relation to marriage or sexual relations, but focused intensively on reaching agreed compromises often based on monetary compensation. The emphasis on compromise was sometimes so strong that it was allowed to override the strict legal or customary rights of parties – which can be problematic in many matrimonial or sexual violence cases, which tend to form a large number, if not the majority, of their cases. The reliance on ‘common sense’ ideas in the Ghanaian context also led to the adoption of a variety of codes of justice, ranging from human rights principles to the Christian principles of the mediator or cultural beliefs about respect for the elderly.

The congruence of the CHRAJ mediations with popular understandings of justice is very strong: its District officers, trained in ADR and personally committed to a ‘human rights’ code of ethics, do provide an impartial arbitration which does give all parties a real (and unrushed) opportunity to put their case in a friendly, non-coercive atmosphere. They have the authority which comes from being a state, constitutionally protected and independent institution. And, unlike the more informal, non-state DSIs, they do have some capacity to implement judgements. Although they cannot enforce directly like a court of law, they facilitate compensation payments by ordering them to be paid and collected via their offices. If the agreements are not respected it is immediately obvious and disgruntled parties can ask for further action, or they may subsequently go to court.

One problem with the CHRAJ procedures is that the emphasis on compromise and agreement above all else can still result in pressure on weaker parties – particularly the many vulnerable women who seek their help – to accept settlements which do not really serve their best interests or may prevent them from obtaining their full legal rights. This has to be balanced against the fact that they are successfully getting some kind of recompense for vulnerable or poor people who probably would not have dared to go to a court at all.

5.4 The legitimacy of the CLSs and Land and Chieftaincy Disputes Resolution Committee

Although the CLSs are supposed to be based on the existing, formally defined Traditional Authorities, they are still ‘new’ institutions which are little known to the public, partly because only small numbers of pilot CLSs have as yet been set up and even fewer are fully operational. The mixed DA/Chieftaincy Committees are even less well known and are the product of special initiatives in particular Districts on a rather random basis.

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 happens 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. These all imported factors extraneous to the narrow question of the dispute between the parties. But the dominant characteristic of the CLS procedures was in fact a concern to establish the ‘facts of the case’; rules of judicially established customary law, or other land laws were rarely applied. And many panels were clearly trying to establish who the winning party was, arguing ‘there is only one truth’.

The procedures themselves, although conducted in local languages, combined formal elements of the state court system (written summons in English, taking of evidence and cross examination of parties) with the formal rituals and protocols of the traditional system. Many of the latter were quite intimidating to ordinary citizens and certainly do not conform to the basic principle of ADR which is that the mediator should be a neutral figure who can engage informally with the parties to facilitate agreement. In Brong-Ahafo the hearings took place in the Paramount Chief’s Palace and witnesses had to swear oaths by stepping on the money which had been paid in. Traditional hierarchies were reproduced quite strongly in the court format: 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.¹⁴ Such a format also made the panel relatively

¹⁴ 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 gave an institutional, legal and economic basis to the chieftaincy which both consolidated the political identities of the pre-colonial entities upon which they were (more or less) based and produced 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

unfriendly to women and to strangers or migrant farmers; there was evidence that strangers or settler farmers felt at a distinct disadvantage and were reluctant to use it, whilst the predominantly 'male elders and chiefs' membership and traditional atmosphere of a Paramount Chief's court also frightened off female litigants.

The DA Land and Chieftaincy Disputes Resolution Committee in peri-urban Accra had more flexible procedures which seemed to depend on the importance and type of case: with some cases, a 'modern' ADR approach was adopted, in others formal traditional protocols and language were used ('high' or idiomatic Ga comprehensible only to indigenous citizens of high status), whilst in important inter-community cases the hearing resembled more of a traditional chief's court with large numbers of people in attendance.

It would seem evident, therefore, that the procedures and codes used in chiefs' traditional courts did diverge in many ways from popular concerns with balanced and impartial due process. This is not to say that individual chiefs may not be respected individually as able to adjudicate wisely and impartially, but the logic of traditional procedures and codes can make this difficult to achieve if they are allowed to override the rights of individual parties and at the same time reinforce social and economic hierarchies.

6 Conclusions

The data from our surveys and other observations have provided some evidence on the relationship between, on the one hand, what ordinary people and the users of these DSIs actually think about justice and dispute settlement, and, on the other hand, what these institutions are offering in practice. The comparison of the three kinds of local dispute settlement institution revealed that the Magistrate's Courts were highly congruent with popular values and expectations, and offered the majority of litigants what they were seeking. The CHRAJ ADR mediations were also clearly attuned to important sets of beliefs and needs, especially for vulnerable people such as the poor and young women who could not afford or were afraid to use, formal courts, and wanted impartial, amicable settlement. But they did not necessarily deliver enforceable remedies or fully protect rights. The customary-based CLS land dispute committees seemed the least attuned to popular ideas and expectations about how to settle land disputes, catering to a relatively narrow and elite set of clients using very formal traditional procedures.

Two particularly interesting aspects of the findings may be highlighted.

First, is the challenge they present to the conventional, indeed stereotypical picture of popular ideas about justice long presented in much of the literature. Because most Ghanaians will, if asked, pay respect to the institutions of chieftaincy, and chiefs administer the customary land relations which involve the majority of the population, it is assumed that:

- a) the majority of citizens prefer the 'informal' customary justice or dispute settlement institutions as offered by chiefs; and

of the loss of many formal powers) remained an institutionalised and important part of the national political elite, as well as being the recognised custodians ('allodial owners') and administrators of lands held under customary tenure.

- b) customary or traditional justice means social reconciliation and compromise rather than legal remedies, as validated and sanctioned by family and community involvement.

In this picture of traditional and ‘*therefore*’ popular justice, impartiality is presented as less important than knowledge of how to resolve disputes in a context of community power relations. And reconciliation, or restorative justice, is presented as the most valued outcome. But if this is true, why were the CLS land dispute committees so apparently divorced from popular values and expectations? Does this mean that custom or tradition is no longer respected? Or that the chiefs are seen as not able to provide the impartial and balanced justice which people say that they value?

One possible explanation is that conventional descriptions of customary or traditional justice are in fact misleading or even mistaken, particularly the emphasis on restorative justice. We have already seen how the identification of ‘customary’ with ‘informal’ is mistaken. Any brief acquaintance with the history and culture of the Akan and other kingdoms of Ghana would suffice to counteract this notion (Wilks, 1975; McCaskie, 1995). The powerful hierarchies of these polities were not only consolidated but further strengthened under the colonial Indirect Rule system and the Native Courts played a particularly important role in the development of judicially recognised customary law (see Woodman, 1996; Crook, 2008). But the kinds of procedures and values which were taken up into the Native Courts have often been forgotten (colonial customary law at least in West Africa, was not all a complete ‘invention’, after all – *contra* Chanock, 1985).

One of the earliest descriptions of traditional procedures in the courts of the higher Ashanti chiefs is to be found in Rattray’s classic anthropology text published in 1929 (Rattray, 1969). Revisiting Rattray is instructive. He first of all carefully distinguishes between minor quarrels and cases which could be settled by family heads or respected elders and cases which were brought before the court of a higher (Divisional or Head) chief. In the former, the practice was indeed to aim at *mpata* or reconciliation in which the injured party would gracefully accept an apology, symbolised by a gift of an egg or a fowl, or even gold dust (Rattray, 1969: 389). In the chief’s court it was a different story. The procedure was triggered by the disputing parties swearing the chief’s oath. In so doing, both parties became liable to extreme sanctions including death if they lost their case. The trial itself was a terrifying procedure, not just because of the superior power of the chief and his council, but also because it was subject to the supernatural sanctions of various gods and spiritual forces. The mysterious power of the chief was enhanced by having all discourse filtered through a spokesman or ‘linguist’. Interestingly, the parties were ‘not expected to tell the truth’ and did not take an oath to do this (Rattray, 1969: 388). It was the job of the court and the witnesses to bring out the truth. Witnesses were sworn on gods chosen by the chief, with the threat of awful consequences. In particular, Rattray notes that the court was not interested in reconciliation, but in establishing fault. (If all else failed, the court would resort to various ordeals). There were ‘degrees of guilt’ which determined whether the party at fault would be executed or could ‘pay for his head’ by giving a thank-offering. Moreover, as Rattray notes, the power and status of chiefs had come to be associated with how successful they were at attracting cases, because of the revenue which could be derived from them (1969: 388).

Of course many of these practices were modified as the Native Courts developed during the 1930s and onwards, absorbing or borrowing in the process many aspects of British law

(Gocking, 1993). But many of the attitudes persisted – the British rulers constantly criticised the chiefs for their interest in the revenue-raising aspects of justice, for instance – and can still be discerned today, even though the Native Courts were abolished in 1958. The chiefs continued to run their ‘courts’ settling land and other disputes in the so-called ‘informal sector’ after independence, with the most powerful chiefs such as the Asantehene still exercising real power over land matters.¹⁵ Hence the traditional protocols, procedures and rituals survived, of which the concern with fault finding is still very evident. In fact, as Woodman has argued, the decoupling of the chiefs’ courts from the formal common law courts over the past 50 years has probably encouraged an increased divergence between ‘lawyers’ customary law’ and ‘living or practised’ customary law (Woodman, 1996; 2001); new rules have developed whilst older and maybe undesirable practices have never been reformed. It is therefore not surprising that when the government revived a state-sponsored form of chiefly justice such as the CLS land disputes committees, the traditional formalities, the hierarchical atmosphere and the concern to establish fault were reproduced relatively unchanged in spite of the presence of state-sector representatives on the panels.

The old distinction between the very local level family and village headman forms of dispute resolution (which are seen as appropriate for amicable settlement) and the tribunals of the higher chiefs is also very evident in popular perceptions. And it could even be argued that there are echoes of the chiefly traditions in the popular concern for the party at fault to publicly acknowledge that the truth has come out.

Scholars who have studied the operations of the chiefs’ unofficial courts since 1958 have also commented on how well-established traditional rules of evidence continue to be observed. Berry’s observations of the courts of high ranking Asante chiefs report on how rival claims to land are assessed through detailed consideration of historical genealogies and oral histories of settlement (Berry, 1997; 2001). The processes of reasoning for producing a result are very different from modern or forensic rules of evidence, and the remedies are very different (Woodman, 1996). Ideologies of ‘genealogical legitimacy’ mean, as Berry has argued, that rights to land, for instance, flow from establishing social group membership and the historic claims of those groups. She sees customary dispute resolution over land, therefore, not as a once-and-for-all declaration of title but as a constant process of ‘negotiation’, subject to change with each new dispute and new generation. This of course is simply another way of saying that it is rooted in political power relations within the community – which means that decisions reflect inequalities of power, not some abstract ‘impartiality’ (cf. Peters, 2002).

It can be argued, therefore, that stereotypes of traditional chiefly justice as being about reconciliation or restorative justice are indeed misleading. Insofar as the CLSs are offering some contemporary version of a customary court procedure they are not necessarily going to privilege reconciliation; and neither are they plausibly going 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. The CLS panels are too embedded in the power relations of local land ownership and social hierarchies to offer this kind of settlement. Their concern is more to establish *rightful claims* according to customary rules of historical legitimacy. Ordinary citizens still respect chieftaincy and ‘tradition’ in Ghana, but they are unlikely to associate a chief’s

¹⁵ The Asantehene’s full court when assembled still counts up to two hundred members (chiefs and sub-chiefs, Kumasi clan chiefs and officials) and is a highly ritualised affair (Crook, 2008).

court, as an institution, with their vision of justice as an impartial process for bringing out the true facts with an enforceable remedy. And even if they do want reconciliation or an amicable settlement, the chief's court does not necessarily offer that either. They are only likely to resort to a chiefly institution if they already involved in a set of relationships over land which suggests that the chief will look on their claim favourably. It is only at the family or very local level that informal modes of traditional dispute settlement may be resorted to, in the hope of a fair and balanced settlement.

Secondly, it is worth emphasising the significance of the positive findings on the Magistrate's Courts and the CHRAJ. A strong case can be made that the first instance state courts in Ghana do present a form of justice which corresponds with popular understandings of justice and fairness (due process and impartiality) and also offers the certainty and enforceability of remedies which people want if attempts to find amicable settlement have failed. State courts and agencies have been too readily dismissed in favour of so-called 'informal' solutions to the need for better and more legitimate forms of public dispute settlement. It is true, of course, that the state courts have a crisis of effectiveness; they are unable to cope with the huge and increasing numbers of suits lodged.¹⁶ In this sense, the Magistrate's Courts are the victims of their own popularity, but this does not mean they should be abandoned; they rather need reform, resources and new ways of working. Various measures could focus on developing and encouraging the informalities and judicial activism already being practised by Magistrates, and weaknesses in court administration are undoubtedly responsible for much of the backlog caused by constant adjournments. Above all, the popular reluctance to consider out-of-court settlement has to be tackled – and this is perhaps a 'cultural' matter, to which ADR is seen as the solution. But ADR will not address this rooted behaviour unless it is implemented in very specific ways.

As argued, it is difficult to see ADR solutions as emerging directly from customary institutions unless they change in ways which will probably make them lose what makes them culturally unique and important. Informal ADR is in any case resorted to by large numbers of ordinary citizens from a variety of other social institutions and individuals. But for ADR to be offered in its most professional form, respectful of both human rights requirements and popular ideas of justice, the state needs to guarantee the training and maintenance of appropriate standards. This is where institutions such as the CHRAJ or the Court-attached ADR offer such positive possibilities; they have real congruence with popular values about procedure and impartiality, and offer enforcement of remedies. If their reach could be extended and the legal profession brought on board, they might begin to make an impact. But there is still a need to be careful of over-emphasis on compromise, without clear guides on what 'codes' or principles are being implemented. Above all they must satisfy the most basic popular value which seems to emerge from the research; they must ensure that the 'truth comes out'.

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¹⁶ The Magistrate's Courts nationally dealt with 43,1090 civil cases and 49, 272 criminal cases in 2007-8, representing clear-up rates of only 40% and 30% respectively; in our Accra case-study court in the same period 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% (Ghana, 2008).

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Annex Tables

Table A1: Mass survey: distribution of respondents by sex

	Valid Percent
Male	45.5
Female	54.5
Total	100.0

Table A2: Mass survey: distribution of respondents by age

	Valid Percent
18-25	20.9
26-39	32.7
40-64	33.3
65+	13.1
Total	100.0

Table A3: Mass survey: distribution of respondents by educational level

	Valid Percent
No formal education	32.2
Primary education	17.8
JSS	38.9
SSS	8.5
Post secondary	2.4
Not known	.3
Total	100.0

Table A4: Mass survey: distribution of respondents by occupation

	Valid Percent
Business owner	.9
Petty trader	16.8
Artisan	9.5
Food crop farmer	30.5
Cocoa farmer	20.6
Other cash-crop farmer	4.0
Driver	1.7
Pensioner	.6
Civil/ public servant	.3
Security officer	.4
Semi-skilled/ unskilled labourer	1.7
Religious leader	.3
Managerial/ professional/ technical	2.3
Student	2.7
Unemployed	7.8
Total	100.0

Table A5: Mass survey: origin of respondents

	Valid Percent
Native of this town or village	31.9
From another town or village in this District	15.3
From outside this District but within this Region	11.7
Another Region	37.9
Outside Ghana	3.1
Total	100.0