
Richard C. Crook and Kojo Pumpuni Asante

Introduction

The legal systems and courts of most sub-Saharan African countries are widely perceived as being in a state of crisis: they are criticised for a variety of failings including their inaccessibility to ordinary citizens due to their formality and ‘alien’ colonially-derived procedures; excessive delays leading to huge backlogs of cases; unaffordable costs and corrupt practices. Popular remedies that aim to address this litany of difficulties tend to emphasise, on the one hand, a need to make greater use of non-state institutions such as revived traditional chiefs’ courts and other informal, local dispute resolution mechanisms, or, on the other hand, ‘legal empowerment’ strategies using paralegals, NGOs, or state-supported Alternative Dispute Resolution (ADR). The dominant approach in the current discourse on justice and the rule of law in African and other developing countries is, however, one of profound scepticism about the role of the state. To some extent this is based on the existence of legal pluralism in most African states, which means that state justice institutions are not necessarily the dominant source of authoritative dispute resolution or enforcement of social norms. The policy implications of this assumption can be seen in the tendency for ‘access to justice’ programmes to give priority to non-state and customary forms of justice, on the assumption that they are more accessible and legitimate for ordinary citizens.

1 The research upon which this article is based was funded by the UK Department for International Development (DFID) and Irish Aid, through the Africa Power and Politics (APPP) research programme (http://www.institutions-africa.org). The views expressed here are those of the authors and should not be taken to represent those of DFID or Irish Aid.
2 Richard Crook is a Visiting Professorial Fellow at the Institute of Development Studies, Brighton, UK and Honorary Professor of Development Studies at the University of Sussex, UK.
3 Kojo Pumpuni Asante is a 3rd Year PhD student at the Institute for Development Policy and Management (IDPM), working on the politics of oil and gas in Ghana, as well as a researcher with the Effective States and Inclusive Development (ESID) Center, both based at the University of Manchester.
5 This is, of course, especially the case in ‘fragile’ or post-conflict states which have tended to dominate the discourse.
In this piece we argue that a more balanced approach is needed in which the synergies which can exist between state and non-state, formal and informal, are recognised and built upon. The evidence that such synergy is both possible and successful is drawn from research on the ‘unsung’ success story of Ghana’s Commission on Human Rights and Administrative Justice (CHRAJ) which for the past twenty years has been offering a very popular alternative dispute resolution service (ADR) at the grassroots level throughout the country. The CHRAJ study formed part of a broader research project which compared the CHRAJ with the land dispute resolution committees of the new neo-traditional Customary Land Secretariats (based on the traditional chieftaincy authorities) and the state’s first instance local courts, the Magistrates or District Courts, which have also introduced court-connected ADR. The main focus of the research was to assess and explain the extent to which these dispute settlement institutions (DSIs) were providing public dispute settlement which was ‘legitimate, accessible and effective.’ The empirical focus was on civil cases, which in the CHRAJ mediations consisted mainly of family matters, debt, landlord-tenant relations, employer-employee disputes, minor assaults and ‘defamation.’ CHRAJ also handled a few land and property cases but only ‘unofficially’ because of concern that these were outside their legal mandate.

The article concentrates primarily on analysing the kinds of procedures used, codes of law or norms applied to disputes and the remedies offered, and then assesses the extent to which they were congruent with locally-rooted beliefs and expectations about how to settle disputes fairly. How legitimate, accessible, and effective were the CHRAJ mediations? And to what extent has CHRAJ become a ‘hybrid’ institution which blends popular values and local cultures with statist characteristics?

A mixed set of methodologies was used to collect the data. First, three case-study Districts were selected for intensive study: one in a peri-urban area of Accra (the capital city); the second a rural cocoa-growing District in the Brong-Ahafo Region and the third the capital of the Northern Region, Tamale. The primary method was anthropological observation of proceedings over a period of six months, on a daily basis or whenever cases came up. Observation was combined with a representative sample survey of popular opinion (800 respondents) in the first two Districts, together with in-depth interviews with 48 disputants who had cases with the CHRAJ, using a structured questionnaire, and elite semi-structured interviews with CHRAJ officers and other local officials.

7 (2009); Ewa Wojkowska & Johanna Cunningham, Justice Reform’s New Frontier: Engaging with Customary Systems to Legally Empower the Poor, in LEGAL EMPOWERMENT: PRACTITIONERS’ PERSPECTIVES 93, 96–7 (Stephen Golub ed., 2010).

7 The Ghana research was carried out in collaboration with the Center for Democratic Development (CDD-Ghana) under the leadership of Professor Gyimah-Boadi. The authors gratefully acknowledge the contributions of other CDD staff, especially Victor Brobbey, without whom this work could not have been completed.
The Commission on Human Rights and Administrative Justice (CHRAJ)

The (CHRAJ) was created in 1993 in accordance with the provisions of Chapter 18 of the 1992 Constitution, and its autonomy and independence are constitutionally guaranteed. Its principal mandate is to investigate a broad range of human rights violations and abuses of power and maladministration by government agencies, which infringe on citizens’ rights as guaranteed by the Constitution. This includes violations of the right of women and children, unfair treatment of citizens by public agencies, corruption of public officials, and unequal recruitment practices. The CHRAJ can, for instance, subpoena witnesses and bring contempt of court charges against those who fail to obey its request. It can also ask the courts to enforce remedies or restrain offending conduct including the implementation of legislation which it has found to be constitutionally invalid. The Commissioner has the status of an Appeal Court Judge.9

Since CHRAJ started work in the early 1990s it has been extremely proactive and has attracted large numbers of cases – between 4000 and 5000 per year on average in the 1990s—over half related to unfair dismissals, another quarter concerned family property disputes and landlord-tenant relations, and a further quarter involved wrongful arrests and ill treatment by state officials. Under the leadership of its first Commissioner, Emile Short, the CHRAJ was also involved in some high profile confrontations with NDC government officials (1992–2000) over corruption allegations which raised its public profile considerably.10 It also acquired a reputation for being proactive on issues such as prison conditions and abuse of women. This continued under the Acting Commissioner Anna Bossman, 2004-2011, to the extent that by 2009-10 57% of cases concerned women’s and childrens’ rights and over 90% of complaints were against private individuals and organisations.11

Procedures for District mediations

The free mediation service offered by the CHRAJ District Offices corresponds closely to an ideal model of ADR: it deals primarily with disputes between private individuals, settled in private in a friendly, non-coercive and informal atmosphere by an impartial mediator who is a ‘stranger’ in local society.12 The hearings were

9 See CONSTITUTION OF THE REPUBLIC OF GHANA May 8, 1992, ch. 18, art. 221.
11 See COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE, ANNUAL REPORT 2009–10 48–49 (2010). Discussions with both CHRAJ officers and the Judicial Service suggest that this may have been a response to accusations that CHRAJ was going beyond its mandate and needed to more clearly restrict itself to ‘human rights’ issues.
conducted in the District Director’s office, with normally the District Director presiding and another officer – usually the Registrar – taking notes. The Directors all appeared well trained in ADR and personally committed to ‘human rights’ values. The District Offices observed were spending between three and four days a week dealing with complaints, so that this had in effect become their main activity aside from public educational work. The Tamale Regional Office received 690 complaints in 2009-2010, of which 84% were human rights issues (76% of those being women’s and children’s rights); the District in Greater Accra Region received 287 in 2007-8, while the Brong-Ahafo District received 354 (2008). 13

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

Generally, the CHRAJ mediators were very successful in maintaining an informal and relatively calm atmosphere, using conversational techniques or dialogue with each party in the local language to clarify the facts and to draw out a basis for agreement. But given that the majority of the cases concerned matrimonial or child custody issues, the mediators frequently had to deal with very distressing and emotionally charged conflicts, in which the parties were very hostile to each other (often egged on by a relative) and there was shouting, rudeness and threats. In some cases (e.g. when a man threatened to kill the baby for which he was being asked to pay maintenance) mediators had to threaten to report offenders to the police or take court action against especially obstreperous parties. Unlike the court system, the CHRAJ officers were very persistent in pursuing respondents to ensure that they turned up for meetings, and following up on the implementation of agreements. 14

13 COMMISSION ON HUMAN RIGHTS AND ADMINISTRATIVE JUSTICE, supra note 11, at Statistical Appendix.

**Codes of law and principles of settlement**

When asked to reflect on the principles they used in their mediations, and what they considered to be a fair settlement, the CHRAJ officers offered the most consistent picture of the values they worked by. This undoubtedly reflected their training and their professional commitment to ‘human rights.’ For many this was also a deeply felt personal or moral, even religious, commitment. The principles of CHRAJ mediation put a heavy emphasis on the impartiality of the mediator and the search for compromise and mutual agreement between the parties; mediators rarely, if ever, made reference to ‘customary’ rules or principles. All used the phrase ‘win-win’ to describe what is being sought in a ‘fair’ settlement. And they were also aware of the potential conflict between observing legally defined human rights standards, as embodied in the Constitution and in relevant statutes such as the Children’s Act, 1998, and the emphasis on negotiated compromise, which could deprive one of the parties of their full rights. Particularly in Tamale, where forced marriage, underage marriage (with consequent deprivation of education for girls) and harassment of widows were common practices, the officers were confronting a very real (and familiar) conflict between human rights norms and the need to respect local cultures. They said that their strategy was not to attack these practices directly or publicly but to deal with cases on an individual basis, using negotiation and education, whilst at the same time not shirking from referring violent abuses to the police. They saw the educational campaign as a long term process. It was nevertheless significant that the local nickname for CHRAJ in Tamale was ‘the ladies’ parents’ (meaning ‘guardian of women’).15

The vast majority of the cases in the observed CHRAJ District Offices were in fact complaints brought by women against men for maintenance of children, disagreement over custody of children, breaches of promise to marry, and maintenance after separation or divorce, often mixed with accusations of domestic violence and abuse. Many of the child maintenance cases involved very young women—schoolgirls and students—who had been abandoned immediately after getting pregnant, and were seeking support for their education or training as well as child maintenance. Others involved failed relationships after some years of cohabitation; these were often presented as disputes over property or land which they had worked together. Very few of the couples were married, either customarily or through a civil license.16

---

15 Interview with Regional Director, Tamale District Office, CHRAJ, in Tamale, Ghana (Feb. 2, 2011).

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

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

These cases illustrate very well some of the dilemmas CHRAJ mediators faced in balancing the rights of various parties; they also show that ADR-type compromises may produce results which neither party finds very satisfactory, either because of legal obligations to uphold childrens’ rights or the need to find a practical way of awarding some compensation to a women who otherwise might have received nothing because of a fear of going to court.

Underlying many of these negotiated compromises over women’s and children’s rights were, therefore, legal principles and CHRAJ’s primary
responsibility to ensure that the human rights of the women and children in these cases were respected. In Tamale, these could be used to prevent girls being removed from school to undergo arranged marriages. But when dealing with disputants, mediators often couched their discourse in terms of the moral obligations of parents, or customary beliefs. In custody and child maintenance cases, for instance, references to the obligation of a father to ‘name’ his child were frequent, since this signals a recognition of paternity and an obligation to support. One mediator was clearly referencing Christian ideas about the desirability of reconciliation between marriage partners, and others sometimes fell into the role of ‘marriage counselors’ when they felt that resolving differences and helping parties stay together would present a more positive and achievable outcome. Unfortunately for women who wanted a divorce, usually customary, CHRAJ routinely had to tell them that ‘CHRAJ did not have a mandate to handle divorce,’ and that they therefore could only deal with the compensation or maintenance claims as property matters.17

**Legitimacy, accessibility and effectiveness**

*Legitimacy*

To what extent were the procedures and codes of justice used by the CHRAJ mediators congruent with locally-rooted beliefs and expectations about how to settle disputes fairly? The popular survey showed that when ordinary Ghanaians were asked to define what they regarded as a fair way of settling disputes, the majority (68% of all respondents) put most value on the necessity for an impartial and/ or competent judge who could ensure that the ‘truth’ would come out and that all parties were given a chance to present their side of the story.18 This is very much a ‘process’ definition of fairness, which was shared by the disputants interviewed and confirmed by our observation of cases. An important minority of respondents (14% overall) also emphasised the need for both parties to publicly accept or acknowledge the truth once established, particularly where one party was shown to be at fault.19

The congruence of the CHRAJ procedures with popular understandings of justice is therefore very strong: the District Offices provide an impartial mediation which does give all parties a real (and unrushed) opportunity to put their case in a friendly, non-coercive atmosphere. The survey of CHRAJ disputants revealed that they were primarily concerned about having the person who they felt had wronged them to acknowledge the truth and ‘do the right thing,’ even if they had to accept a

---

17 Dissolution of marriages under state ordinance can only be heard by state courts; divorce from customary marriages or partnerships are handled by families and chiefs.


19 See id. at 9.
compromise which they didn’t necessarily feel was adequate. 42% of the disputants saw the verdict as being a determination of the true facts, or an application of the law. But 35% saw the process as having a moral dimension, primarily when it involved providing for children. The CHRAJ emphasis on compromise was perhaps the one value which disputants did not necessarily share so strongly, given that in cases of alimony, child support, or child custody which may have involved prior histories of domestic violence, it could lead to wronged parties getting less than they were due. However, the parties were prepared to accept the verdict and the compensation as better than nothing. When we questioned those whose cases had been settled, 63% overall were satisfied and felt it was fair; but plaintiffs were more likely than defendants to say that the verdict was ‘fair but they were dissatisfied;’ this suggested that the compromise settlement led to plaintiffs feeling that they had not really got all that they wanted, whilst defendants felt that they had secured a ‘good deal.’ Nevertheless, compared to the Customary Land Secretariats (CLSs) and the Magistrates Courts, CHRAJ had the highest overall satisfaction levels; 71% of all the disputants agreed that ‘it was the best way to settle disputes.’

**Accessibility**

The accessibility of the CHRAJ mediations can also be rated very highly: they are free, and very informal or ‘user friendly.’ They use local languages or whatever languages are understood by both parties, so that 93% of disputants did not need an interpreter, and 91% said they felt ‘at ease’ and comfortable during the hearing. This has made the CHRAJ very attractive to poorer, younger people and especially to women, who were the majority of complainants in the Districts observed. 60% of those interviewed were under 40 years of age, and their modal level of education was lower than litigants in the CLSs or Magistrates: 52% had only Middle School Leaving Certificate (now Junior Secondary). These are people who would not normally go to Court because they are ashamed or afraid, or feel they cannot afford it.

**Effectiveness**

Using the CHRAJ mediation was much faster than going to the local Magistrate’s Court or other dispute settlement institutions such as a chief’s customary tribunal or the CLS. The vast majority of cases were dealt with in one or two hearings, and over 90% of disputants said their cases had been dealt with in one

20 See id. at 19.
21 See id. at 18–19. A recent national opinion poll carried out by CDD-Ghana for the UNDP showed that the CHRAJ was ranked as one of the most trusted of government institutions in Ghana. See CDD-Ghana, GOVERNANCE AND PEACE POLL IN GHANA, 2014 SURVEY REPORT 19 (2014), http://cddgh.org/_upload/general/file/GAP%20Poll%20Findings-Final%20Report%20(July%2030)-1.pdf.
22 6% had no formal education and 15% had attended Primary school. See Crook et al., supra note 18, at 17. See also CHRAJ Litigants’ Survey full results, available from r.crook@ids.ac.uk or kjasante@gmail.com by request.
month or less, from the time of submitting the complaint. The District Offices surveyed had been achieving clear-up rates of around 60% over the previous three years. Most importantly, enforcement of the agreements was quite good in that maintenance and compensation payments were paid through the CHRAJ office account, so their implementation could be monitored by CHRAJ officers.23

Conclusions

Overall, the research shows that a state institution such as Ghana’s CHRAJ can successfully offer a form of dispute settlement that is effective, accessible to ordinary citizens especially more disadvantaged groups, and legitimate, in the sense that it draws upon and responds to local values and expectations about justice. The main explanations for the relative success of the CHRAJ are to be found in its hybrid character.

Thus on the one hand, its local offices benefit from a national organisational structure and management which sustains the professionalism and commitment of staff, and enable rules and authoritative remedies to be enforced. The commitment of staff is itself a product of both professional training and the strongly-held values of individual officers. This has produced an organisational culture in which, in spite of constant understaffing and low pay rates, promotion of human rights values, honesty and a public service ethos are reinforced throughout the organisation. The leadership of CHRAJ has also managed to use its constitutional position to maintain its autonomy from political interference from the outset.

On the other hand, the official policy of promoting human rights through its local level ADR service has enabled officers to work informally in a way which is both culturally sensitive and accessible to ordinary citizens. Their main focus is to try to create agreements between disputants which are based on what the parties themselves consider fair, whilst maintaining human rights principles—not an easy task, but one in which they frequently have to negotiate the boundaries between universal principles and local cultures. Overall, this hybridity means that the formal and informal are mutually supportive, instead of the one undermining the other—in contrast to the situation in so many other African governance institutions.

23 See supra note 14.