IDS RESEARCH REPORT 58

The Law, Legal Institutions and the Protection of Land Rights in Ghana and Côte d'Ivoire: Developing a More Effective and Equitable System

Professor Richard Crook (ICS)
with
Professor Simplice Affou (IRD)
Dr Daniel Hammond (Department of Land Economy, KNUST)
Dr Adja F. Vanga (Université de Bouaké)
Mr Mark Owusu-Yeboah (ILMAD, KNUST)

January 2007

Institute of Commonwealth Studies, University of London
Institut pour le recherche en développement (IRD), Abidjan
Université de Bouaké
Kwame Nkrumah University of Science and Technology (KNUST)

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First published by the Institute of Development Studies in January 2007

ISBN 978 1 85864 633 2

A catalogue record for this publication is available from the British Library.

Available from:
Communications Unit
Institute of Development Studies
at the University of Sussex
Brighton BN1 9RE, UK
Tel: +44 (0) 1273 678269
Fax: +44 (0) 1273 621202
E-mail: bookshop@ids.ac.uk
Web: www.ids.ac.uk/ids/bookshop

Typeset by Barbara Cheney.
Printed by Imagedata Group, Brighton UK.
IDS is a charitable company limited by guarantee and registered in England (No. 877338).

Cover
Photographer: Jacob Silberberg
Caption: Attorneys for Amina Lawal listen to the Katsina State Judiciary Sharia Court of Appeal's ruling on her case.

The Law, Legal Institutions and the Protection of Land Rights in Ghana and Côte d'Ivoire: Developing a More Effective and Equitable System

Richard Crook

Summary

The social regulation of rights to allocate and use land is of critical importance in the development of the predominantly agrarian economies of West Africa. Increasing conflict over land takes place within a context of legal pluralism, where customary systems are still dominant, but have different degrees of legalisation. The overall aim of the project was to analyse the effectiveness and equitability of judicial, legal and administrative institutions for providing accessible dispute resolution, and for protecting the security of the urban and rural poor to hold and use land. It compares the 'legalisation' of the whole range of customary and non-state regulatory institutions into state law in Ghana with the greater pluralism of Côte d'Ivoire, and asks whether the revival of customary systems or the introduction of local Alternative Dispute Resolution Systems (ADRS) can offer protection against uncertainty and arbitrary dispossession. It concludes that state courts serve a real need for authoritative remedies and should be enhanced and supported. The introduction of ADRS also needs state support. Customary or traditional justice systems have played a key role in protecting land rights where they have been legalised by the state, as in Ghana. But where there are powerful chieftaincies, as in southern Ghana, they are not necessarily suited to ADR solutions because of their formality and embeddedness in local power structures. They can still play a positive role where there is community support. Situations of polarised intercommunal conflict as in Côte d'Ivoire also undermine their capacity to be effective.

Keywords: Ghana, land, land law, land rights, access to justice, customary law, legal pluralism, disputes, courts, d'Ivoire, Ivory Coast.

Richard Crook was a Research Fellow in Governance at the IDS during the period January 1999 to September 2003; most of the research upon which this report is based was carried in Ghana and Côte d'Ivoire during the period 2001–3 and continued at the Institute of Commonwealth Studies (ICwS) from 2003 to March 2005. He is currently Director of the Institute of Commonwealth Studies, School of Advanced Study, University of London (richard.crook@sas.ac.uk). He has a PhD in Government from the London School of Economics and Political Science, and he previously held positions at the Department of Politics, University of Glasgow and the Centre of West African Studies, University of Birmingham. He has spent all of his working life researching on and teaching about the politics and government of developing countries particularly in the West African and South Asian regions, and has published extensively on the topics of local politics and decentralisation (see *Democracy and Decentralisation in South Asia and West Africa: Participation, Accountability and Performance*, with James Manor, Cambridge University Press, 1998), state–civil society relations and administrative performance.

Simplice Affou worked with Professor Crook as director of the IDS/ICwS research project in Côte d'Ivoire 2001–2005. He was trained as a sociologist and agricultural economist at the Universities of Picardie, Paris and Montpellier, and was awarded his *doctorat d'état* in agricultural economics at Montpellier in 1995. He is well known for his seminal works on the political economy and sociology of cocoa farming and food crop farming in Côte d'Ivoire, including *Les Planteurs absentéistes en Côte d'Ivoire* (Paris, 1987) and *La relève paysanne en Côte d'Ivoire* (Paris, 1990). He is currently Director of Research at the IRD (formerly ORSTOM) Centre de Petit Bassam in Abidjan, and Professor of Agricultural Economics at the University of Bouaké. He has been involved in a series of major international research projects on agriculture, land tenure and the Plan Foncier Rural since 1996, most notably with SADAOC, CIRAD and the Banque Africaine de Développement, and has also worked on peri-urban land problems.

Daniel Hammond worked with Professor Crook as director of the IDS /ICwS research project in Ghana, 2001–2005. He wrote his PhD on land tenure in Ghana at the University of Cambridge and has taught and researched on questions of land tenure and land management in Ghana since 1980. Recent publications include a major report for DFID on *Land Security and the Poor in Ghana* with Liz Alden Wily (DFID, Accra, 2001) and 'Land tenure and land policy' in *The Fate of the Tree: Planning and Managing the Development of Kumasi*, edited by K. K. Adarkwa and J. Post (Accra, 2001). He is currently Head of the Department of Land Economy and Dean of the Faculty of Planning and Land Economy, Kwame Nkrumah University of Science and Technology, Kumasi, Ghana.

Adja Ferdinand Vanga worked with Professor Affou and Professor Crook on the Côte d'Ivoire case studies from 2001–2005. He took his PhD at the University of Abidjan (Abobo-Adjamé) in 2001 and is currently an Assistant Professor of Sociology at the University of Bouaké.

Mark Owusu-Yeboah worked with Professor Crook and Dr Hammond on the Ghana case studies from 2001–2005. He trained as a sociologist at the University of Ghana, from where he received his MA, and is currently a Research Fellow at the Institute of Land Management and Development at Kwame Nkrumah University of Science and Technology, Kumasi, Ghana, and Director of Ghana LandNet. He has worked extensively on land problems in Ghana, most recently with the GTZ Legal Pluralism and Gender Project, and the Natural Resources Institute, University of Greenwich project on Kumasi natural resources.

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Acknowledgements

This report is based on research carried out between October 2001 and March 2005, funded by an ESCOR (SSRU) grant from the UK's Department for International Development (DFID). We are very grateful for the generous support provided by DFID to our respective institutions (the Institute of Development Studies, University of Sussex, from 2001 to October 2003; the Institute of Commonwealth Studies, University of London; the Kwame Nkrumah University of Science and Technology, Kumasi, Ghana; and the University of Bouaké, Bouaké, Côte d'Ivoire). Any views expressed in this report are the views of the authors, and should not be taken to represent DFID policy in any way.

We should also like to acknowledge the important contributions made by other members of the research team in Ghana and Côte d'Ivoire. In Ghana, Charles Ankisiba not only assisted with fieldwork and interviewing but also drafted reports on peri-urban land issues in Kumasi and Wa. In Côte d'Ivoire, Dr Kadhidia Touré (Université de Bouaké) assisted with the early stages of the fieldwork in Katiola and Bouaké. Charles Ankisiba, William Mensah and Kwadwo Addae (KNUST, Ghana) managed much of the survey interviewing in Ghana; Eric Kouamé, Anzian Kouacou, Elisabeth Coulibaly, Doua Dosso and Sibéhon Tuo (Université de Bouaké) and Adou Ya (IRD Abidjan) assisted with fieldwork in Katiola, Bouaké and Tabou. Without their courage, dedication and hard work the fieldwork could not have been completed, particularly in Tabou where the work was both difficult and dangerous.

In both countries our work was carried out with the support and collaboration of local stakeholders and officials; we are especially grateful to the chiefs and people of the villages where we carried out case-studies (see Appendix 1). We should also like to thank the following officials: in Ghana, the staff and judges of the Supreme Court, Accra, the Kumasi High Court, the Wa High Court and the Goaso Magistrates Court; the Law Reform Commission; the Lands Commission, Office of the Administrator of Stool Lands and Land Title Registry offices in Accra, Kumasi and Wa; the Asantehene's Lands Secretariat; the Ministry of Local Government and the staff of the District Assemblies; the Commission for Human Rights and Administrative Justice; the Ministry of Agriculture and the Ministry of Lands and Forestry (LAPU).

In Côte d'Ivoire, the staff and judges of the local Tribunals; the Prefects and Sub-Prefects and the staff of the Communes; the staff of the *Ministère de la Construction et de l'Urbanisme*, the Plan Foncier Rural (BNETD), and the *Ministère de l'Agriculture* (Direction de la Réglementation et du Foncier) both in Abidjan and in the *Directions départementales*.

Finally, we should like to thank Linda Bateman of the Institute of Development Studies, Brighton, without whose constant and efficient administrative support this complex international research collaboration would never have been possible.

Acronyms

ADR	Alternative Dispute Resolution
ADRM	Alternative Dispute Resolution Mechanism
ADRS	Alternative Dispute Resolution Systems
ANADER	Agence Nationale d'Appui au Développement Rural
AO	Agricultural Officer
BNETD	Bureau National d'Etudes Techniques et de Développement
CGFR	Comité de Gestion Foncière Rurale
CHRAJ	Commission for Human Rights and Administrative Justice (Ghana)
CPP	Convention Peoples' Party (Ghana)
CVGFR	Comités Villageois de Gestion Foncière Rurale
DCD	District Coordinating Director (Ghana)
DCE	District Chief Executive (Ghana)
DCGTx	Direction et Contrôle des Grands Travaux
DFID	UK Department for International Development
DISEC	District Security Committee (Ghana)
DSI	Dispute settlement institution
FPI	Front Populaire Ivoirien
JSSC	Justice and Security Sub-Committee of the District Assembly (Ghana)
LAPU	Land Administration Programme Unit (Ghana)
LSA	Land sector agencies (Ghana)
MCU	Ministère de la Construction et de l'Urbanisme
MSLC	Middle School Leaving Certificate
NAs	Native Authorities
NCs	Native Courts
NDC	National Democratic Congress (Ghana)
NPP	New Patriotic Party (Ghana)
OASL	Office of the Administrator of Stool Lands (Ghana)
PDCI	Parti Democratique de la Côte d'Ivoire
PDU	Plan Directeur d'Urbanisme
PFR	Plan Foncier Rural
PNC	People's National Party (Ghana)
PNDC	Provisional National Defence Council
PNGTER	Programme nationale de gestion des terroirs et d'équipement rural
RDR	Rassemblement des Républicains
SETU	Société d'Equipement des Terrains Urbains
SSNIT	Government social security fund (Ghana)
TCP	Physical Planning (formerly Town and Country Planning) Department (Ghana)

Executive summary

Part A The aims of the research and its relation to existing knowledge

1 Summary of the research topic and its main objectives

1.1 The research addresses a key policy question in the area of African land law and access to justice: are the livelihoods and the rights of the poor and vulnerable best protected through sustaining legal pluralism (a mix of customary institutions, local Alternative Dispute Resolution Systems – ADRS – and state institutions) or does an integrated state system of justice give better protection? In Ghana and Côte d'Ivoire there is a situation of legal pluralism; customary land-holding systems are dominant but undergoing rapid change and have experienced severe strain in Côte d'Ivoire under the impact of mass migration into the cocoa-growing and urban areas. Increasing conflict over land and insecurity of landholding thus make the question of how to provide better institutionalised regulation of such conflict very timely.

1.2 The overall aim of the research was to investigate how law, judicial and regulatory institutions, both formal and informal, can contribute more effectively to resolving land disputes and enhancing security over the possession and use of land.

1.3 The specific research objectives focused on understanding the factors which underpin the *effectiveness*, *legitimacy* and *inclusiveness* of dispute settlement institutions (DSIs) which adjudicate or otherwise resolve land disputes. This involved the study of both the state and non-state, customary and statutory institutions involved in land allocation and conflict management at the local level in the two countries.

2 Background to the research: the debate over legal pluralism and protection of land rights

Policy debate over insecurity of land rights in West Africa tends to focus on the 'problems' posed by the continued dominance of customary forms of land tenure which are rooted in social group membership and obligations rather than written documentation, and on the linked issue of legal pluralism, where a multiplicity of legal codes, (customary, religious and state) coexist or compete within the same polity. The debate revolves around two themes:

1 Should customary and other non-state land regimes be supported because of their inherent flexibility, social embeddedness and accessibility, or do they in fact facilitate the 'legal rightlessness' of the poor as against locally inequitable power structures, and the state itself?

2 Does the plurality of legal orders offer useful choices for the ordinary citizen ('forum shopping'), or does it produce a general ambiguity, lack of enforceability and lack of protection for land rights, particularly for those who lack power in the urban areas? How much choice do poor citizens really have about which 'forum' or legal code they invoke to settle a dispute or protect their rights?

3 The choice of case studies: comparing Ghana and Côte d'Ivoire

3.1 Ghana and Côte d'Ivoire are a 'matched pair' in that they share similar economic structures and cultures. Both are cocoa exporters of world significance, based on small farm production, both have experienced large-scale inward labour migrations, and the societies of their southern and common border regions have linked histories and languages (partly due to the historic influence of the Ashanti Empire). But these similarities serve to highlight differences in the historically determined configuration of legal pluralism in each country. These differences are concentrated in:

- different degrees of 'legalisation' of customary and other land laws, and
- the degree of pluralism and competition among regulatory orders.

3.2 A main research hypothesis is that these differences have had a significant impact on the certainty and protection offered by both customary and state dispute settlement institutions in situations of conflict and insecurity. The greater degree of pluralism and the low levels of legalisation in Côte d'Ivoire are connected to the greater degree of insecurity and eruption of politicised, violent communal conflict over land which have erupted in that country since the 1990s.

4 Legalisation and the configuration of legal pluralism in Ghana

4.1 Both pre-colonial and colonial legacies in Ghana led to the emergence of a strongly legalised form of customary land law, recognised by the state and integrated into the British-derived common law administered by the state courts. Colonial institutions such as the Native Courts and the Native Authorities as well as national-level political institutions created a powerful chiefly elite, with a hierarchy extending down to local communities.

4.2 The end result has been that local communities in Ghana have a strong capacity to protect customarily held land, and, through the institution of chieftaincy, have preserved local institutions for regulation of disputes. Thus migration and marketisation of land have been handled more peacefully and institutionally. But the power given to the chieftaincy to manage and allocate land, based on the legal concept of allodial land ownership, is now having destabilising effects on the rights of migrants and even customary landholders in the peri-urban and urban areas. And, state institutions for management of an integrated land system have created further conflict through an overambitious regulatory system.

5 Legalisation and the configuration of legal pluralism in Côte d'Ivoire

5.1 In Côte d'Ivoire, the policies of colonial and post-independence regimes meant that customary and local forms of land law have never been recognised by the state. And there was no politically powerful 'neo-traditional' chiefly elite. Hence land relations in the cocoa-growing areas have relied more on social bargaining and informal arrangements which were often overridden by the state. In the urban areas, state agencies have controlled land allocation and development.

5.2 These conditions of access to the land provoked politicised ethnic conflict and perceptions of dispossession amongst host communities into which the state itself was drawn as party competition emerged in the 1990s. This historic lack of protection for local land rights has led to the eruption of politicised ethnic conflict and indirectly to the civil war in that country.

6 The policy context

6.1 Both in Ghana and Côte d'Ivoire recent land reform programmes have adopted what has been called an 'adaptation paradigm'. That is, instead of sweeping away customary tenure with a wholesale individual land titling and ownership programme, the state accepts the *de facto* dominance of customary forms of landholding, and recognises the whole range of existing customary rights in land, whether written or unwritten. It then attempts to 'legalise' and formalise them through written documentation and mapping. The ultimate aim is still greater certainty of legal title, but based on a more legitimate and locally recognised set of land rights.

6.2 In Ghana, the reform programme is based on the principles laid down in a National Land Policy document agreed in 1999 by the previous National Democratic Congress (NDC) government, but accepted by the incoming New Patriotic Party (NPP) government in 2000. It is being implemented, with substantial donor support, by the Land Administration

Programme Unit (LAPU) within the Ministry of Lands and Forestry. Its aims include a review of continuing anomalies between customary and statute/common laws on land, and institutional reforms such as rationalisation of the state land sector agencies and decentralisation to strengthened customary and chieftaincy institutions. The problem of land dispute resolution is recognised as an important element in all of the LAP components. A two-pronged approach is suggested:

- The creation of special Land Courts (Divisions of the High Court) in regional capitals, to try to deal with backlogs in the state system.
- The development of what are called 'Alternative Dispute Resolution' procedures. First, the revived political power of the chieftaincy is reflected in proposals to make ADRS an integral element of the new Customary Land Secretariats – meaning that the chiefs and their customary tribunals will be recognised as a form of ADR. Secondly, an ADR bill is to be introduced in Parliament which empowers the courts and the Judicial Service to introduce ADRS for out-of-court settlement. Proposals for district-level Local Advisory Committees of 'community elders', organised by the elected District Assemblies, have not yet been agreed by government.

6.3 In Côte d'Ivoire, the policy of the Front Populaire Ivoirien (FPI) government of President Gbagbo is officially based on a commitment to implement the 1998 Rural Land Law (*Loi relative au domaine foncier rural*). The main purpose of the 1998 law was to set up formal decentralised or locally based institutions and procedures which would be empowered to carry forward the detailed work of mapping, recognising and legalising the whole range of customary and locally established rights, with the cooperation of local communities. It was thus hoped that indigenous and customary rights would be secured, as well as the use rights agreed with 'strangers' under customary procedures. But many misunderstandings about its impact on the rights of foreigners (non-Ivorians) developed – often confused with the rights of 'strangers' – and violent politicised conflicts erupted between host communities and migrants in the south-western cocoa areas. The 1998 law is now an issue in negotiations between rebel forces and the government aimed at ending the civil war and *de facto* partition of the country into southern and northern sections, and prospects for its implementation depend upon these political developments.

Part B **Research design and methodology**

7 Research questions and concepts

7.1 The main questions which were operationalised in the research concerned the effectiveness, legitimacy and inclusiveness of various dispute settlement institutions (DSIs). These were operationalised through asking about public perceptions of process and what the public valued or looked for in a DSI. Researchers also looked for objective measures of effectiveness such as speed and cost. The main questions were:

- What are 'land disputes' about, and do different kinds of disputes get settled in different DSIs?
- Why do people choose particular DSIs? What values are they looking for in the process and the outcome?
- What is the public's opinion of different DSIs? How do users in particular perceive their experiences of disputes and their settlement?
- How do different forms of DSI protect the rights of the poor and vulnerable – rights to a fair hearing, rights to security of possession?
- Are there any objective measures of the effectiveness of different DSIs?

7.2 Empirical focus: in each country the empirical focus was on the full range of DSIs from the most informal (which includes both local or customary processes and informal dispute settlement offered by state agencies) to the formal tribunals and courts of state or quasi-state agencies, as follows:

- Informal arbitration at the local level – family heads, village elders, respected community leaders and 'land chiefs'
- Customary chiefs' courts
- State agencies offering dispute settlement or arbitration, ranging from informal settlement by individual officials to formally constituted arbitration committees
- Formal state courts: in Ghana, the former Community Tribunals, now Magistrates Courts, and the High Courts were covered. In Côte d'Ivoire, the first instance *Tribunal* was investigated.

7.3 Research design: in each country, case-study areas were selected according to the presumed type of land conflict situation:

- Type I: a situation of marketised, crop agriculture with competition between successive generations of migrants and host communities.
- Type II: a situation where there is a low degree of marketisation, no perceived land shortage and land is allocated at low cost according to local customs.
- Type III: urban or peri-urban situations characterised by marketisation, severe competition and conflict among statutory, traditional and 'informal' (usually illegal) systems of land regulation.

7.4 Definition of 'legalisation': the degree of institutionalisation and formality of a regulatory order. At one extreme the 'most legalised' is exemplified by a single, state-endorsed, legal framework and body of written justiciable laws. At the other extreme 'least legalised' is a situation in which land relations are matters of informal, social and political bargaining or negotiation, in which a wide variety of resources can be drawn on to establish advantage and authority.

8 Methodology and data collection

See Appendix 1 for a detailed description of the case-study areas in each country. Data was collected using (a) focus group meetings with selected informants; (b) in-depth semi-structured interviews with selected informants; (c) observation of dispute settlement procedures; (d) questionnaire-based surveys of litigants in the courts in Ghana and Côte d'Ivoire, and in Ghana a village-level mass survey of popular perceptions involving 676 respondents.

Part C **Research findings**

9 Overall structure of the findings

The main findings are presented by type of dispute settlement institution, comparing the locations by type of area, and focusing on effectiveness, legitimacy and inclusiveness.

10 Formal state courts: Ghana

Land cases are undoubtedly creating an unmanageable backlog in the state courts. Land cases account for just under 50 per cent of all cases nationally, but the numbers are increasing and backlogs of unheard or unresolved cases increasing, both in the High Courts and even more seriously in the Magistrates Courts.

Why do people go to Court? The breakdown of the kinds of cases in which our survey respondents were involved produced a surprising result: 52 per cent were 'intra-family' disputes (inheritance, divorce, unauthorised dispositions by family members). The common stereotype that it is double sales or unauthorised dispositions and 'definition of boundary' disputes which are clogging up the courts is clearly inaccurate. It is family cases which polarise the parties so bitterly that they are more likely to go to a state court.

Choice of DSI: do people go straight to the state court, or use other methods first? The survey showed that state courts are the *first* choice of nearly half of the litigants: 47 per cent overall had chosen to go straight to the court without using a chief's court or traditional procedure. The court litigants were strongly motivated by the search for an 'authoritative' and impartial settlement or said they had resorted to court because of the 'recalcitrance' of the opposing party which only the court could overcome. The search for authority is linked to the remedy which courts offer – declaration of title. Even more striking (and linked to the hostility between the parties in the state court) was the extremely low level of, and reluctance to consider, out-of-court settlements.

Accessibility and justice issues: the perceptions which litigants had of the state courts were surprisingly positive; in spite of the severe delays and constant adjournments, the majority rated the behaviour and manner of the judges highly, and felt that overall it had been worth bringing the case. It was also clear that the kind of justice offered by the state courts was not as alien or inappropriate as commonly supposed. The Magistrates Court judges were well respected and their procedures were informal, flexible and user-friendly. There is clear evidence of a shift from adversarial to 'inquisitorial' approaches to the trial process on the part of judges, and language is *not* a problem.

Inclusiveness: the breakdown of litigants also showed (contrary to stereotypes) that going to court is not exclusively the privilege of the male, wealthy or well educated. Women were a 'significant minority' (31 per cent), and they were predominantly illiterate (61 per cent), perhaps reflecting age factors. Cost did not seem to be as big an issue as expected, except where cases go on for many years. Figures cited were not out of the reach of the collective resources of families with farms and properties, at least in southern Ghana.

Effectiveness issues: it is clear that much of the delay in the court system is caused by case management problems, particularly the prevalence of adjournments, poor briefing by counsel, poor scheduling, absences, poor record management including corruption by court officials, and the abuse of interim injunctions. When this is combined with the extreme reluctance to contemplate out-of-court settlements, it can be argued that delay in the court system is not just the product of 'excessive litigiousness'; it is also a product of the way people use litigation, the administration of the courts and the behaviour of lawyers, court officials and litigants themselves.

Overall, the commitment to litigation is so strong that 59 per cent of respondents declared that they felt the process was worthwhile.

11 Formal state courts: Côte d'Ivoire

The low level of usage: overall, the state courts (Tribunals) in Côte d'Ivoire are not as popular as those in Ghana and not heavily used. They do not complain of massive backlogs. Usage increased however during the late 1990s in both the south-western area and Bouaké, due to changes in the political situation (liberalisation leading to less fear of the administration), and increasing conflict amongst host communities which loosened sanctions on going to the state court, mainly on the part of host or indigenous litigants.

Accessibility and inclusiveness: slow, highly formal procedures (written documentation considered in chambers) mean that the courts are not very user-friendly especially to rural and uneducated people. But cost did not seem to be a major inhibiting factor. Migrant communities, up until the post-2000 conflicts at least, preferred to seek dispute resolution by the administrative authorities (Prefectoral service).

Effectiveness of the courts is potentially quite good in that the procedures are careful and objective and rely on thorough investigation. But they lack flexibility and capacity.

The reasons for going to court: as in Ghana, litigants show a strong commitment to taking a dispute to the bitter end. Out-of-court settlements are rare. In Côte d'Ivoire going to court is very much a last resort rather than first choice, and incurs the danger of social sanctions or even reprisals. So it is linked to the real possibility of conflict.

12 Mediation and arbitration by state or state-supported agencies in Ghana

Formal and statutory arbitration committees (Land Title Registry Adjudication Committee and the Lands Commission Settlement and Arbitration Committee) have not been used very much, although they reportedly achieved some successes. The reasons derive from a preference for more informal settlement using the discretion of senior officials.

Informal mediation and conflict resolution by individual officers: this is quite well used within the Lands Commission, and the Town and Country Planning (now Physical Planning) Departments of the District Assemblies. The procedure is undoubtedly effective – it can be rapid and cheap (only 'informal payments', it can be assumed), as well as authoritative. In effect officials are exercising a discretionary authority which is inherent in the role of their agencies; they have access to the documentation, specialist expertise and the power to make administrative decisions with legal consequences. There are some doubts, however, about the appropriateness of allowing officials to use their discretionary powers to this extent, since questions of impartiality and conflict of interest could arise. Other agencies such as the Ministry of Agriculture and the District Administrative authorities are helpful but much more limited in what they can do.

Local-level state-supported ADR: the Commission for Human Rights and Administrative Justice (CHRAJ): the district CHRAJ office has developed into a highly successful dispute settlement institution offering a simple, cheap and honest service which could be taken as a 'best practice model' of what an Alternative Dispute Resolution Mechanism (ADRM) should look like. The CHRAJ staff were offering a professionally impartial and informal mediation service with written documentation of decisions, which had been become quite popular, settling around 200 cases a year since 1995, of which around 30 per cent on average each year were land cases.

13 Mediation and arbitration by state or state-supported agencies in Côte d'Ivoire

Formal arbitration institutions: the most elaborate and potentially effective local DSIs in Côte d'Ivoire are the village and Sub-Prefectoral land committees provided for under the 1998 land law. Unfortunately they have not yet become operational as the law has not really been implemented. Another arbitration system set up to deal with disputes between farmers and cattle herders in the northern areas had not been very successful, due mainly to practical difficulties of enforcement.

Informal mediation and conflict resolution by individual officers: in both the urban and rural areas, the Prefectoral service still dominates dispute resolution, partly because they still exercise controlling powers over allocation and legal certification of land. As in Ghana they are therefore dealing with disputes about the exercise of their own powers, or problems caused by inter-agency overlaps and conflict. This is especially important in the urban areas.

Inclusiveness and accessibility: the role of the Prefects is closely connected to their political role, and to the expectation in Côte d'Ivoire that political connection is the most important factor in dispute settlement. Thus migrant communities in the south-west had the most trust in the Prefects until after 2000, whilst in Bouaké trust diminished during the 1990s due to political liberalisation and the revived role of the chieftaincy.

14 Non-state mediation and arbitration at the local level: customary courts and informal dispute settlement institutions in Ghana

Kinds of land disputes at local level: the survey showed that 22.6 per cent of respondents had experienced a dispute over land (defined as a 'justiciable event'). The breakdown of the disputes shows a striking contrast with the kinds of cases brought to the state courts. The commonest causes of dispute (47.7 per cent) were trespass or some kind of difference with a neighbouring farmer.

Kinds of DSIs used and why: amongst the wide range of DSIs used, it is noteworthy that only just over a quarter overall (26 per cent) had used a 'traditional' court (chief, chief and elders, or land priest (*tendana*)) – although chiefs' courts were much more popular in Kumasi. The next most-used types of DSI were a family gathering (21 per cent) and informal 'arbitration' (16.6 per cent) – that is, the parties sought the help of 'informed' or respected persons which could be an elder, their landlord, or the locally elected Unit Committee.

Legitimacy of different forms of DSI: at the local level, village chiefs and family heads were the most trusted people from a general perspective. But court judges and the elected local government Unit Committee Chairpersons came a close third and fourth, showing that chiefs are by no means the only or even dominant sources of dispute resolution. Moreover, people made a clear distinction between village chief and paramount chief – the latter was ranked well below judge, and in Asunafo, court judge was actually top of the list. Reasons for the lack of trust in the 'big chiefs' include their greater formality and remoteness, and issues around their management of land and the profit to be made from it, particularly in the peri-urban areas. In Asunafo, the politics of the chiefs' relations with Kumasi and issues to do with migrant land rights also mattered. Chiefs may be regarded as having too much interest in land issues to be trusted as impartial judges. Rising land values in Wa led to conflicts in which the authority of both customary leaders and the state was defied.

Inclusiveness issues: for those who had actually had a dispute, the choice of a DSI, as between a chief's court, a family gathering or arbitration by respected persons was not significantly affected by either sex or educational level, suggesting that at the very local level each mode was equally accessible. But there were very significant differences between local people and migrants or strangers (people from outside the locality). Non-locals were only half as likely to have used a traditional or chief's court, and were much more likely to have used arbitration by respected persons or to have to sorted out the issue with the other party. As most migrants were in the Asunafo area, this explains the small numbers using a chief's court in Asunafo, and highlights the problems of trust and impartiality surrounding the chiefs in both peri-urban areas and migrant farming areas.

15 Non-state mediation and arbitration at the local level: customary courts and informal dispute settlement institutions in Côte d'Ivoire

Kinds of disputes: in Tabou, migrations, the cocoa boom and subsequent crisis, and commercialisation of land have all generated severe conflicts. The most common are: within families usually between younger generations and family heads over land disposals, between Ivorian migrants and foreigners over land which host communities still claim, and between host communities and migrants of all sorts over the conditions on which land was granted or the host landholders' attempts to renegotiate or deny earlier arrangements. In Katiola, disputes concern mainly the cattle herders, state land appropriations for projects and migrations from the Senoufo area. In Bouaké, the main disputes have arisen over compensation for land which has been taken over for urban development, and the process of allocation of urban plots.

Kinds of DSIs: in the Côte d'Ivoire case-study areas, traditional authorities are very local and based on village councils and elders; the land priest or land chief plays an important role. Social sanctions and ritual/magical procedures are important. Only in Bouaké have more formalised forms of chiefly authority emerged over the management of urban lands.

Legitimacy of different DSIs: chiefs and village councils have been suffering from fragmentation and loss of authority and respect, both from within their own communities, and from the migrant populations. The younger generations in particular have less trust in their elders and the migrants regard them as too much a part of the 'problem' of their relations with host communities to be a viable 'solution' for dispute resolution.

Inclusiveness: social sanctions make local and customary DSIs almost an inevitable 'first choice' of disputants, and the Sub-Prefects frequently refer cases back to the village councils or chiefs. This means that they are accessible in terms of local use and understanding; but very likely to be appealed against by dissatisfied parties. When migrants and locals argue over land, they try to resolve the economic issues amongst themselves privately, first, and then migrants are likely to appeal to the Sub-Prefect.

16 Conclusions and policy implications: legitimacy, effectiveness and inclusiveness of land dispute settlement institutions in Ghana and Côte d'Ivoire

16.1 Policy implications for Ghana state courts:

- ***Alternatives to the state courts and the remedies they offer are difficult to find:*** the demand for authoritative remedies, fairness and enforceability is such that solutions based on 'easing pressure' on the courts through greater use of ADRS or customary institutions are unlikely to be successful if they fail to offer equivalent authority. The Land Administration Programme as it rolls out is likely to increase these demands as greater emphasis is put on establishing legal titles and recording the great variety of customary titles. This suggests that it would be most unwise to try to enforce a 'no appeal' rule on customary and other forms of arbitration and ADR.
- ***The Magistrates Courts are the key 'front-line' institutions*** at local and rural levels. They have the most potential to offer flexible, rapid and accessible justice; yet their current resource position is totally inadequate. Funding of appointments and other support would offer immediate returns. A new Land Division of the High Court is highly desirable but may not make much impact on the mass of new cases emerging.
- ***There is potential for state-supported and enforced ADRs.*** Court-attached ADR will require enormous changes of attitude and aptitude amongst the legal profession. More promising is the system already developed by the CHRAJ. At the community level, experiments with dispute-resolving NGOs have reportedly achieved some success, and local government bodies such as the Unit Committees, or District Advisory Committees on land, could be developed more systematically although there are considerable political dangers. But the limitations of ADR have to be recognised; in situations where there are strong market pressures (a lot of money at stake) or where there are large inequalities of power, they cannot necessarily protect the rights of vulnerable people. Ultimately, the state courts cannot be bypassed; they serve a very real need (and right) for authoritative justice.
- ***Reform of court management and procedures is essential:*** the courts themselves must be reformed and given more capacity to deal with at least some of this strong positive demand, rather than bypassed. Considerable improvement can be made by simple administrative case management reforms. Informal changes in the role of judges towards a more investigatory and active stance, which are currently officially frowned upon in the 'adversarial' English model, could be encouraged and legitimised.

16.1.1 Policy implications for the Côte d'Ivoire court system:

- ***Courts as an alternative to political conflict:*** given the level of political and communal conflict in Côte d'Ivoire, and the dominance of political–administrative dispute resolution mechanisms, the formal courts have the potential, if properly constituted and managed, to 'depoliticise' and legalise the resolution of land. The commitment of

the courts to rules and formal procedure could satisfy demands for impartial justice, provided enforcement was effective.

- ***The capacity and flexibility of the courts would require considerable change*** if they were to become more widely used. Written procedures have benefits in terms of objectivity and fairness in consideration of the evidence, but they could not cope with much extra demand, and flexibility is low. The codes in application are themselves very formal with little room for equity considerations.

- ***ADRS will be difficult to develop*** but could be considered. Judicial ADRS are virtually unknown in Côte d'Ivoire, and recent experiments in local state-supported ADRS have given way to administrative dominance. For this reason, court-annexed ADR might be a way of avoiding such dominance, although as noted the judicial service clearly lacks the capacity and the knowledge to go very far with such reforms at present. The 1998 Rural Land Law Village and Sub-Prefecture level Committees are the most elaborated and well-thought-out form of ADR already on the statute books, and should be implemented as far as possible. Their success, however, will depend upon a resolution of current political conflicts.

16.2 Policy implications for mediation and arbitration by state agencies:

- ***The dangers of abuse of power:*** in both Ghana and Côte d'Ivoire the routine exercise of discretion and informal problem-solving by officials is both inevitable and to some extent desirable, and it is unrealistic to think that it can be prevented. It provides rapid and flexible solutions to problems that might otherwise end up in court, or lead to social conflict. But some doubt should be raised about encouraging officials to expand these discretionary activities. Questions of impartiality and conflict of interest could arise where individual officers are acting informally within legally constituted state agencies which have responsibility for granting legal status to land transactions. Corruption is a real danger, especially if they are acting as judges in their own causes. And illiterate or vulnerable people could easily be abused by unscrupulous officials.

- ***Regularisation of informal official activities:*** in Ghana, proposals for an official Dispute Resolution Advisory Committee as part of the rationalisation of the land agencies should be encouraged.

- ***Reforming Prefectoral administrative power in Côte d'Ivoire:*** the role of the Prefects in Côte d'Ivoire is so entrenched in the political system and so dominant in dispute resolution amongst other agencies that it is completely impracticable to suggest that it be abolished or even seriously modified. The main possibility for reform would seem to lie in the fact that, in practical terms, Prefects cannot actually handle all the matters which come before them and so they routinely refer them (in the rural areas at least) to the Ministry of Agriculture or to the customary authorities. Thus boosting the capacity of the courts together with popular willingness to use them, and recognising the role of the customary authorities more fully, as embodied in the 1998 Rural Land Committees, could provide some kind of alternative to administrative power. The actions of authorities such as the Ministry of Housing and Urban Affairs are in theory at least subject to judicial review in the civil law system, so this has to be encouraged.

16.3 Mediation and arbitration by customary and informal DSIs at local level:

- ***Customary institutions and ADRS in Ghana:*** although village chiefs and other informal DSIs are well respected they are probably best left to encouragement through NGO and civil society action. Any association with state forces may cost them legitimacy. The courts of the higher chiefs do not really resemble ADR, and there is also the problem of their 'interest' in the land. One way to improve the form of justice offered and to enhance the accountability of the chiefs is to give more formal recognition to the dispute resolution tribunals which chiefs will be given with the new Customary

Land Secretariats proposed in the LAP. They could then be subjected to the normal rules of public accountability and legal procedure. At the same time, fuller training in both customary law and ADR procedures could be offered, to create a very local popular court system as has been done in many other African countries.

- ***Other local DSIs:*** there is good potential for encouraging dispute resolution by local opinion leaders through NGO-based training initiatives. Many such leaders have a role on the local government Unit Committees but caution should be exercised about making them a formal institutional base for a DSI. Their political connections could lead to damaging politicisation as has happened in Kenya and Uganda.
- ***Strengthening customary institutions in Côte d'Ivoire:*** the village-level councils in Tabou and Katiola are much less hierarchical and formal than those in Ghana (resembling more the traditional institutions of the Nadowli area) and would lend themselves more easily to an ADR-type approach. But within the well-entrenched political and administrative system of Côte d'Ivoire (highly centralised around Presidential patronage systems), they lack authority and credibility. Indeed in many ways they cannot stand over and above or separate from their communities. The restoration of good relations between host and migrant communities is now, as a result of the civil war, something which will require many years of political action for reconciliation. The strength of customary institutions in places such as Bouaké and Katiola still lies in their ability to represent and act on behalf of a local public which is not totally fragmented and divided. It may be suggested that in rebuilding itself, the Ivorian state needs to give the traditional authorities some real resources and autonomy, such as would be provided by an implementation of the 1998 Rural Land Law. The Ministry of Agriculture will have to play a big role in helping the customary authorities with legal and technical support, and help to resolve the inevitable conflicts with some attention to equity.

16.4 Overall conclusion

Overall, the research shows that forms of dispute resolution which provide fair and accessible justice to both the rural and urban poor do require state support for an effective yet flexible and user-friendly court system. State courts serve a real need for authoritative remedies and should be enhanced and supported. In the development of a state committed to the rule of law, they also offer the potential for a balanced alternative to administrative and political power. Informal dispute resolution for agreed mediation at the very local level is best left alone, but some customary or chiefly based systems are too formal and embedded in local power structures to offer genuinely voluntary ADR-type mediation and should be regulated by the state system.

Part A **The aims of the research and its relation to existing knowledge**

1 Summary of the research topic and its main objectives

1.1 The importance of land and its social regulation

It is well accepted that the rules which govern how land is allocated and used – through inheritance, community membership, sale, lease, etc. – and who may take the benefits of its products and its store of value, have an important impact on social and economic life. (For instance, the fact that cocoa in the world's two largest producers – Ghana and Côte d'Ivoire – is still predominantly cultivated on small and medium peasant family farms rather than commercial plantations owes a lot to the history of land tenure in those countries.) Land regimes also have an important impact on the social relations of production (labour contracts, sharecropping and tenancy) and on the development of urban economies – the patterns of expansion, land and labour markets, and survival strategies of the poor. 'Access to justice' or legitimate ways of resolving conflicts over land rights are thus a crucial element in security of livelihoods for the poor and vulnerable (DFID 2000). The legitimacy and effectiveness of the land regulation system are ultimately crucial for political order and stability itself, as the breakdown of political stability and the eruption of civil war in Côte d'Ivoire during the period of the research project itself so vividly demonstrate.

1.2 The overall aim of the research

The principal aim was to investigate how law, judicial and regulatory institutions, both formal and informal, can contribute more effectively to resolving land disputes and enhancing security over the possession and use of land. This is an issue of particular significance in the sub-Saharan African context, most especially in West Africa. In this region the pressures of population growth, the conversion of virtually all southern forest lands to cash crop agriculture and timber exploitation, large scale migration, and rapid urbanisation have produced increasingly politicised conflicts over land (IIED 1999). Some of these conflicts – host communities *vs* migrants, intercommunal, intergenerational, gender-based – reflect the embeddedness of land laws in local power structures and social group membership. Others are linked to the role of the state, either in its articulation with local regimes or in seeking directly to control land; everywhere, these developments are deepening the marginalisation and exclusion of poor and vulnerable groups. Institutions for the settlement or regulation and adjudication of these conflicts over land are therefore of key importance.

1.3 Legal pluralism

In addition to increasing levels of conflict and insecurity, institutions for regulation of land relations in the West African region are typically set in a context of legal pluralism. A key policy question in the debate over access to justice is whether protection of livelihoods and the rights of the poor and vulnerable would be best protected through sustaining legal pluralism (a mix of customary institutions, local Alternative Dispute Resolution Systems – ADRS – and state institutions) or whether an integrated state system of justice would give better protection (DFID 2000: 43). The research set out to address this issue in the West African context.

1.4 Comparing Ghana and Côte d'Ivoire

These questions were investigated through a comparative study of a 'matched pair' of West African countries, Ghana and Côte d'Ivoire, which share similar cultures and economic structures, but which differ significantly in their legal institutions and traditions, particularly in the extent to which customary and non-state regulatory land institutions have been 'legalised'. We asked whether current attempts in both countries to either strengthen (Ghana) or to revive and legalise customary land law institutions (Côte d'Ivoire) will help to resolve problems of uncertainty, conflict and arbitrary dispossession.

1.5 Key objectives of the research

1 To better understand the factors which determine the effectiveness of dispute settlement institutions in adjudicating or resolving land conflicts and in protecting rights to hold or use land. This involved study of both state and non-state, customary and statutory institutions involved in land allocation and conflict management at the local level.

2 To develop policies for enhancing the performance of such institutions, through analysing what processes work best to provide the most effective protection and access for the poor and vulnerable.

2 Background to the research: the debate over legal pluralism and protection of land rights

In most of the countries of sub-Saharan Africa (and in many other ex-colonial states of South and South East Asia) a situation of 'legal pluralism' exists – that is, land rights are regulated through a wide variety of institutions, state and non-state, formal and informal, using a variety of legal codes and social practices, many of which are locally specific. The 'law' on land rights is not just that implemented by the state courts; it is made, re-made and reasserted through a multiplicity of everyday practices and institutional actions (Juul and Lund 2002). This is particularly so with local community-based and 'customary' forms of land rights, which are constantly being reinvented in response to changing circumstances and changing power relations, e.g. migrant pressure in Côte d'Ivoire, the political economy of different crops, peri-urban land sales (Chauveau 1997; Berry 1993; Larbi, Antwi and Olomolaiye 2003).

2.1 Definitions of legal pluralism

Much of the discussion of legal pluralism in the literature revolves around definitions of law and whether non-state codes are 'law' (see Griffiths 1986; Tamanaha 1993).[1] Whilst not wishing to enter fully into this debate, the definition adopted for the purposes of this research was taken from the anthropological or 'functional' perspective, which sees 'law' as necessarily involving the allocation of authority (legitimate power) over people and resources – an allocation which implies unequal relationships. Legal authority in these terms is not arbitrary but is embodied in recognised and predictable 'role relationships and obligations' which are sanctioned by a 'publicly acknowledged authority' (Radcliffe-Brown 1952; Pospisil 1971). The critical or irreducible element of law is therefore its *publicly authoritative* character.

1 Moore (1978) suggests that 'law-like' regulatory orders which operate in non-state situations should be termed 'reglementation'.

Legal pluralism is, as Franz von Benda-Beckmann puts it, simply a description of the 'theoretical possibility' of more than one such legal order (Benda-Beckmann, F. von 2001). The main problem with legal pluralism arises when there is disagreement over which codes are authoritative. In most modern states the highly specialised institutions of law and law enforcement are the prime if not dominant enforcers of particular state-supported allocations of resources and power relationships. But in many African states it is not always the state codes which prevail or are most commonly invoked. Even more important, perhaps, is the normative debate over whose interests are served through the invocation of different legal codes. Two main themes have emerged.

2.2 State *versus* non-state legal orders

First, opinion has polarised between those who argue that the interests of ordinary citizens and the poor and underprivileged in society are best served through supporting the authority of customary and other non-state regulatory orders (particularly with respect to land), and those who argue that state law is the best protector of the poor and the excluded against locally inequitable power structures and gender bias.

On the one hand, those in favour of non-state regimes point to their inherent flexibility, social embeddedness, accessibility and practical emphasis on dispute resolution. (Berry 1993, 1997; Basset and Crummey 1993; Chauveau 1997). In the context of land law reform and issues such as registration and titling, this has led to advocacy of the currently popular 'adaptation paradigm', according to which the state should shift to recognising and enforcing the whole range of customary and locally agreed tenures, seen as 'facts on the ground' (Platteau 1996; Bruce and Migot-Adholla 1994; Atwood 1990; Kasanga 2001; Larbi *et al.* 2003). This, of course, is closely linked to the idea that 'locally based institutions' for dispute resolution and land management should be supported and encouraged (Berry 1997; Fred-Mensah 1999; IIED 1999). Nevertheless, even those scholars who celebrate the flexibility of local, traditional land tenures acknowledge that access to land remains 'contested and negotiable', and that there is real ambiguity over which judicial venues have the authority or capability to resolve continued conflict. The consequence is that individuals search for security through investment in social relations, including clientelist networks, religious communities or even witchcraft (Chauveau 1997: 351).

Those in favour of state law, on the other hand, argue that the essential ambiguity and flexibility of customary law in fact facilitate the 'legal rightlessness' of the poor as against the state and locally dominant elites (Chanock 1991; Ruf 1985; Léonard 1997). It is a well-established observation in anthropology that unwritten customary laws are flexible because they are 'situational'; a customary land dispute settlement procedure in most Ghanaian or Ivorian cultures, for instance, involves debate over rival versions of history and family or lineage genealogies. Which version is pronounced right depends very much on the interpretations – and political position – of the dominant social group, tempered by considerations of the need for social consensus and resolution of conflict (see Crook 1973; Chanock 1985, 1991; Berry 1997, 2000, 2002). Whilst not necessarily accepting Chanock's view that African 'customary law' was the invention of the chiefs put in power by British colonial rulers, it is clear that customary rules are constantly reinterpreted within their context of dominant power relationships. A typical example from Ghana is the recent claim by many Akan chiefs, in the role of allodial [M7]Stool landholders, that when peri-urban land is scheduled for urban building development, it 'reverts' to the Stool and the rights of 'customary freeholders' are extinguished. Such a claim directly contradicts 'rules of customary law' judicially recognised by the common law courts, documented and embodied in precedents over the past 100 years, and hence available for historical comparison (see Woodman 1996: 109). If such a claim were to be decided now, purely by a customary or local informal tribunal, would a customary freeholder in a subordinate power position to the chief be able to challenge it? Can customary law adequately protect peri-urban dwellers? This is a crucial question for protection of the rights of the poor and vulnerable, and one which both advocates of reviving customary institutions and those who wish to promote 'alternative dispute resolution' (ADR) need to address (Anderson 2003; Debroy 2000; Nader 1979, 2001; Maxwell, Larbi, Lamptey, Zakariah and Armah-Klemesu 1999).

2.3 'Forum shopping' and the plurality of legal orders

Second, is the debate over the alleged benefits or difficulties associated with the very existence of a plurality of legal orders. Some see an advantage in the potential for choice amongst different institutions for settling conflicts especially over resources such as land, since it facilitates 'forum shopping'. It is argued that in a situation of legal pluralism people can use the law as it suits them, searching for the most practical or advantageous set of rules or arbitrators (Benda-Beckmann, K. von 1991; van der Linden 1989; Griffiths 1986).[2] Others would question the degree of freedom ordinary citizens have to really choose how to settle a dispute, and again draw attention to the power of those who control institutions of law enforcement and dispute settlement and who can enforce their codes on the weak. They also argue that the extreme ambiguity, uncertainty and lack of enforceability created by dual or multiple systems of legitimation lead only to lack of protection for land rights and increased vulnerability, particularly where people are more or less condemned to live in a situation of technical illegality (Farvacque and McAuslan 1992; Kasanga, Cochrane, King and Roth 1996; van Leeuwen and van Steekelenburg 1995; Affou 1999; Dembele 1997; Larbi *et al.* 2003).[3] There is also evidence that not all ordinary farmers celebrate the uncertainty of negotiated and multiple legitimations of their land tenure; people often feel oppressed and frustrated by the constant reversibility of assumed land settlements, and the unenforceability of adjudicated disputes, and welcome the apparent certainty of mapped boundaries (Sellers and Firmin-Sellers 1999; McAuslan 1998). There are strong arguments, therefore, for ending dualism perhaps on the basis of recognition and incorporation of 'practised' and accepted local laws into state law.

2.4 An institutional approach to the impact of legal pluralism

The position which was taken in this project in relation to the above debate is that one cannot automatically read off a propensity to help the poor and the weak from the 'state' or 'non-state' characteristics of a legal code and its institutions. State law, particularly in ex-colonial countries, has been used just as much to expropriate people's land without compensation and to legitimate oppressive exploitation of their labour or natural resources as it has to protect the poor. Yet we should not romanticise local and customary laws either – they too can be used to deny rights or expropriate lands, particularly during processes of land marketisation, where local elites have used their power to 'capture' the added values (Benda-Beckmann, F. von 2001).

Our perspective on the legal pluralism debate directly underpinned, therefore, the decision to adopt an 'institutional' approach which goes beyond the debates about state *versus* non-state law to focus on the actual processes (political and legal) through which laws are made and contested claims are adjudicated (Kees van Donge 1999; Woodman 1996 and 2001). From this perspective, its findings relate more to the second main issue broached above: that of the relations among a plurality of legal orders, how different 'fora' are viewed by citizens and how conflicts among the different institutions and codes affect individuals and communities. If we assume that purely local systems cannot withstand market forces or powerful external vested interests, then it becomes a question of how the power of the state can be harnessed to enforcing, rather than undermining, the protection of land rights and the access of the poor to land, whether or not those rights are based on customary or state legal codes.

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2 'Forum shopping ' was originally a pejorative term used in private international law to describe the attempt by litigants to gain advantage by using the existence of concurrent jurisdictions to choose the most advantageous procedure or even substantive law. The USA in particular attracts plaintiffs in tort actions because of its procedural inducements, 'no win no fee' incentives offered by lawyers, and high damages (Bell 2003: 18, 29 and 47). In the more recent literature on customary law and legal pluralism in ex-colonial countries, however, it has more frequently been celebrated as a weapon of the weak.

3 A good example is the vulnerability created in Ghana by the contradiction between the reality of what is happening in urban land markets operating under 'customary' law, and the requirements of state law on land administration and titling which are impossible to fulfil (Larbi *et al.* 2003). In Côte d'Ivoire by contrast it was the state which deliberately contradicted the authority and predictability of local codes for allocating land rights in the areas of migrant cocoa cultivation, through arbitrary action.

3 The choice of case studies: comparing Ghana and Côte d'Ivoire

3.1 Ghana and Côte d'Ivoire as a 'matched pair'

Ghana and Côte d'Ivoire are neighbouring West African states which form a 'matched pair' in that they share similar economic structures and cultures. Both are cocoa exporters of world significance, based on small farm production, both have experienced large-scale inward labour migrations, and the societies of their southern and common border regions have linked histories and languages (partly due to the historic influence of the Ashanti (Asante) Empire). These similarities serve to highlight three key differences in the historical formation of their political, legal and social structures: (1) the impact of different colonial legal and administrative traditions (the reception of English common law and French civil law respectively); (2) the impact of differing policies towards the 'legalisation' and development of customary law during the colonial and post-colonial periods, as embodied in different colonial policies on the role of 'traditional authorities'; and (3) their very different post-colonial political trajectories (Crook 1991, 2001).

Côte d'Ivoire enjoyed over 30 years of political stability and growing prosperity under a one-party system which kept the country closely tied to France and consolidated many of the French colonial policies on land, the power of the central state, and customary law. These policies and the political system upon which they were based only began to collapse during the late 1990s after the death of President Houphouët-Boigny. Ghana, on the other hand, became increasingly unstable after independence, culminating in the economic and political collapse of the late 1970s and early 1980s, and the decline of its cocoa industry. The weakness of the state in Ghana in the long term enabled the strong local and indigenous institutions laid down during the colonial period to survive and re-emerge in the 1990s.

3.2 Impact of differences in legalisation of land relations

The impact of these differences in legal and political development has been most evident in the different ways in which each country has dealt with the spread of commercialised agriculture and large-scale labour migration, both internally and from outside their borders. Ghana's local or indigenous social institutions of land regulation have always been more strongly supported by the state, both colonial and post-colonial, and have now been integrated into a single legal framework. This has meant that Ghanaian societies at local level have been able to keep a stronger social control over these processes of commercialisation (by contrast with much urban development) and have managed to absorb migration relatively peacefully. In Côte d'Ivoire, on the other hand, local forms of land regulation have, in the absence of state support, relied more on social bargaining or negotiation and have been constantly overridden by the state. The historic lack of protection for local land rights helped to swell perceptions of dispossession amongst host communities into which the state itself was drawn as party competition emerged in the 1990s (Crook 2001). This in turn led to the eruption of politicised ethnic conflict and indirectly to the civil war which erupted in 2002 (Crook 2001; Chauveau 2000 and 2002).

Our choice of the two countries was therefore aimed at comparing the impact of different configurations of legal pluralism on the certainty and protection offered by dispute settlement institutions, in situations of conflict over land rights. These differences were created historically by: (1) different degrees of 'legalisation'[4] of customary and other land laws, and (2) the degree of pluralism and competition among regulatory orders.

4 See Part B, for the definition of 'legalisation'.

4 Legalisation and the configuration of legal pluralism in Ghana

In Ghana, as in Côte d'Ivoire, legal pluralism originates in the variety of pre-colonial societies which were incorporated into the colonial states. So long as that variety and difference amongst indigenous cultures survives then of course there will continue to be legal pluralism in Ghana of some sort, unless the state succeeds in abolishing all local legal codes both in law and in practice. More significant, however, for our argument is the extent to which the colonial and Ghanaian states have attempted to support, recognise, legitimise and/or incorporate the variety of indigenous codes and thereby legalise them, creating an 'official' legal pluralism.

4.1 Colonial rule and the recognition of customary law

When British colonial rule was formally established first over the Gold Coast and then Ashanti and the Northern Territories, there already existed a number of states with hierarchical structures of institutionalised authority (political offices) which could support established codes for allocation of land and resources at the community level. Some of the largest of these states – Ashanti Empire, Akyem Abuakwa, Fanti Confederation, Dagbon – were highly militarised with urban centres of trade and administration, and a strong sense of their own political identity. In Akan societies, as in the great kingdoms of the northern areas, the hierarchy of chieftaincy was a key institution right down to local level and articulated with lineage structures. Local communities had their own established codes for managing local resources. The early commercialisation of the southern Ghanaian economy from the 1860s onwards, followed by the development of Indirect Rule under colonialism, gave a further boost to the strength of these communities. As Polly Hill argued in her pioneering studies, access to the land needed in the 1920s for the first boom in cocoa export agriculture was very effectively facilitated and managed through existing traditional concepts of land ownership and land rights, ranging from outright sale to various forms of extended family 'corporate' ownership, and rental or sharecropping agreements (Hill 1963: 16).[5] By the time the cocoa boom reached Ashanti and then the western areas in the 1940s and 1950s, the more powerful Ashanti chiefs were able to claim that land could not be sold at all, only leased on terms set by themselves 'on behalf of' their communities.

British colonial rule had a very particular effect on the legal codes of these various pre-colonial societies. What came to be known as 'customary law' in the colonial common law courts was the product of a colonial policy of recognising the legitimacy of the variety of local customary private laws and land tenures, and the creation of state-supported courts, the Native Courts (NCs), to administer those laws. The Native Courts, as the lowest level of first instance courts, not only had the power to administer the customary law of family, inheritance, land and religious customs; they also had jurisdiction over minor criminal cases, local by-laws and various colonial regulations (markets, licences, etc.). The judges of customary law in the Native Courts were the chiefs empowered under the Indirect Rule system as official local government authorities (Native Authorities – NAs). Thus 'customary law' developed during the colonial period as a body of court-developed law, much of it, at least in the more significant Native Courts, recorded and reported. No doubt it reflected

5 Amongst the patrilineal Krobo, cocoa land was acquired by *huza*, 'companies' based on a traditional male political organisation; the matrilineal Akwapims developed companies based on the *abusua* or extended family of matrilineal kin (Hill 1963: 72–5). According to Hill, outright sale of 'unused' land by sub-chiefs and family heads was 'the traditional practice in Akim Abuakwa and Akwapim', but sub-chiefs were only supposed to sell such land to pay for Stool debts. It was the abuse of this process during the cocoa boom which sparked the campaign by the paramount chief of Akim Abuakwa (the Okyenhene) to establish that his Stool was the joint owner of all lands (unused or otherwise) and entitled to one-third shares of both crop harvests and sale or rental payments, not the sub-chiefs. This claim was also at the heart of the Asamankese case, the longest and most expensive litigation in Gold Coast legal history (Hill 1963: 141 and 148).

the particular local power conjunctures which determined who would be members of the NC panels. But it cannot be dismissed as purely a colonial invention.

Even more importantly, the Native Courts were regarded by the British as part of the hierarchy of state courts; customary laws could be pleaded and 'judicially recognised' in the higher courts, both on appeal and at first instance. Over time, it was established that a customary rule would be accepted as a legal rule if it could be shown that it had been applied by a Native Court; the resulting decision then became part of the common law under the normal rules of *stare decisis* (Allott 1994; Woodman 1996: 45). This has led, after a century or more of court decisions, to the emergence of what could be termed an 'Anglo-Ghanaian' common law, or what Woodman calls 'lawyers' customary law'. All customary rules are now treated under the 1992 Constitution of Ghana and the Courts Act of 1993 as 'questions of law not fact' and are constitutionally part of the 'laws of Ghana'. In fact, both the Constitution and various statutes have in effect codified aspects of customary land law, such as the concept of Stool lands,[6] customary freehold (defined in the Land Title Registration Law of 1986, section 19(1)(b)), the accountability of heads of families for family lands (defined in the Head of Family Accountability Law of 1985), and registration of customary marriages (Customary Marriage and Divorce (Registration) Law of 1985).[7] As is inevitable with any codification, it can be argued that the pure 'customary' concepts have been amended or modified in the process, given local variations and the development of even case-law precedents over time. This is particularly true of the provisions for accountability of heads of families and registration of marriages – although no doubt legal reformers would regard these as improvements.

Of course, the continuation of legal pluralism means that local social practice itself has continued to develop outside the court-determined framework and thus the potential for contradiction between precedent and what litigants will now allege are 'true' rules of customary law or of social practice is a constant problem of the system (Woodman 1988). As has often been pointed out, once customary rules are defined and translated into English common law concepts, then real divergences can emerge due to the real differences which exist between the two kinds of law with respect to processes of reasoning and the remedies which are sought (Woodman 1996). In Ghanaian and Ivorian societies, disputes over land rights are traditionally discussed in terms of disputed histories of settlement and genealogies (Berry 2001). These can still be listened to in a state court, but the way in which the court comes to a decision will probably be different, not least because of the basic common law practice of discussing a case in terms of the *ratio decidendi* of the relevant precedents. Nevertheless, even given these continuing limits, a crucial feature of Ghanaian legal pluralism is that the customary laws of various communities have been integrated into state law, which will recognise, according to the circumstances of the case and the status of the parties, the legitimacy of particular local laws. Customary law has thus become highly legalised; and its development in the state courts undoubtedly feeds back into the continuing non-state sector of chiefs' customary courts, especially where chiefs are well-educated.

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6 The Constitution for instance defines Stool land very specifically as 'any land or interest in or right over land controlled by a stool or skin, the head of a particular community or the captain of a company for the benefit of the subjects of the stool or the members of that community or company' (Article 293(1)). Many chiefs particularly in Ashanti would contest the necessity of the beneficial trust restriction, since the ambiguity of the term Stool lands is such that many chiefs claim that their Stool family owns all the land of a state and that their subjects are there by their permission (see e.g. Crook 1973:19 and interviews with Nana Boakye-Ansah Debrah, Asokore-Mamponghene, Kumasi, 10 June 2003, and the Asantehene's Lands Committee, Kumasi, 13 June 2003).

7 The Intestate Succession Law of 1985 attempted to modify the rules of matrilineal inheritance, with apparently only limited success in practice. Although 'harmonisation' of the different customary codes in Ghana has long been advocated by jurists (see Bentsi-Enchill 1971), it is unlikely to happen through formal codification. The same could be said for the formal provisions which exist for customary rules to be 'declared' by the national House of Chiefs and then assimilated into state law through a Legislative Instrument. Very little use has been made of these powers (Woodman 1996).

4.2 The role of the chieftaincy

The role of the chieftaincy is in fact a continuing and critical feature of Ghanaian customary land law. Even though the Native Courts were abolished in 1958, after independence, and the chieftaincy has progressively been stripped of virtually all of its judicial and administrative powers including the collection of land revenues, chiefs continue to be recognised as the 'trustees' of community or 'Stool' lands. And they continue to be the *de facto* land managers of most customary landholdings, allocating plots and selling leases for 'drinks money' (fees) at market rates, and running customary courts for the settlement of land and other disputes. Their office is also constitutionally recognised and protected under the 1992 Constitution. The explanation for their continuing importance is to be found in colonial history.

Perhaps in no other African country with the exception of Nigeria and the Buganda Kingdom of Uganda, was the power and role of the chieftaincy so strongly supported by the British. The Native Authorities 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. The power of these rulers was recognised formally in the colonial system through the role given to the territorial councils of the ruling chiefs (the Joint Provincial Council of the Colony, the Asanteman Council and the Northern Territories Council). Even in the decolonisation constitution of 1951 these Councils were electoral colleges for the election of parliamentary representatives.

One major part of the bargain which the British made with the chiefs was to recognise their claim to be, in the role of office holders or occupants of the Stool of their political community, the ultimate 'owners' of all the unallocated lands of that community. This recognition came after the campaign of Colony chiefs and lawyers against the 1896 Lands Bill, which threatened to vest all 'unoccupied' land in the colonial government and give it the power to both control and take the benefit of commercial concessions (Crook 1986: 88). The early nationalist intellectuals who led the campaign were British-trained lawyers who successfully argued that there was no 'unowned' land in the then Gold Coast; and that land could not be permanently alienated because it belonged to the community of 'the living, the dead and the yet to be born'. The communities in question were the mainly Akan states of southern Ghana, and the chiefs, it was argued, in their official capacity as occupants of the Stool ('throne'), had a sacred duty to protect and manage that land on behalf of their communities.[8] Hence the concept of 'allodial' ownership was born, a concept which remains at the heart of current debates over the nature of traditional land tenure.

4.3 The concept of allodial ownership

Whilst in its origin the idea of an absolute and even inalienable allodial land ownership clearly served the political interests of the chieftaincy, its emphasis on the idea of 'trusteeship' or guardianship also limited the ambitions of the chiefs to turn themselves into landlords with a beneficial as well as a 'controlling' interest in the lands of their political community. Thus ever since its recognition, chiefs in Ghana have been waging both political and legal campaigns to expand their claims to be the absolute 'owners'of the land, and hence particularly in urban areas to act like 'rent seeking office-holders' (Berry 2002: 92).[9] It also provokes contestation in areas of Ghana which do not share its essentially 'Akan' character – the notion of the Stool as embodiment of a political community in which allegiance or political jurisdiction implies also recognition of rights over land. In non-Akan

8 See (Sarbah 1897); (Casely-Hayford 1903); and Danquah's later work (Danquah 1928). As Rathbone notes, the activities of these writers in developing and presenting such formal concepts of land ownership and 'native constitution' had obvious political and normative purposes (Rathbone 2000: 34).

9 Indeed some scholars argue that the chiefs' judicial and land management powers separated them from their communities during the colonial period and gave them an interest in perpetuating the ambiguity of commoners' land rights and their dependence on the chief (Firmin-Sellers 2000).

communities such as the Ga or Ewe, land is held by families, not Stools, and in the various societies of the Northern and Upper Regions 'land priests' or *tendana* control access to land as representatives of the lineages of 'original settlers'. The British recognition of the Colony chiefs' claims was unfortunately implemented under Indirect Rule policies in the Northern Territories after 1932 in such a way as to imply that the rulers of the four main northern kingdoms in what is now the Northern Region also had an 'allodial' claim to the land, laying down the seeds of current conflicts with both *tendana* and with 'subject peoples' such as the Nawuri or Konkomba (Schmid 2001).

The importance of this historical legacy for regulation of land rights is to be seen, therefore, in the continuing power of chiefs and chiefs' customary courts in the control and management of land and the determination of land rights. On the one hand, the power which the chiefs and communities have through allodial ownership and other recognised customary land laws, and the continuing vibrancy of the social institutions within which they are embedded, have given local communities particularly in southern Ghana a strong capacity to protect themselves and their lands against incomers. (The state itself can of course still override many of these protections.) And there is a degree of certainty in the fact that the state courts will strongly support these well-established community and family rights against outsiders, thus reducing the potential for contradiction between different legal codes and dispute settlement institutions.

4.4 Chiefs and state in contemporary Ghana

On the other hand, the very presence of the state, standing behind the chieftaincy and customary law, has introduced some new uncertainties. The chiefs and the law they administer were until recently a formal part of the state, and they continue to exercise considerable political authority deriving from both official recognition of their status and from the social and economic power they have in local societies. This is particularly true of the former NA chiefs described above (divisional or paramount chiefs) whilst powerful monarchs such as the Asantehene (King of the Ashanti Confederacy), the Okyenhene (King of Akyem Abuakwa) or the Ya Na (Dagbon King) are figures of national political importance. This means that (whatever the Constitution says) chiefly power is inevitably politicised. Over the past 45 years, most of the major chieftaincies have been embroiled in party political conflicts, and their local disputes have frequently become affairs of state. The very role of chiefs is part of a long-standing ideological divide between the two main political 'traditions' in Ghana, the Convention Peoples' Party (CPP)-Nkrumahist and the Busia-Danquah parties. Thus chiefs and their institutions are frequently contested both by rival factions and by alternative institutions such as parties, local government, youth associations and churches. It is therefore somewhat misleading to see customary law, as administered in the chiefs' courts, as somehow a locally rooted, 'informal' and legitimate alternative to state law. The chiefs' courts are always liable to contestation and the courts of the major monarchs can hardly be described as informal.[10]

4.5 The centralisation of state control over land

The contribution of the state in supporting and recognising much of customary law and its institutions has also had its price. Land management and use have been increasingly subjected to centralising and bureaucratising processes, particularly in the areas of Stool land revenue collection, transfers of customary land, title registration and planning control. The Lands Commission – a constitutionally established agency – not only controls the allocation of all state-owned land, but has to approve all customary transfers by certifying they are in conformity with district land use plans. It also keeps records of deeds and other land documents. These functions overlap with those of the old Deeds Registry (established in the

10 One should distinguish here between village chiefs with no status in the traditional hierarchy, and the superior divisional and paramount chiefs. It is the latter who are more likely to have politically contested roles.

nineteenth century and still in operation) and the Land Title Registry created in 1986, which to date has only established registration districts in two metropolitan areas, Accra and Kumasi. A separate Land Valuation Board is supposed to carry out the valuation of state lands sold or leased by the Lands Commission. The Office of the Administrator of Stool Lands collects revenues on customary Stool lands – timber royalties, ground rents on leases – and remits them to the Stools, the chiefs' Traditional Councils and the District Assembly local governments in agreed proportions (55 per cent goes to the District Assemblies). At the district level, the Town and Country Planning Department (now Physical Planning) and the Survey Department play both formal and informal roles in controlling and documenting both urban and rural customary land transfers or changes of use. Unfortunately the weight of all these overlapping government agencies has not necessarily enhanced certainty in the regulation of land rights. Lack of integration and indeed competition amongst the different land sector agencies have produced a level of ineffectiveness which has encouraged the customary system to carry on operating outside the legally required state regulatory procedures. Thus whilst customary law has been legally integrated into state law in many ways, the actual regulation of transfers (the land market) and disputes over rights continue to function in a multiplicity of arenas. Each of the land agencies and the local government departments are engaged in informal dispute resolutions whenever citizens encounter problems with their administration, and the *de facto* illegality of much of the customary sector is productive of conflict not just between individuals, but also between landholders who have obtained land through customary processes, and the state sector. The general view, as summarised in the government's National Land Policy and the current Land Administration Project, is that the attempt to regulate customary land tenures has been ineffective (see also Kasanga 2001).

Overall therefore, state support for customary or local land law and its substantial legalisation and integration into state law and state institutions have strengthened the capacity of Ghanaian communities to protect customarily held land, and, through the institution of chieftaincy, preserved local institutions for regulation of disputes. But the predominant power of the chieftaincy in these institutions may have implications not just for those with 'secondary rights', particularly migrants, but also for indigenous members of communities who hold land under so-called customary freehold tenures, particularly in urban areas. Indeed, some have argued that in the most competitive urban land markets, the customary system is unable to protect customary landholders (Maxwell *et al.* 1999). And the potential conflicts between regulatory orders inherent in any system of legal pluralism have not been reduced as much as might have been expected by the wide-ranging intervention of state regulatory agencies. On the contrary, they have created conflict through an overambitious regulatory system which encourages the creation of 'illegal' landholdings – and hence uncertainty of rights when it comes to adjudication of disputes (Kasanga *et al.* 1996; Larbi *et al.* 2003).

5 Legalisation and the configuration of legal pluralism in Côte d'Ivoire

5.1 Colonial policy on chiefs and customary law

The pre-colonial political situation in Côte d'Ivoire was very different from that of Ghana. The southern areas were extremely sparsely populated with few urban centres and no large-scale political units apart from the Agni kingdoms of the south-east, which were tributaries of the Ashanti Empire. In the central south-west, peoples such as the Bété did not have the social 'self-defence' mechanisms and dense community structures of an Akan kingdom, nor did they have systems for control and allocation of land above the lineage level (Chauveau and Dozon 1987). The French colonial state had little interest in legalising indigenous customs and in the case of land had been concerned mainly to override local rights with its claim to 'own' all unoccupied land, later extended to include the right to take control over and allocate any land if there was an 'economic justification'.[11] Thus French colonial policy did not create a politically influential 'neo-traditional' elite with judicial and governmental powers (which is not to deny that many *chefs de canton* were able to accumulate some degree of personal wealth and power).

5.2 The legacy of colonial policy: strong state and unrecognised forms of local land rights

During the middle years of the 20th century the Agni responded to Baoulé and Dioula migrants attracted by the new cocoa industry by creating their own local land regime without any administrative support. By the time the cocoa frontier had switched to the central and south-western regions in the late 1950s and 1960s, the Agni had alienated a lot of their land on terms which they could not enforce and which they came to see as disadvantageous. But the indigenous populations of the south-west were even less protected against new waves of migrants with capital and access to labour supply, many by this time coming from Burkina Faso and other Sahelian countries. In such a bargaining situation, the Bété were bound to come off worst; in particular, they were unable to convert their locally sanctioned claims to rights over land into fully fledged 'landlord–tenant' relations which could generate a realistic economic rent from the increase in land values and the product of the land. Instead, land was sold at nominal prices or leased for various forms of one-off payment, combined with relations of mutual political and social obligation (Léonard 1997). The violent resentment which grew during the 1970s expansion in turn set the stage for the re-emergence in the 1980s and 90s of a regionally based opposition party which drew most of its intitial support from the south-eastern and south-western populations.

Much of this resentment was caused by the post-independence land law policies of the Houphouët-Boigny regime. After independence, the colonial state's legal claims over land were extended and strengthened. In the urban areas, the state was at least consistent in that in Abidjan and the other main towns it gave full powers to a state agency, the Ministère de la Construction et de l'Urbanisme (Ministry of Housing and Urban Affairs) to take control over and manage land; elsewhere the local authorities (*communes*) have more limited planning powers as in Ghana. In the agrarian sector, the famous Decree of 1967, which declared that 'land belongs to those who cultivate it' was intended to support a *laissez-faire* policy of liberal access to land for all investors, whether migrant peasants or large capitalist enterprises. This was followed up by a Ministry of Interior circular which declared customary rights in 'unregistered land' abolished (although registration has remained virtually a dead letter) (Heath 1993: 32). In practice, state action at the local level produced a situation of systematic ambiguity and uncertainty. On the one hand, state

11 Decree of 15 November 1935 (Heath 1993).

officials continued to acknowledge and work with the reality of local systems of 'customary' land tenure, and the existence of a multiplicity of fora for the settlement of land rights (Chauveau 1997; Léonard 1997). On the other hand, the state reserved the freedom to choose which rules would be enforced and by what mechanisms, using administrative action rather than judicial procedures. Paradoxically, therefore, it was the possibility of random intervention by the state and the invocation of official law that frequently gave the system of land relations its unpredictable and 'political' quality.

During the boom of the 1960s–80s, state agencies such as the Prefectoral Administration, the Ministry of Agriculture and the Forestry Department systematically pursued policies which favoured the expansion of coffee and cocoa cultivation by migrants, and by elite investors. The sheer scale of the migrations into Côte d'Ivoire during this period dwarfed anything which Ghana had experienced; by 1980, non-Ivorian Africans formed 41 per cent of the work force (Crook 1991). The marketisation of land which accompanied these huge migrations was handled by local communities, lineages or individuals on the basis of negotiated arrangements which invoked the familiar normative idioms of 'indigenous land rights'. What was happening in practice was the creation of a whole new repertoire of land and labour relationships: outright sale, sale with continuing social obligations and/or claimed rights of reversion, various forms of sharecropping, 'pledging' of land for loans, informal tenancies, familial labour arrangements and wage labour contracts. These were 'traditions' invented for the situations in which migrants and local populations found themselves (Chauveau 1997 and 2002; Koné 2002). All of these 'arrangements' could be overridden by the state through administrative action – thus constantly weakening or undermining the development of a legalised set of local codes for the regulation of land rights.

5.3 An extreme form of legal pluralism

The end result in Côte d'Ivoire has been the creation of an extreme legal pluralism: there is a multiplicity of sets of norms and/or purported rules governing land and labour relations, coupled with a multiplicity and fragmentation of the authorities or 'fora' where these rules might be confirmed and enforced. It is quite telling that amongst the minimum of *five settings* for the resolution of land claims identified by Chauveau in south-western Côte d'Ivoire, he does not mention the official law courts (the local *Tribunaux*). The competition amongst dispute-settling fora, the virtual absence of state law and the unpredictable interventions of administrative authorities suggest a situation in which 'unenforceability' is the norm, unless communities exercise their own kinds of sanctions. This may be contrasted with the extreme formality of the state legal system based on the French civil code. The lack of state support for – indeed, the state's hostility to – local community codes in fact led host communities of the central and south-western regions to feel that they had no means whatsoever of enforcing any landholding customs in their favour (Ruf 1985; Léonard 1997).

6 The policy context

6.1 African policy responses to land reform and customary law

The problems of land insecurity and the mounting numbers of land disputes throughout sub-Saharan Africa have generated many decades of policy debate, involving donors, researchers and governments. In West Africa, customary forms of land tenure typically sustain multiple 'land use' rights rooted in social group membership (family and political community), rather than on formal individual titles and mapped boundaries. Debate therefore revolves around the question of whether insecurity is a product of customary land tenures and, if so, what kind of reform is most appropriate. Some argue that mapping, registration and individualisation of title are essential, both for security and for economic (market-based) development (Platteau 1992, quoted in McAuslan 1998: 527; de Soto 2000); others that customary land tenures need to be recognised, supported and perhaps formalised in some

way – the so-called 'adaptation paradigm' (Atwood 1990; Bruce *et al.* 1994; Sellers and Firmin-Sellers 1999; IIED 1999; Lavigne-Delville, Toulmin, Colin and Chauveau 2002).

For the first group, the problem with the existence of multiple customary forms of land tenure is that they sustain ambiguity and flexibility which are unable to cope with increasingly severe conflicts over access to land and loss of land rights caused by urbanisation and rural land shortage. Preservation of customary tenure will, in practice, they argue only lead to legal 'rightlessness' for most poor people (Chanock 1991; Ruf 1985; Léonard 1997). The second group argue that registration is expensive and impracticable, and frequently leads to the dispossession or exclusion of poor and vulnerable occupiers of land, particularly those with subsidiary or derived rights. They point to the continued vibrancy and social rootedness of indigenous systems, including their capacity for local dispute resolution (Berry 1997; Fred-Mensah 1999; IIED 1999: 34; Kasanga and Kotey 2001; Larbi *et al.* 2003). Thus instead of fruitless attempts to replace customary tenures with wholesale individual land titling and ownership programmes, the state should accept the *de facto* dominance of customary forms of landholding, and recognise the whole range of existing customary rights in land, whether written or unwritten. These rights could then be 'legalised' by state law (if not already the case) and more fully formalised on a gradual, on-demand basis through written documentation and mapping. The ultimate aim is still greater certainty of legal title, but based on a more legitimate and locally recognised set of land rights.

Most African governments since independence have, however, pursued policies which have combined consolidation of state control over ownership and distribution of land with policies for 'modernisation' of landholding, designed to encourage marketisation (often under pressure from donors) (IIED 1999: 8; McAuslan 1998: 537). Greater certainty of title is thus seen as a way of dealing with one of the alleged causes of 'overload' on state judicial systems. The other response to increasing numbers of land disputes and associated conflicts is to see them as a 'capacity issue' which can be dealt with by diverting them to a range of alternatives to the state judicial system, such as customary and informal local institutions and Alternative Dispute Resolutions mechanisms.

Both in Ghana and Côte d'Ivoire, recent land reform programmes are trying to combine market-friendly reforms with the 'adaptation paradigm'.

6.2 The Land Administration Programme (LAP) in Ghana

In Ghana the reform programme is based on the principles laid down in a National Land Policy document agreed in 1999 by the previous National Democratic Congress (NDC) government, but accepted by the incoming New Patriotic Party (NPP) government in 2000. The land policy is being implemented, with substantial donor support, by the Land Administration Programme Unit (LAPU) within the Ministry of Lands and Forestry. The LAP has four main 'Components':

1 Harmonising land policy and the regulatory framework, which is predominantly concerned with law reform and the courts. The main aim of this component is to address some of the difficulties and possible conflicts which have arisen through judicial recognition of customary land codes by the common law courts over the past 100 years, together with the accretions of statute and Constitutional law.

2 Institutional reform, which is primarily about the 'restructuring' of the main state land sector agencies (LSAs), and the decentralisation of much of land management to strengthened, state-supported chieftaincy institutions with 'Customary Land Secretariats'. This aspect of policy is an attempt to recognise the difficulties caused by the incapacity of the land agencies to implement their statutory regulation of customary lands (including Stool land revenue collection) and hence the creation of widespread technical illegality. It is based on the acceptance of the 'adaptation paradigm', in that it seeks to work with what is seen as the reality on the ground – the *de facto* control of 80 per cent or more of land allocations by chiefs and families or communities.

3 Improving land titling registration and mapping, valuation and land use management: of particular significance for customary land rights in this component is the commitment to begin mapping and registration of so-called 'allodial' titles, i.e. the claims of the paramount Stools to be the 'owners in trust' for all the lands of their political communities. In the World Bank Project Appraisal Document of 2003 it is argued that demarcation and registration of allodial rights should be the starting point, since certainty of all other land rights depends on these 'root titles' (World Bank 2003: 46). If implemented, this is bound to strengthen the position of the chiefs *vis-à-vis* 'customary freeholders', i.e. members of their communities who have been granted land for use according to their rights as members of indigenous families of those communities.[12]

4 Project coordination, monitoring and evaluation.

Although the main elements of LAP relating to dispute resolution are mentioned under Component 1, they are in fact an integral part of the institutional reforms outlined in Component 2, particularly the restructuring and decentralisation of the state land agencies, and the establishment of Customary Land Secretariats. Dispute resolution is seen as an issue for a number of reasons: huge numbers of conflicts over land remain unresolved either because of lack of capacity of and access to the courts; even when they have been submitted to other forms of resolution, the outcomes are uncertain and ambiguous unless more authoritative and acceptable ways of enforcement are built in to them. In developmental terms, such a situation is seen as an obstacle to any programme of titling and registration (claims are never sufficiently clarified) and hence to the prospects of investment in and development of land, both for economic purposes and urban planning.

6.2.1 LAP and Alternative Dispute Resolution Systems

The LAP therefore suggests a two-pronged approach: the creation of special Land Courts (Divisions of the High Court) in regional capitals, to try to deal with backlogs in the state system; and the development of ADRS. But what these ADR mechanisms (ADRMs) should be and where they should be located is the subject of some variation in the different official and donor memoranda. There are three different kinds of proposal on the table:

1 It is proposed that ADRS be set up as an integral element of the new Customary Land Secretariats, in order to resolve disputes over land allocation and recording of land rights at the local level. Thus the chiefs and their customary tribunals will be recognised as a form of ADR.

2 It is planned to introduce an ADRS bill in Parliament which will empower the courts, the judicial service and the legal profession to use (perhaps impose?) court-supported ADRS.

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12 The Land Title Registration Law, 1986, defines customary freehold as 'an interest in land held by sub-groups and individuals in land acknowledged to be owned allodially by a larger community of which they are members....Grants of customary law freehold may be transferred to any person, and the transferee may be registered as proprietor thereof.' (Preface to the Act and subsections 19(1) (b), 58 and 79.) Just like private property, the lands may be passed on to their heirs or leased out by the recognised holders, but always subject to the acknowledgement of the overriding 'allodial' rights. The position of customary freeholders *vis-à-vis* chiefs seems also to be threatened by Article 267(5) of the 1992 Constitution which prohibits the 'creation' of any freehold interest 'howsoever described' in Stool land. But Ministry of Lands legal advisers have argued strongly that the Constitution does not prevent the grant or registration of customary freeholds, nor invalidate existing ones, where the grantee is a subject of the Stool, on the grounds that such rights are 'inherent' and not created, and are in accordance with customary law and usage as protected by the Constitution in Article 267(1). This opinion was accepted by the Attorney General in 2004, subject to the condition that conveyances of customary freehold should always state the allodial interest and that no customary freehold be transferred to a stranger or non-subject of the Stool by an existing freeholder. This may well represent an amendment to existing common law precedents, as well as to the 1986 Law, but as yet these issues have not been tested in court.

3 Other proposals focus on the role of the elected local authorities and non-governmental organisations (NGOs): for instance, the LAP Project Appraisal Document of April 2003 envisages that Local Advisory Committees of 'community elders' be organised by the elected District Assemblies to resolve cases where the parties have not been able to reach agreement in a chief's court (a form of proto-District Lands Tribunal). And some District Assemblies have supported local 'dispute settlement' NGOs organised by respected community leaders, often with the help of retired members of the legal profession.

These various proposals for the introduction of ADRS reflect differing and in some respects contradictory understandings of what ADR mechanisms are, and how they are supposed to operate. There is (perhaps deliberate) confusion over whether ADR mechanisms are 'non-state' alternatives or whether they can and should be state-supported. But the differing institutional locations proposed also reflect both the politics of the current regime, and 'bureaucratic politics' among rival agencies.

6.2.2 The politics of land reform since 2000

The NPP government elected in 2000 brought to power the so-called 'Danquah-Busia' tradition in Ghanaian politics – a conservative nationalist group of the established 'old elite' of educated professionals, lawyers and businesspeople, many associated with or members of the wealthy neo-traditional families of the big 'Colony' and Ashanti chiefs. Since 2000 there has been strong pressure from both intellectuals and the chieftaincy, both officially and through their political linkages, for a revival of the customary system (Kasanga 2001; Kasanga and Kotey 2001: GTZ 2002). The leading chiefs in the country, mainly from the Eastern and Ashanti Regions, are currently engaged in an open political campaign to reverse as many as possible of the legislative measures brought in by the Nkrumah (CPP) government and successive governments since 1952, measures which not only took away the chiefs' official judicial and administrative functions but also gave most of their powers to collect revenue from Stool land, and to manage the development of land, to the LSAs. The chiefs quite naturally see policies for recognising and strengthening customary land law and management as an opportunity also to revive their customary judicial powers. They therefore claim that their customary tribunals are an authentic form of ADR, which should rightly be located in the proposed Customary Land Secretariats, not within the 'modern' elected local government or judicial service institutions. A revival of chiefly power is however a contested subject in Ghana, not least because in most non-Akan societies chiefs have not combined political jurisdiction with land 'trusteeship' in the same way; in those societies, family heads and land priests have been the primary holders of land rights or allocative mechanisms.

The LSAs have had until now official quasi-judicial functions (e.g. the Land Title Registry Adjudication Committee, and the Lands Commission's Settlement and Arbitration Committee – see below sections 12.1.1 and 12.1.2) and their officials frequently offer informal dispute resolution over land matters. They would welcome strengthening of the state judicial services and have no problem with encouragement of informal local-level or 'non-state' ADRs, which might reduce the difficulties facing officials in the districts. But they are very fearful of the consequences of decentralisation, either to a revived chieftaincy or to democratic local government bodies. Giving judicial or quasi-judicial powers to these authorities would undoubtedly be seen as boosting the trend to strip away many of their functions. This fear is compounded by the rationalising ambitions of the LAP, which undoubtedly envisage mergers and abolition of overlapping or redundant agencies or departments. The Lands Commission and the Office of the Administrator of Stool Lands (OASL) are constitutionally established bodies; but the others, such as the Land Title Registry, the Deeds Registry, the Land Valuation Board, the Survey Department and the Town and Country Planning Department have only their parent Ministries (Lands and Forestry, and Local Government in the case of Town and Country Planning) to look to for protection.

The legal profession and the judicial service, of course, have a strong interest in supporting the development of court-supported ADRS and the creation of modernised and additional land courts. But the government is more inclined to listen to the demands of the chieftaincy – supported quite strongly by the current fashion amongst donor agencies and NGOs for favouring non-state and locally based informal dispute resolution systems, which they tend to conflate (sometimes mistakenly) with customary institutions.

Thus policies for the reform and improvement of land dispute resolution including the state judicial services are not only a key element in the LAP, located within the Ministry of Lands and Forestry. They also affect the interests of a range of state agencies and departments and are strongly contested by different political and bureaucratic interests within the heart of government and society, as well within the donor and NGO communities. A consensus on how to proceed will not be easily established, and this has to be recognised as a crucial element in the research which was conducted in Ghana.

6.3 Land reform policy in Côte d'Ivoire: the *loi foncier rural* of 1998

The election in 2000 of President Laurent Gbagbo and his Front Populaire Ivoirien (FPI) government brought to power, for the first time in Côte d'Ivoire's history, a government which represents the interests of the peoples of the south-east and south-west who have been most aggrieved by state policies on land rights and land use since 1960. Even before this government came to power, a crisis of inter-ethnic conflict had been building up in the cocoa-growing areas, as relations deteriorated between host communities and migrants both from other parts of Côte d'Ivoire and from non-Ivorians. The situation had been made worse by a political campaign launched by the previous Parti Democratique de la Côte d'Ivoire (PDCI) government in the 1995 election campaign which stressed the rights of 'true Ivorians' as against foreigners, and whipped up nationalist sentiment around the concept of *l'ivoirité* (Crook 1997). Although much of this political campaign was aimed at the party of the PDCI's rival, the Rassemblement des Républicains (RDR[M14]), and its leader Alassane Ouattara, which had its biggest strongholds in the north, its unintended consequences were to increase hostility in the south-western areas not just to 'northerners' and foreigners but also to Baoulé migrants, identified as predominantly supporters of the PDCI. The land issue had become politically crucial (see Chauveau 2000).

As in Ghana, land policy since 2000 has in fact been derived from a pre-2000 PDCI policy initiative, the 1998 *Loi relative au domaine foncier rural*. This law was the consolidation of a programme for the mapping and registration of rural land rights which had been launched in 1990, the *Plan foncier rural* (PFR). The PFR began as a pilot scheme for surveying, recording and mapping rural land use and land rights in a 'participatory' manner; located in the Ministry of Agriculture, it was heavily funded by the World Bank and the French Ministry of Cooperation (overseas aid). The rather ambitious aim was to provide a centrally constructed, comprehensive data base of all rural land but this was never achieved, even after it was handed over to the BNETD (Bureau National d'Etudes Techniques et de Développement)[13] for a more focused technical implementation (Stamm 2000). The main purpose of the 1998 law was to set up formal decentralised or locally based institutions and procedures which would be empowered to carry forward the detailed work of mapping, recognising and legalising the whole range of customary and locally established rights, with the cooperation of local communities. The law provides that claimants have ten years from its promulgation (i.e. up to 2009) to register their rights, which will be recognised by the issue of a formal document or certificate setting out the terms under which the land is held. After a further three years, these certificates must be converted into individual titles.

It was thus hoped that the process launched in 1998 would eventually secure both indigenous and customary rights as well as the use rights agreed with 'strangers' under

13 A special agency directly under the Presidency, before 1998 known as the DCGTx (Direction et Contrôle des Grands Travaux).

customary procedures. Its aims were therefore extremely relevant to the crisis which had been brewing for over 20 years (Chauveau 2002). Unfortunately, although very little implementation had been undertaken by 2002, even by way of informing rural communities of what the law contained and how it was going to affect them, the prospect of this kind of a census of land rights provoked anticipatory conflict over who was going to get the certificates. In particular, many rumours and misunderstandings about its impact on the rights of foreigners (non-Ivorians) began to develop. The provision that foreigners could not 'own' land (be given a full title) except as a leasehold, was interpreted by the indigenous populations of the south-west as a licence to 'renegotiate' all existing land use agreements with migrant farmers – large numbers of whom are indeed 'foreigners' from Burkina Fasso, Mali and Guinea. In a very short time *all* migrants, whether from Burkina or from northern Côte d'Ivoire, were being treated by local host populations as indistinguishable and 'renegotiation' of long-standing economic arrangements turned rapidly to violent confrontations as land was reclaimed rather than converted to leases.

6.3.1 The descent into civil war after 1999

The *coup d'état* launched by a northerner, General Guéï in 1999, although ostensibly to forestall the consequences of forthcoming fraudulent elections in 2000, was interpreted by many as a 'pro-northern' – and hence pro-migrant – coup, even though the General subsequently backed down from his attempts to provide for the peaceful reintegration of Burkinabé migrants who had fled (Chauveau 2000).[14] Thus when the 2002 *coup d'état* was launched by a pro-Guéï faction within the army, it was immediately seen as a northern plot against the 'southern' government of President Gbagbo and the FPI. The ensuing civil war provoked even more violent clashes between host communities and migrants in the centre and south-west, exacerbating conflict over land and making the prospects of implementing the 1998 law even more remote, except insofar as it is seen as a way of dispossessing migrants – exactly the opposite of its original intentions. Peaceful reform aimed at recognition of the full range of customary land rights will now be even more difficult. The lack of legal and authoritative modes of dispute settlement, combined with politicisation of the disputes themselves, is now expressing itself in more frequent resort to communal violence – the end product of a series of state policies which have allowed a situation of extreme legal pluralism and uncertainty to develop, in a country overwhelmed with problems of mass migration.

14 In order to maintain 'balance' – and in an attempt to ensure his unimpeded election as President in the 2000 elections – he even maintained the electoral ban on Alassane Ouattara, leader of the northern-based RDR. The leader of the RDR, originally in alliance with the FPI against the PDCI government of Bédié, 1993–99, had been prevented from standing in the 1995 elections by Bédié on the grounds that Ouattara was not an Ivorian (being born in what is now Burkina Faso) and could not become one because his parents were not Ivorian – an accusation vigorously contested by Ouattara, and one which has poisoned the political atmosphere since that time (Crook 1997).

Part B **Research design and methodology**

7 Research questions and concepts

7.1 Understanding the effectiveness of dispute settlement institutions

Our primary research objective was to better understand the factors which determine how effective judicial, regulatory and other dispute settlement institutions (DSIs) are at resolving land conflict and protecting the security of the rural and urban poor to hold or use land. 'Effectiveness' is a multidimensional concept which may be defined and measured in a number of ways. Normally, the effectiveness of public institutions is measured by relating outputs and outcomes to goals and to public welfare; but with some of the institutions under consideration it is very difficult to determine official goals, and the 'outputs' of legal or other dispute settlement processes are mainly 'decisions'. So public perceptions of what is valued and what is satisfactory become one of the key ways of understanding and measuring effectiveness. In addition, it was considered important that research on justice institutions should deliberately take a 'bottom-up' perspective, since this is crucial for improving our understanding of how legal institutions can better serve the needs of the poor and vulnerable (see DFID 2000: 37).

7.2 Main research questions

In studying the way in which land dispute settlement institutions actually worked we therefore concentrated on the following questions:

- How do the users of DSIs, and the local population generally, perceive the legitimacy and accessibility of the different DSIs? This can be broken down into questions about why people use or 'choose' a particular DSI, and what values they are looking for in the outcome – fairness, balancing of interests, social harmony, authoritative decision? And how much do they value the quality of the process itself – its comprehensibility and accessibility?
- What value do people put on the certainty of processes, meaning the likelihood of acceptance by rival parties, enforcement and non-reversibility?
- What objective evidence is there that the different kinds of settlement procedures and codes give people, particularly the poor and vulnerable, security of possession and protection against arbitrary dispossession? Are some kinds of rights or social groups protected more than others, e.g. indigenes *versus* 'strangers'?
- Is there any evidence that people engaged in disputes manipulate the plurality and potential conflict amongst different DSI possibilities?
- How successful are the various DSIs at conflict management? This involves subjective evaluation of case-histories, rated according to whether the outcome reduced conflict, particularly violent conflict, and whether the decisions were accepted as fair (in the short term) by the parties.
- Are there any objective measures of the effectiveness of different DSIs, such as assessments of speediness, cost, enforcement?
- How do purely administrative issues such as quality and numbers of personnel, funding and equipment, performance incentives and organisational culture impact upon the effectiveness of DSIs?

7.3 Empirical focus

In each country the empirical focus was on the full range of DSIs from the most informal (which includes both local or customary and informal dispute settlement offered by state agencies) to the formal tribunals and courts of state or quasi-state agencies, as follows:

- Informal arbitration at the local level – family heads, village elders, respected community leaders and 'land chiefs' (*tendana*) in the Upper and Northern Regions.
- Customary chiefs' courts, from village level up to (in Ghana) the formal traditional courts of paramount chiefs such as the Asantehene.
- State agencies offering dispute settlement or arbitration, ranging from the informal to formally constituted arbitration committees: in Ghana, the land sector agencies such as the Lands Commission and the Land Title Registry have such committees. Other government agencies such as the Physical Planning Departments of the District Assemblies, the District Administration and the Ministry of Agriculture often resolve disputes informally through the actions of individual officers, whilst the Commission for Human Rights and Administrative Justice (CHRAJ) has developed its role from a legal investigator into government maladministration to a regional and district-level dispute resolution body. In Côte d'Ivoire, the Prefectoral service, the Ministry of Agriculture and Forestry Department officials routinely involve themselves in land matters and dispute resolution. As noted in section 6.3, the 1998 *Loi foncier* provided for village and sub-prefecture land management committees with dispute resolution functions, but few of these have been operationalised to date.
- Formal state courts: in Ghana the former Community Tribunals, now Magistrates Courts, and the High Courts were covered. In Côte d'Ivoire, the first instance Tribunal was investigated.

7.4 Research hypotheses

The research design for investigating these questions was based upon two main hypotheses about what might determine the way in which institutions for allocation and adjudication of land rights operate. The first concerns degrees of competition for land, the second the national legal context and kind of legal pluralism which exists.

7.4.1 Degrees of marketisation of land relations

First, it is evident that the degree of competition for land affects its scarcity and its potential monetary as well as use value. These factors are likely to impact upon the severity and frequency of conflict, particularly willingness to litigate. We therefore chose three kinds of area in each country for detailed case-study work, as measured by the extent of commercialisation, migratory and population pressures:

- Type I: A situation of marketised, crop agriculture with competition between successive generations of migrants and host communities.
- Type II: A situation where there is a low degree of marketisation, no perceived land shortage and land is allocated at low cost according to local customs.
- Type III: Urban or peri-urban situations characterised by marketisation, severe competition and conflict among statutory, traditional and 'informal' (usually illegal) systems of land regulation.

7.4.2 Degrees of legalisation

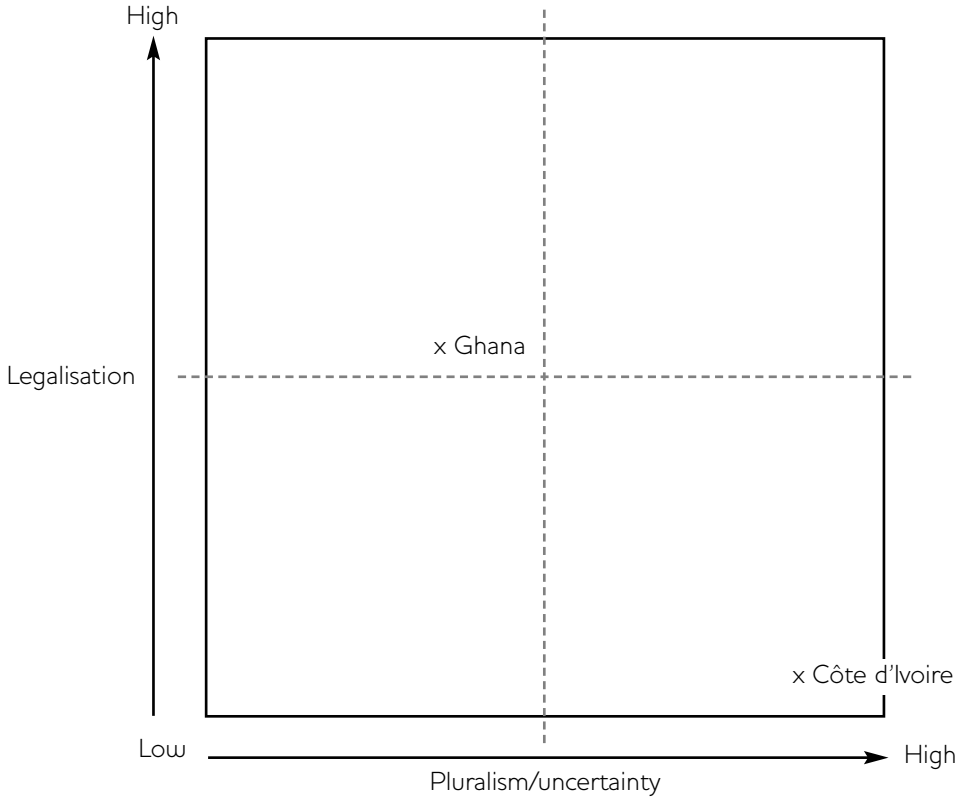
Secondly, it was hypothesised that a key factor in explaining aggregate differences between these two countries would be the interaction between the degree of 'legalisation' of land laws, and the degree of pluralism and competition among regulatory orders. Together, these will have an important impact on the degree of uncertainty and lack of enforceability in the system of land regulation.

7.5 Definition of legalisation

'Legalisation' may be defined as the degree of institutionalisation and formality of a regulatory order (Stinchcombe 1997; Crook 2001).[15] Expressed as a continuum, at one extreme the 'most legalised' is exemplified by a single, state-endorsed, legal framework and body of written justiciable laws. Degrees of legalisation can range through increasingly diverse, less formally established but still institutionalised regulatory orders until, at the other extreme, there is a situation in which land relations are matters of informal, social and political bargaining or negotiation, in which a wide variety of resources can be drawn upon to establish advantage and authority. If the lack of a single legalised order is combined with extreme *competition between regulatory orders*, none of which is authoritative and where agreements are difficult to enforce or predict, then there is a situation of high uncertainty. This can be represented as a matrix (see Figure 7.1).

Côte d'Ivoire, particularly in the southern areas of cocoa and coffee cultivation, illustrates this latter scenario, combining low legalisation with high levels of pluralism and uncertainty, referred to by Chauveau as the '*jeu foncier*' (Chauveau 1997). Ghana can be characterised as exhibiting a much higher degree of legalisation and a lower degree of competitive pluralism.

Figure 7.1 **Degrees of legalisation in Ghana and Côte d'Ivoire**



15 The term is discussed more fully in Crook (2001); it is preferred to formalisation in that it encompasses the notion of a fully recognised legal code as 'publicly authoritative' as well as elaborated (see Chapter 2.1).

The justification for placing each country in its place on the matrix derives from the historical analysis presented in sections 4 and 5 above; the different kinds of legal pluralism which have developed in each country, and the differing degrees of legalisation have clearly had an important influence on the way in which each country has dealt with the spread of commercialised agriculture and large-scale labour migration. These differences in turn impact upon the ways in which access to land and disputes over land rights are managed.

8 Methodology and data collection

In each country, case-study areas were selected according to the three types described in 7.4. In Ghana, the areas chosen were: Asunafo District, Brong-Ahafo Region (Type 1); Nadowli South District, Upper West Region (Type II); and Kumasi (Type III). In Côte d'Ivoire, the initial areas for case study were: the *département* of Tabou in south-west Côte d'Ivoire (Bas-Sassandra region), focusing on the *sous-préfectures* of Grabo, Tabou and Grand-Béréby (Type I); the *département* of Katiola, to the north of Bouaké (Vallée du Bandama region) (Type II); and the town of Bouaké (Type III). (The attempted *coup d'etat* and ensuing civil war of 2003 made it necessary to select a new urban area, on the outskirts of Abidjan, and continuing violence in the south-west severely restricted the completion of research there.) In each of these areas, the case-study work proceeded by selecting particular villages or, in the towns, particular quarters and peri-urban settlements. The villages in the rural areas were selected according to criteria such as differing balances of indigenous and stranger inhabitants, and the known presence or absence of a history of disputes or peaceful relations (see Appendix 1 for a complete list of the selected villages).

At the village level in all three types of area, data was gathered through (a) focus group meetings with selected informants; (b) in-depth semi-structured interviews with selected informants; (c) observation of dispute settlement procedures; (d) questionnaire-based surveys. In Ghana, a popular opinion survey using structured questionnaires was carried out: 676 respondents were interviewed, selected by random household sampling within each of the case-study villages. The state agencies and formal courts were studied through observation, semi-structured interviews with officials, lawyers and judges, and a survey of litigants or those using the courts. In Ghana, we interviewed 243 litigants appearing for land cases in three courts over a four-month period: the High Courts of Wa and Kumasi and the Magistrates Court of Goaso (Asunafo District). In Côte d'Ivoire, in-depth interviews were conducted with 15 litigants selected randomly from those who had brought cases in the *Tribunal* of Tabou since 1998 (see Appendix 2 for questionnaires).

Part C **Research findings**

9 Overall structure of the findings

The main findings are presented by type of dispute settlement institution, comparing the locations by type of area. The findings reported here focus on some of our main research questions:

- What are 'land disputes' about, and do different kinds of disputes get settled in different DSIs?
- Why do people choose particular DSIs? What values are they looking for in the process and the outcome?
- What is the public's opinion of different DSIs? How do users in particular perceive their experiences of disputes and their settlement?
- How do different forms of DSI protect the rights of the poor and vulnerable – rights to a fair hearing, rights to security of possession?
- Are there any objective measures of the effectiveness of different DSIs?

10 Formal state courts: Ghana

10.1 The court system in Ghana

The legal basis of the current court system in Ghana is the Courts Act of 1993, following from the 1992 Constitution of Ghana, and consists of the superior Courts of Judicature – the Supreme Court, the Court of Appeal, the High Court and the Regional Tribunals – and the lower courts. The High Courts in each region are both first instance courts for all civil and criminal matters, and exercise supervisory jurisdiction over the lower courts – Circuit Courts and Magistrates Courts. Under the 1993 legislation the lowest court (at district level) was called a Community Tribunal, and incorporated a lay panel of community assessors sitting with a legally qualified magistrate. These were abolished in 2002 and reverted to being Magistrates Courts under a single legally qualified judge.[16] (The Tribunals were a legacy of the Provisional National Defence Council (PNDC) 'revolutionary' era which were incorporated into the main legal system in the 1993 legislation and served as a form of special criminal court at the Circuit and Regional levels (Gocking 2000)). Since 1993 the Fast Track High Courts have also been added to the system; these do not differ in their jurisdiction or composition, but only in their procedures (although there has been legal challenge to their 'constitutionality').

The Magistrates Court is the lowest level of civil court which hears land cases; until 2002, it was limited to cases involving property not exceeding five million *cedis* in value.[17] This meant that they were the main first instance courts in the rural districts, but in the urban areas especially the metropolises of Kumasi and Accra, they did not in practice hear any land cases which routinely started in the High Court. In 2002 the limit on Magistrates Courts was raised to 50 million *cedis* (around £3000), which it is hoped will ease some of the pressure on the High Court. This is probably unlikely in that the pattern of going straight to the High Court has become well entrenched – unless legal practitioners begin to advise their clients to use them on grounds of speed and cost.

16 See Courts (Amendment) Act 2002.

17 5 million *cedis* = approximately £300.00 at current rates.

10.2 Focus of the research

The following courts were selected from the three case-study areas:

1. The Community Tribunal (now Magistrates Court) in Goaso, which is the District Assembly capital of Asunafo rural district. There was one judge sitting at this court during the research period.
2. The High Court of Kumasi, which serves primarily an urban or peri-urban area characterised by marketisation, severe competition and conflict among statutory, traditional and 'informal' (illegal) systems of land regulation. The Kumasi High Court has six court rooms and a facility for a 'Fast Track' court, and there were six judges sitting during the period of the research.
3. The High Court of Wa (Upper West Region) which serves an area where there is a low degree of marketisation, no perceived land shortage and land is allocated at low cost according to local customs. There were very few land disputes coming to this court, but those that did were linked to the peri-urban growth of this Regional capital. There was one High Court Judge sitting during the period of the research.

The research was designed to address three fairly simple sets of questions:

- Why do people go to court, as opposed to other forms of dispute settlement institution? (What do they want or expect from the court process? Do they always want a full trial and judgement?)
- What are their experiences of the litigation process? How 'user friendly' is it, how inclusive and acceptable is it to those who use it?
- Are there ways in which the service can be improved?

In order to answer these questions we adopted a methodology which begins with the users themselves, and asks them directly about their experiences. The research results are based on a targeted or purposive survey of 243 land case litigants in the relevant courts, selected over a specified time period. We also interviewed the providers of the judicial service – judges, lawyers, court officials – and observed court proceedings over the same time period.

10.3 The role of the state courts in land dispute settlement: a crisis of overload

The state courts in Ghana continue to form a crucial element in the land regulation system – indeed some might say they are the *most* important. They are constitutionally endowed with the power to apply all the rules of law recognised in Ghana, whether customary, common law or statute, and are resorted to by very large numbers of litigants who wish to see an authoritative settlement of their case. Yet, as is well known, the state courts, particularly the courts of first instance – Magistrates Courts in the districts, and High Courts – have been in a state of crisis for some years, insofar as they are overwhelmed with the large volume of land cases, few of which can be heard or settled within a reasonable time. There is therefore an urgent need to think about ways in which the court system can be helped to provide a more effective judicial service for the land sector.

The dimensions of the crisis in the first instance courts are well known, and need not be laboured here. The problem is a combination of large numbers of suits being filed and an incapacity to handle the case load expeditiously, causing a huge backlog of unheard cases to build up and long delays for litigants. Such delays mean that many injustices are never resolved and many people are deprived of their rights by the unchecked illegal actions of

Table 10.1 **Statistics of cases at the High Court, Kumasi**

Year	1997	1999	2000	2001	2002	Total % increase
Total cases	17,178	17,708	18,413	19,526	19,876	15.7%
New cases	1,948	1,564	1,864	1,725	1,222	
Cases settled	1,157	1,069	1,637	772	582	
Total land cases	7,759	7,739	8,011	9,044	9,214	18.8%
New land cases	445	218	315	389	252	
Land cases settled	117	48	359	65	58	
Land cases as % of total	45	44	44	46	46	
% of total cases settled	6.7	6.0	8.9	4.0	2.9	
% of land cases settled	1.5	0.6	4.5	0.7	0.6	
% of new land cases	5.7	2.8	3.9	4.3	2.7	

others. It is thought that land cases themselves account for around 45–50 per cent of the total cases filed nationally (no recent accurate figures are available).[18]

In the Kumasi High Court they have accounted for an average of 45 per cent of all cases over the past five years. More telling, over the period from 1997 to 2002, the absolute number of cases filed (and hence pending) increased by 15.7 per cent – and the total number of land cases pending increased by 18.8 per cent. In other words, in spite of efforts made by the Asantehene since 2000 to withdraw at least Stool Land cases from the courts, the rate at which land cases were being settled was constantly outstripped by the rate at which new cases were being added each year[19] (Table 10.1). The absolute number itself at the beginning of the five-year period was itself daunting, and clearly beyond the capacity of any court system to clear up *if it is assumed that most cases will be taken to trial*. Unfortunately, unlike other legal systems, as we shall see in the following analysis, the rate of out-of-court settlement is extremely low in Ghana – estimated by practitioners interviewed to be around 5 per cent (see also Wood 2002). It is this unusual characteristic of the Ghanaian system which makes the crisis seem peculiarly intractable and indeed causes those who contemplate it nothing but despair![20]

Draft figures for the Accra Central Registry present a similar picture; according to Mrs Justice Wood, rates of settlement for land cases over the 1998–2001 period fell from 4.2 per cent to 2.6 per cent, and the average minimum time for a litigant who goes through all the levels of the appellate system is between three and five years – but could easily be as much as 15 years (Wood 2002).

Although no breakdown of cases in the District or Magistrates Courts is available, the number of civil cases dealt with and pending is even more overwhelming. As in the High Court, the number of new cases coming in each year far exceeds the rate of settlement. In 2003–4, the Magistrates Courts nationally had 59,031 cases before them, of which 71 per cent were new cases that year. Of that total, 23,351 (40 per cent) were settled. In Ashanti, the equivalent figures were 10,293 total cases, of which 65 per cent were new, and the number of cases settled was 4,230 (41 per cent) (Ghana 2004).

The 'real cause' of this backlog is of course the subject of a national debate; on the one hand, it is argued that the problem is a 'demand-side' one – it is said that Ghanaians are too ready to bring cases without first exploring other methods first, that they are too litigious and pursue cases unnecessarily, or that the land tenure and land administration systems

18 According to Kotey, land cases accounted for 41.5 per cent of all pending High Court civil cases in 2002, but excluding appeals pending from lower courts, or on appeal to the Court of Appeal and the Supreme Court (Kotey 2004: 8).

19 The Asantehene is the supreme ruler or King of the Ashanti Confederation, the most powerful and wealthy traditional ruler in Ghana.

20 There are currently six judges in the Kumasi High Court; if they each heard an average of four cases a day, it would take over five years to hear the existing cases filed, assuming that the Court sits for 30 weeks.

Table 10.2 **Breakdown of land cases by subject matter**

	Valid percent
Family dispute	52.7
Trespass/boundary dispute	17.7
Unauthorised disposition of rights in land: by Chief/stranger	12.8
Other	7.8
Unauthorised sale of land	4.9
Dispute over cultivation/crops	2.9
Unauthorised disposition of land rights by Land Commission/Government compulsory purchase order (CPO)	1.2
Total	**100.0**

themselves are so ambiguous and confusing that they automatically generate 'excessive conflict'. On the other hand, many commentators argue that the problem is supply side – the courts ought to be able to cope with whatever is brought before them but they lack capacity or efficiency in some way. The idea that levels of litigation are 'excessive' is of course difficult to judge – excessive in relation to what standard? Clearly the fact that thousands of people feel impelled to move from informal dispute to formal court action reflects a social and economic reality which cannot be wished away. One needs to ask, why is this happening?

10.4 Why do people go to court?

Given the expense and the possible delay, what is it that finally motivates somebody with a land dispute to abandon – or bypass – the wide variety of informal and traditional methods of dispute resolution available in Ghanaian society, and file a land suit in court? It can safely be predicted that there is not one single reason, but that it is probably a combination of factors which underlies such a step.

10.4.1 Kinds of dispute which come to court

Is the decision to go to a state court influenced by the nature of the dispute? The survey provided a surprising answer: the largest single category of cases (over 52 per cent of the total) involved family disputes of some kind, mainly inheritance disputes between different sides of a family, amongst children of the deceased or between the widow and the children, unauthorised disposition of family land by an individual family member, and property disputes between divorcees (Table 10.2).[21] The common stereotype that it is double sales or unauthorised dispositions and boundary disputes – allegedly caused by lack of boundary definition and registration of ownership – which are clogging up the courts is clearly inaccurate. The latter kinds of cases accounted for only 12.8 per cent of the total. Cases against the government or the Lands Commission were a tiny proportion, only 1.2 per cent.

It would be wrong, of course, to suggest that the distribution of types of cause in this survey is somehow representative of the general causes of land disputes in the population as a whole. Our survey of the general population in selected villages in our case-study areas showed that, of village respondents who had experienced a dispute, 50 per cent said their disputes concerned 'trespass' and disputes with neighbours. Only 26 per cent concerned family or inheritance matters. This demonstrates the clear difference between the kinds of

21 'Family' is being used in the European sense here, to denote disputes amongst the father's and mother's sides of families, or between husbands and wives, as well as disputes within matrilineal or patrilineal extended families. In the Akan areas of Ghana, matrilineal descent means of course that the wives/widows and children of a deceased man are not members of the *abusua* (blood family); hence the very common occurrence of disputes between a man's children and his matrilineal kin (siblings, nephews and nieces). But informants suggest that disputes within the blood family are also becoming more common, especially as the Intestate Succession Law of 1985 virtually created the conditions for litigation over the definition of 'family property', which depends upon showing a 'contribution' to the creation or purchase of the asset by any other family member.

Table 10.3 **Methods used first to settle a dispute, by location**

	Goaso Magistrates Court	Kumasi High Court	Wa High Court	Total
State Court	31.9%	52.2%		46.1%
Traditional Court, Chief, elders	53.2%	29.6%	100.0%	37.0%
Family	8.5%	8.1%		7.8%
District Assembly, Government official		4.3%		3.3%
Between concerned parties		3.8%		2.9%
Police		1.6%		1.2%
CHRAJ	2.1%	0.5%		0.8%
Informal arbitration	4.3%			0.8%
	100.0%	**100.0%**	**100.0%**	**100.0%**

cases which villagers attempt to settle themselves, and those which are more likely to end up in court. It is family disputes which are the most likely to be brought to Court, either because the parties feel they need an 'external force' or neutral arbiter to enforce a solution, or because they arouse the most bitter emotions, or because they feel it is feasible. It is family cases which polarise the parties so bitterly that they are more likely to go to a state court.

In fact, given what is known about the dynamics of large extended families such as are found in Ghana, it is not surprising that they are unable to resolve disputes over landed property amongst themselves in an amicable fashion. The bitterness once families fall out, especially over an inheritance, is such that an external and authoritative arbiter is essential. It could be that the lack of cases against government – in spite of the outcry about previous governments' record of improper land acquisition without compensation – simply reflects a reluctance to take on government, which can better afford an endless dispute than even the wealthiest private individual. This can only be speculation; what is clear is that the courts are being overwhelmed with cases which reflect mainly the deep social conflict which is emerging from changes in the social and economic character of the Ghanaian family particularly, in our cases, the matrilineal family. But the boom in litigation cannot be blamed entirely on the matrilineal system, given that in the Volta Region land cases dominate litigation in the courts even more than in Ashanti.[22] A more likely cause is the boom in urban development which is eating up the peri-urban areas of Accra, Kumasi and other main cities at a fantastic rate, much of it without planning permission or other legal title – a boom which is clearly proceeding without much legal challenge by the planning authorities.

10.4.2 The choice of dispute settlement institution – why the state court?

The second issue relates to whether our litigants had gone to court only after exhausting all other possibilities – hence seeing court as a 'last resort' when all else had failed – or whether they had deliberately made the state court their first choice for resolving the dispute.[23] Again the survey produced a surprise finding: 47 per cent of respondents had gone to a state court *first*, without going through other kinds of dispute settlement procedure, showing that for the majority of the litigants, the court was the preferred or most obviously appropriate way of getting their dispute resolved (although of course many of the defendants were dragged to court by the decision of the plaintiffs).

Overall, 37 per cent of respondents had first tried to resolve their case using the chief, the elders or more formally, a 'traditional court' process. Only small numbers had used other

22 The Ewe people of the Volta Region have a patrilineal descent system.

23 This is an issue which is closely linked to debates about 'legal pluralism', with those who celebrate the coexistence of 'customary' and religious law administered by non-state dispute settlement institutions, side by side with the laws of the state arguing that 'forum shopping' benefits the poor and underprivileged.

Table 10.4 **Survey of litigants: sex of respondents**

	Valid percent
Male	69.0
Female	31.0
Total	**100.0**

Table 10.5 **Survey of litigants: age of respondents**

	Valid percent
40–64	52.7
65+	34.9
26–39	12.4
Total	**100.0**

Table 10.6 **Survey of litigants: educational level of respondents**

	Valid percent
Up to Stnd 7/MSLC	47.3
None	30.0
Secondary/TTC	16.5
Post-secondary	6.3
Total	**100.0**

Table 10.7 **Survey of litigants: occupation of respondents**

	Valid percent
Farmer	52.1
Trader, worker, artisan	23.9
Middle-class professional	15.5
Retired	3.8
Pastor	2.1
Unemployed, student	1.7
Home-maker	0.8
Total	**100.0**

kinds of dispute settlement, mainly family heads. It should be noted that there were significant differences between Kumasi and the other two locations here, in that in Goaso and Wa respondents were much more likely to have used a traditional court or the chief or elders first (Table 10.3), perhaps reflecting the more rural character of the catchment areas of those courts.

The reasons which respondents gave for choosing the state court, either immediately or after other methods had been tried, overwhelmingly reflected the perceived need for authority and certainty associated with court remedies. The largest group (33 per cent) specifically mentioned the authority of the court; others (28.3 per cent) said they had become frustrated by the failure of the other party to respond or to come to an understanding and so a court action was seen as a way of using an authoritative force to get the issue resolved, whether the other party liked it or not. Many people commented specifically that traditional or informal arbitration was all very well but it lacked 'backing' and could not be enforced if the other party reneged on the agreement. There was also a suspicion about the impartiality of arbitration; one respondent said: 'Arbitration would not have helped because the one who would have sat on the case is part of the plaintiffs'.

Many other comments were similar: 'Whether arbitration or court what is needed is fairness. Arbitration has no backing'; 'Court is time wasting and high cost implication but I still prefer the court to arbitration since as a stranger farmer, chiefs will be partial'; 'At the arbitration level she [the defendant] did not comply with the ruling thus I think at the court she will comply with the ruling so I prefer the court'.

This craving for an authoritative settlement was even more marked in those who were asked to compare their earlier experiences of other forms of dispute settlement with the court: 73 per cent said they wanted 'enforcement' of any judgement (assuming that they would win, of course!), a perspective which probably reflects the dominance of 'declaration of title' as the most commonly sought remedy. Again there were some differences between Goaso and Kumasi on this issue, with Kumasi respondents much more likely to cite the authority of the court as their main reason (39.2 per cent as compared with 12 per cent) and Goaso respondents more interested in forcing a resolution on the other party (39.4 per cent as against 11.5 per cent). But levels of education seemed to make little difference to the main reasons for going to court.

10.5 Accessibility and inclusiveness of the state courts

10.5.1 Inclusiveness: what kinds of litigants go to court?

Our sample of litigants was drawn by interviewing all those who attended court for a land case during the period December 2002–April 2003. This produced a sample of 243 respondents: 186 in Kumasi, 47 in Goaso, and 10 in Wa. Very few people refused to be interviewed when approached. (The sample in Wa is very small because there were very few cases in Wa, but the respondents were included in the total survey anyway, although it must be borne in mind that the conclusions of the survey will apply predominantly to the two southern courts.) We deliberately tried to select a balance of plaintiffs and defendants: 55.6 per cent were plaintiffs and 44.4 per cent defendants. The basic socio-economic characteristics of the litigants were as shown in Tables 10.4, 10.5, 10.6 and 10.7.

As can be seen, the litigants were predominantly (just over two-thirds) male, and, as might be expected, were all from the older age groups. They also had higher levels of education than for the Ghana population as a whole – although not excessively so, given that the modal group, nearly half of the sample, had only a Standard 7 / Middle School Leaving Certificate (MSLC) level. But gender and education (or the lack of it), were quite highly correlated; 60.6 per cent of the women respondents had no education as compared to 16.6 per cent of the men. In occupational terms, the respondents were surprisingly typical of the general population, especially given the predominance of the urban/peri-urban Kumasi respondents in the sample. The number in white collar or professional occupations – including quite low-paid clerical jobs – was only 15.5 per cent.

The most important conclusion here is that the survey suggests that 'going to court' is not purely for the rich, powerful or highly educated; a wide range of ordinary citizens use the courts, including many uneducated women, although clearly they are mainly older citizens and it is more likely to be men rather than women who go to the court, perhaps on behalf of family groups rather than purely for themselves.

10.5.2 Does the cost of litigation prevent access to justice?

Much is said about the cost of going to court and the way in which it can exclude the poor in society from justice. But there are few reliable guides on how much it actually costs to take a land case through the court system, especially given the enormous variety in the length and complexity of cases and the number of times one has to attend court. It is certainly true that it costs more if a lawyer is used. In the High Court it is very difficult to do without a lawyer; in our two cases in Table 10.3, 96.4 per cent of respondents had employed a lawyer as compared with only 36.4 per cent in the Goaso Magistrates Court. We asked respondents if they could give an overall estimate of how much they had spent so far, and also asked them to break costs down by items if they could not give an overall figure. Just over half of them were able to give a figure (Table 10.8). The modal amount was 2–5 million *cedis*, but only a small group (8.2 per cent) had spent more than 20 million.[24] Few were able (or willing?) to tell us how much they spent on their lawyers, but again the commonest amount given was 2–5 million, with 70 per cent falling within the 0.5 million to 5 million range.

Twenty million *cedis* is a lot of money for an average Ghanaian in regular employment, but the more common amounts (0.5 million to 5 million *cedis*) are not as out of reach of a family or family segment acting corporately, or somebody with a farm or business, as might have been expected. The rural poor would of course be unlikely to have access to this kind of money.

24 20 million *cedis* is around £1,200 at current rates, or the equivalent of four years' salary of a basic grade civil servant.

Table 10.8 **Estimates of costs of bringing court action**

Cedis	**Valid percent**
Nothing	1.6
Less than 100,000	4.9
100,000–500,000	7.4
500,000–2 million	21.3
2–5 million	31.1
5–20 million	25.4
Over 20 million	8.2
Total	**100.0**

10.5.3 Accessibility of the court process: how 'user-friendly' is the experience of going to court?

The formal state courts inherited from the British colonial system have often been criticised by commentators, both Ghanaian and foreign, for being 'alien', intimidatory and entirely unsuited to the norms of Ghanaian society. This rather exaggerated criticism often forgets that, although the core of the legal system – its concepts and rules – indeed remains the English common law, the courts have been operating in the country for well over a hundred years. During that time and especially after independence they have created through case law and through judicial recognition of many rules of customary law, what could be now be called a 'Ghanaian common law'. And their procedures, as our evidence shows, have in many respects been 'Ghanaianised' too.

Court procedures: In physical appearance and the organisation of the hearing, it is true that the High Courts can seem intimidating. The public, witnesses and parties waiting to be called are physically separated by barriers and a deep well where the lawyers sit, nearest to the judge, whilst the judge is raised up high. Parties are called up to the bar inside the 'inner area' only when their evidence is required. It is often difficult to hear what is going on and judges and lawyers can often appear to be engaged in private conversations of a technical nature. Only a proactive and open judge can overcome these barriers by setting a good atmosphere in the court.

The Goaso Magistrates Court, by contrast, is an open-sided building located in a public area with no barriers between judge and litigants; whenever cases are being heard, members of the public are to be seen informally crowding around the court or sitting listening. It appears as a locally rooted institution (not least perhaps because of the public entertainment it provides!).

Procedures in the Magistrates Court are relatively flexible and informal, and lawyers only infrequently used. What is most interesting however about the procedures observed is that the British 'adversarial' format in which parties (and their lawyers) are supposed to each battle it out to demonstrate the truth of their cause, and the judge listens, has mutated into a much more 'inquisitorial' process more typical of civil law systems. The judge actively questions and cross-examines the parties, seeking to clarify the stories and to establish the truth. The judge in Goaso did this in a highly interactive, informal and non-threatening way, allowing the parties to have their say. This is also happening in the High Court to some extent, primarily it would seem because lawyers are often so poorly briefed and incoherent that the judges frequently resort to speaking directly to the witness in an effort to find out what is being asserted and what points of law are relevant. Judges were also observed intervening in cross-examinations, helping witnesses to establish their points clearly, and indeed cross-examining the lawyers themselves. If an interpreter is being used to translate into English, the judges often cut across an interpreter who is too slow or inaccurate and speak directly to the witness in the local language.

Language: the issue of language is of course, even more critical than procedure or style. Again, the frequently heard assertion that the courts are incomprehensible to ordinary

Table 10.9 **Language used in court, by location**

	Goaso Magistrates Court	**Kumasi High Court**	**Wa High Court**	**Total**
	%	%	%	%
Twi	69.6	13.0		25.9
English		8.7	11.1	6.7
English/Twi combination	30.4	78.3		63.2
English/Waala combination			66.7	3.1
English/Sisala combination			22.2	1.0
	100.0	**100.0**	**100.0**	**100.0**

Ghanaians because they are based on English is quite wrong. English is only used where it is the common mutually understood language of the parties (particularly important in the multi-lingual northern areas of the country), otherwise a combination of English and the local language (Twi in Kumasi and Goaso) is the predominant mode, and the judge and the court clerks record the evidence in English. Overall, 63.2 per cent of the respondents said that their proceedings were conducted in English and Twi, but this is somewhat misleading insofar as the different locations were very different in their practices: in Goaso, 70 per cent of proceedings were in fact conducted all in Twi, whereas in Kumasi and Wa the predominant mode was a combination of English and one of the appropriate local languages (Table 10.9)

To the evidence on language we can add the results of another more specific question in which we asked whether the respondents had understood what was going in the trial. Unfortunately as many had not experienced a full trial, many would not answer this question, although those who had felt they had heard enough on an adjournment hearing were willing to say something. Of those who answered (61 per cent of the respondents), 82 per cent said they had understood the proceedings.

The judges: given that judges in Ghana are adopting a more interventionist or inquisitorial style, the way in which they deal with the parties in front of them and indeed the whole atmosphere of the court as set by the judge determines in a very important way the perceptions which litigants have of the court process. Do they feel intimidated, do they think they have been fairly dealt with, had their point of view listened to? We tried to investigate this issue by asking litigants to describe how they felt the judge had spoken to them during whatever kind of hearing or hearings they had experienced. The results were quite robust and again challenge assumptions about the negative image which the courts are said to have.

Over half of all respondents described the judge in various combinations of positive terms, 'he speaks the truth' (a literal translation of the Twi phrase), he is 'patient', 'fair', 'helpful', and so on (Table 10.10). A few said he was 'fast' – meaning he conducted proceedings in a business-like manner, a comment which we allocated to the positive category! The most commonly used term, which emerged spontaneously in the pilot studies, was the 'truthful' comment. A few gave mixed answers, mostly to say that the judge had various good qualities but was too slow! (This was the predominant answer in Wa.) As might be expected from the more informal atmosphere of the Goaso Magistrates Court, the Goaso respondents were even more positive in their assessment than those in the Kumasi High Courts. Although some of the difference can be attributed to the fact that Kumasi litigants were more reluctant to give an opinion at all, on the grounds that they had not experienced a trial, it is clear from our popular village-level opinion survey that the judge in Goaso was generally respected in the district. When respondents were asked who they would most trust to settle a land dispute, 83.4 per cent mentioned 'a court judge', ahead of even village chiefs (77 per cent) and family heads (72.5 per cent) (see below and section 14.4).

Table 10.10 **Perceptions of the judge's language and behaviour, by location**

	Goaso Magistrates Court %	Kumasi High Court %	Wa High Court %	Total %
Truthful, fair, etc.	65.9	51.9	10.0	52.8
Unhelpful, harsh, etc.	2.3	1.9	10.0	2.3
Slow	0	2.5	0	1.9
Mixed answer	11.4	1.3	50.0	5.6
Can't say – no trial	9.1	35.0	30.0	29.4
Can't say – not heard/ understood	11.4	7.5	0	7.9
	100	**100**	**100**	**100**

Interestingly enough, plaintiffs and defendants did not have radically different views of the judges, with virtually the same proportions giving positive answers. Neither did the educational level of respondents have much effect on their views except that the highly educated – those with a post-secondary level – were slightly less likely to have a positive view (42 per cent as compared to 53 per cent overall).

10.6 Effectiveness and efficiency of the court system

10.6.1 Delays and adjournments

The survey confirmed what is already well known, which is that litigants particularly in land cases, are experiencing severe delays. Of the respondents, 45 per cent had filed their case more than two years previously, and another 25 per cent had been coming to court for between one and two years (Table 10.11). Even more striking was the number of times people claimed they had had to attend court, mainly for the case to be adjourned without a hearing: 40.9 per cent said they had attended court more than 21 times since the case began – a small group (6.1 per cent) even claiming they had attended more than a 100 times! What is most significant about these findings however, is not so much the length of time cases have been going on, as the prevalence of 'adjournment'. The majority of the litigants interviewed had experienced only preliminary hearings, or more frequently, only adjournments after appearing before the judge. (Over the period of the survey we did not, of course, expect to find many cases which actually concluded with judgement given; only 9.5 per cent of respondents had had a judgement). It could be said in fact that most of the frustration and inconvenience experienced by litigants is caused primarily by the adjournment practice, which constantly forces parties to attend court (and thus incur costs of time and money) to no apparent purpose. Why is adjournment such a major and indeed routine part of the experience of pursuing a case in court? If this could be understood, major improvements in the system could follow.

Table 10.11 **Time since cases were first brought to court**

	Valid percent
Less than 3 months	7.5
3–6 months	7.5
6 months to 1 year	14.5
1–2 years	25.5
2–5 years	26.0
Over 5 years	19.0
Total	**100.0**

The litigants themselves, lawyers, judges and court officials all have their own explanations or theories about the adjournment issue. Some litigants of course blame lawyers for simply not turning up when cases are scheduled, or for agreeing to postponements when asked to by the other party's lawyers or the judge. Lawyers certainly have to acknowledge this perception that they are not interested in concluding cases. But there is a surprising degree of agreement amongst litigants and lawyers that a major problem is parties themselves not turning up – principally defendants, but not exclusively so. In many cases plaintiffs themselves don't turn up for their own cases; one defendant we interviewed in Kumasi was enraged because for a whole year the plaintiff had never turned up, even though the defendant had faithfully attended the court when the case was scheduled. It might be concluded that in some instances, a court action is a form of harassment calculated to cause the defendant expense and inconvenience which can be prolonged by the necessity for continual adjournments. This is most obviously the case where plaintiffs obtain interim injunctions which are abused solely for the purposes of delaying the hearing. In many other cases, witnesses do not turn up. It is of course difficult to determine whether there is a 'chicken and egg' problem here; is failure to turn up caused by a well-founded expectation that the case will be adjourned, or are adjournments caused by people not turning up? It could be that mundane conditions of Ghanaian life are to blame: transport difficulties, lack of cash, other more pressing engagements, etc.

10.6.2 Administrative and professional issues

Whatever the reasons for the extensive degree of non-show on the part of litigants, lawyers agree that there are some administrative and legal/procedural problems to be tackled as well. Some cite a simple insufficiency of judges, caused by the unattractive pay and conditions. At the crucial Magistrates Court level, for instance, as of 2004 only 65 magistrates were in post for the 131 Magistrates Courts nationally – the position does not attract qualified lawyers (Ghana 2004). Others say that there is too much reluctance to bring summonses for attendance and, in the event of that failing, moving for cases to be struck out for lack of prosecution. It is evident that many judges feel that lawyers themselves are often poorly prepared and fail to take appropriate actions on behalf of their clients, and fail to present clear or well-documented cases. Judges themselves, of course, could strike out cases if they are satisfied that the parties are abusing the process. In a recent 'backlog clearing' exercise the parties to 4,654 old cases were invited to appear before a special judge or face being struck out; the result was a reduction of 77.5 per cent in the land cases on the books.[25] This outcome tells us little about the real reasons for the disappearance of these cases – it could be that they were effectively dead or ill-founded, the parties may have found other solutions, or, more worryingly, the *de facto* situation had simply been accepted, with whatever consequent injustice.

It is clear that there are some very simple administrative issues which could be tackled; the most obvious is the overoptimistic scheduling of hearings. If 20 or 30 cases are listed for a morning, the majority will be adjourned as a judge is likely to actually hear no more than three or four substantive trials in a session. It might be fairer to the parties if a realistic number of cases were scheduled for hearing and firm dates given, even if they are many months in advance. This would at least avoid the excessive number of wasted trips. Even simple things like making sure the parties know when the date and time of the next hearing is could be improved – in Goaso, where there are few lawyers involved, the parties are given slips of paper with the appointments written down.

Other administrative issues are less easy to tackle; lawyers and litigants also agree that many cases are adjourned because dockets 'go missing'. There is clearly a lack of capacity in the court administration; paper-based filing systems which are not up-to-date, manual typing and charges to clients even for typing of judgements. But are missing files caused by inefficiency and the lack of a decent filing system or is it caused by what some litigants (and lawyers) allege is deliberate mislaying of dockets by court staff, on behalf of the other party?

25 See Wood (2002).

Table 10.12 **Overall, was it worth it to bring your case to court?**

	Valid percent
Worth it	58.6
Not worth it	30.4
Don't know	8.0
Mixed feelings	3.0
Total	**100.0**

10.6.3 Virtual absence of out-of-court settlements

It is evident from the above that the issue of delay in the court systems is not simply a matter of 'too many cases'; the ways in which people use litigation, the administration of the courts, the behaviour of lawyers, court officials and litigants themselves, all play a part. And behind it all, is a special feature of the Ghanaian system: the almost total absence of out-of-court settlements. Judges and lawyers who were interviewed, and others who have written on this topic, concur that when litigants file a land suit their prime motivation is to go to trial and get a court judgement. Very few are willing to entertain out of court settlements, although this is less so in commercial or contract cases.[26] The only explanation given is that land is somehow a more fundamental, non-negotiable issue; it is not substitutable, has symbolic value and of course increasing economic value both in the growing urban areas and as a security for retirement where there is no social security system. Attempts to encourage law firms to mediate between their clients, and proposals for a formal 'Court Masters' system for dealing with interlocutory matters seem to have come to nothing. There are proposals for introducing ADR procedures backed by the court, but if this were to become compulsory, like arbitrations in certain commercial matters, it could lead to undue pressure on weaker parties to settle.

10.7 Overall assessments of the court process

Whilst the views of the judges were strongly positive, respondents' feelings about the process were not quite so positive; when asked whether they felt that all the facts of their case had been properly heard, of those who felt able to give a response (about half), 38 per cent said yes, and another 23 per cent said only 'to some extent' – still well over half of those who replied, but a rather ambiguous response. This in many ways was a logical response since so many respondents were still stuck with adjournments and quite rightly felt that the facts of the case had not had an opportunity to be brought out.

Nevertheless, in spite of difficulties, delays and adjournments, litigants in the courts which we surveyed did not overall have a wholly negative attitude to the courts as such, particularly those in the Magistrates Court. Indeed, our most surprising finding was that when we asked respondents to give an overall opinion of their experiences, a clear majority (58.6 per cent) said they felt that going to court was, in the end, worth all the trouble (Table 10.12).

Moreover the Kumasi High Court litigants were overall more committed to the process than those in Goaso – 61.2 per cent to 54.5 per cent, reflecting the fact that Kumasi litigants were more likely to see the court as the first and most suitable place to take their case. Even more striking, the women litigants (most of whom were uneducated) were the most enthusiastic of all, 70.4 per cent saying the case was worth it as compared with 53.7 per cent of men, whereas the most highly educated were the most dissatisfied (only 40 per cent said they thought it was worth it). We tested to see whether the 'worth it' answer was related to the kind of case being brought, but there were not major differences

26 Kotey (2004) estimates that in only 8 per cent of pending cases has there been any attempt at settlement, or 9 per cent of reported cases.

except that those who had cases involving unauthorised disposition by a chief or by a stranger were less satisfied (50 per cent), suggesting that in these cases delay is critical. Once the land has been sold or disposed of to a third party it is very difficult to reclaim it, particularly after a long time interval. Finally as might be expected plaintiffs were more satisfied than defendants (64.9 per cent as against 50.9 per cent) no doubt because many of the defendants had been dragged to court very much against their will.[27]

10.8 Conclusions

We began our research by asking some apparently simple questions: why do people go to the state court with their land cases? What is their experience of the court system, and are there any answers to the well-known problems of delay and expense which face those litigants? What we found suggests that it is not sufficient merely to blame society for 'bringing too many cases', or to propose that there is an easy set of alternatives to the court system. Our data certainly confirm the sobering dimensions of the crisis – the clear-up rate for pending land cases is not even keeping pace with the flow of new suits onto the books each year, so that total numbers are growing inexorably. But our main conclusions point to the need to sustain and reform the court system rather than side-step it.

- *The need for authoritative remedies:* the most significant finding of the research is that, in spite of all the problems facing litigants when they enter the court system, there is a very strong demand for the authoritative remedies which a court backed by the authority of the state can provide. Once made, people's commitment to litigation is very strong. The extreme reluctance to entertain out-of-court settlements is one indicator of this desire for a definitive remedy; another indicator is the extent to which the state courts are the first choice of large numbers of disputants – in some areas, the majority. Thus solutions based on the idea that a shift to ADRS – including renewed support for customary courts – will somehow relieve the pressure on the state courts are unlikely to be successful if they fail to provide an equivalent degree of authority and enforceability.

- *The state courts still have the potential to offer popular and acceptable forms of justice:* the kind of adjudication experience offered by the courts is not as alien or inappropriate as many of its critics would have us believe. The Magistrates Court in particular was providing a popular, flexible and relatively informal local justice forum. Although litigants are infuriated by the delays caused by constant adjournments, they generally respect the way the judges deal with them and most are not excluded by language or other factors from understanding what is going on. Litigants in our survey included a general cross-section of the population both by sex and by class (although not by age), and even the least well educated had a generally positive view of the process, seeing it as an essential path to establish what they felt to be of deep importance to them. It is clear also from the case analysis that family disputes are the main causes of litigation, rather than disputes between chiefs and their subjects or between strangers and indigenes, which are not appearing in court in the numbers which might have been predicted.

- *Reform of the court management is essential:* given the numbers, neither the state courts nor an additional ADRS can alone deal with the increasing pressure of land disputes. On the one hand, it is clear that state courts cannot be by-passed, as they are serving a very real need. Reform of the court management and procedure is clearly required, particularly in simple matters such as case management, time limits on non-appearance, and the diligence of counsel. Proposed new courts such as the Land Division of the High Court have to be supplemented by an invigorated local Magistrates Court service, especially in the rural areas. On the other hand, there is clearly a place for the promotion of ADRS where appropriate and acceptable, including court-supported ADR, and new forms of community-based ADR which are given state support in training and procedure.

27 Very few of our respondents had had a judgement entered (9.9 per cent), but of those who had, 67 per cent felt that the judgement was fair.

11 Formal state courts: Côte d'Ivoire

11.1 The courts

The main court of first instance in Côte d'Ivoire is called the Tribunal de Première Instance (Tribunal); these courts are located in the largest regional cities. Appeal from the decision of a Tribunal goes to the Cour d'Appel (Court of Appeal) and then to the Chambre Judiciaire de la Cour Suprême (Supreme Court). The only local-level court – the equivalent of a Magistrates Court in Ghana – is in effect a ' branch' of the Tribunal called a '*sous-section du Tribunal*' more commonly called simply a '*section*'. These subordinate courts are to be found in the headquarters towns of the *départements* or Prefectures. The courts initially chosen for study were the '*sections du Tribunal*' of Tabou, Katiola and Bouaké. But the study of the Bouaké and Katiola courts had to be curtailed as Bouaké and all the areas to the north were occupied by rebel forces after the outbreak of civil war in September 2002, and staff and researchers from the university were forced to flee. The results reported below are therefore based predominantly on field work done in Tabou and in Katiola, together with searches of the court archives of all three, carried out before the outbreak of the war. Field work was able to resume in Tabou during August–September 2003 during a brief improvement in the security situation.

11.2 The role of state courts in land dispute settlement

It is important to note at the outset that, compared to Ghana, the state courts in Côte d'Ivoire play only a minor role in the settlement of land cases. The figures for our case-study areas show that very few disputants resort to the Tribunals (see Table 11.1). Thus although the system is seen as slow, there is not a sense of 'crisis' and of unmanageable backlogs of cases, leading to calls for a policy of creating 'alternatives' to the state courts. The President of the Katiola Tribunal could cite only a handful of land cases in recent years and suggested that most were dealt with by the administrative authorities (Prefectoral service and Ministry of Agriculture), especially those involving the main local source of conflict, disputes between Peul transhumant cattle herders and farmers.

In Tabou since 1990, although the number of cases increased from virtually none to around 15 per year in 1997–99, by 2001 the court had heard only 68 land cases over 11 years, representing 22 per cent of the total of 314 cases. Yet Tabou is at the heart of the 'cocoa frontier' forest region, an area which has seen increasing conflict between host and migrant

Table 11.1 **Land cases in the Tabou Tribunal, 1990–2001**

Year	Number of cases	Number of land cases	Land cases as % of total
1990	21	0	0
1991	23	0	0
1992	6	0	0
1993	19	0	0
1994	20	1	5
1995	14	4	29
1996	36	8	22
1997	36	15	42
1998	26	15	58
1999	41	17	41
2000	26	1	4
2001	46	7	15
Total	**314**	**68**	**22**

Source: Archives of the Tabou Tribunal

communities over the past 20 years, growing shortages of both virgin forest and food crop land and huge inflows of foreign migrants. By 1999, the non-Ivorian migrant population of Bas Sassandra Region had swollen to a staggering 42.9 per cent of the total population (Chauveau 2002: 70). The scale of these social transformations and the conflicts they have engendered have not been translated into an equivalent impact on the state judicial system. In the more urban environment of Gagnoa in the *département* of Divo, however, it was reported that the Tribunal was becoming the preferred first destination for land disputes.[28]

In the Bouaké Tribunal, the numbers of cases settled also increased during the late 1990s, from 147 cases in 1995 to 168 in 1997 and 276 in 1999.

11.3 Why do people use (or not use) the state court?

Although the figures from Tabou show that state courts play a minor role in land disputes even in a very conflict-ridden area, they did attract more usage (from a very low base) during the crises of the late 1990s, before dropping back after 2000. A few cases have also appeared in the Bouaké and Katiola courts over the past decade, and the numbers in the Bouaké Tribunal also increased in the late 1990s (see above). Do disputants go to the Tribunal as a last resort, after all other forums have been tried? Or are there particular reasons to do with the nature of the dispute, the social or economic status of the parties, or the perceived political advantages of the state court compared with other forums? Two aspects of the situation need explanation: first, the generally low level of usage, and second, the rise in the number of land cases during the late 1990s in Tabou.

11.3.1 Reasons for low level of usage of the courts

1. Legal codes and customary land tenure: the generally low level of usage is normally ascribed to the perceived irrelevance of the state courts (which use the colonial civil code) to matters concerning land held under customary tenures or locally devised arrangements, even where there is written documentation or *petits papiers*, which has been quite common in Côte d'Ivoire (Koné and Chauveau 1998). In a legal system based on written codes, lawyers literally had no coherent code or text to which they could refer when a land case based on customary or unwritten land law came before them. Before 1998, customary land rights were not recognised as giving any legal title, and formally speaking were thus not alienable (although in practice they were being sold, leased and otherwise dealt with as a result of the marketisation of land in the rural areas). The state had a pre-eminent right to all customary lands to use in the public interest, or if it deemed that the land was 'ownerless' because it was not being cultivated or used. Thus it seemed as though the state court could not offer a 'juridical' solution or remedy (Affou 2005). Although the 1998 land law was a highly significant legal step in this respect, there is little evidence that it had any impact on popular willingness to seek a legal remedy immediately after its promulgation. (see below, section 13).

Nevertheless the disincentive offered by the 'legal' irrelevance of state courts can be exaggerated. Examination of actual cases and court procedures showed that the courts do offer pragmatic solutions based on examination of the evidence, and expert survey and mapping services. And the verdict has the merit of being backed by state enforcement. Yet in practice the majority of cases are dealt with by very local, apparently 'traditional' methods (family elders and village chiefs) or by the administrative authorities, notably the Prefects. This 'preference' for traditional and then administrative dispute settlement, however, reflects less a commitment to informal or 'alternative dispute resolution' methods, or the survival of pure custom, than the political realities of the colonial and post-colonial state. In Côte d'Ivoire, the way in which problems raised by conflict over land or resources are dealt with has always been determined by the logic of a search for political protection by powerful 'patrons', rather than by a search for legal remedies.

28 Interview with *Greffier en chef* (Chief Clerk to the Court), Tabou Tribunal, 2 May 2005.

2. The politics of land use: the Ivorian state, as built by Houphouët-Boigny and the PDCI in the 30 years after 1960, was not just one of the most effective administrative states in Africa; its political stability was based on maintaining a balanced ethnic coalition of support within a single party system, through the distribution of patronage and the use of presidential power. In areas such as the centre and south-west which experienced high levels of migration from the 1970s onwards, both Baoulé and northern Ivorians were perceived as groups who were part of the ruling coalition, supported by the regime in pursuit of its cocoa expansion policy. (In addition, the Baoulé were, of course, the 'President's tribe'.) In disputes involving migrants, it is well established that the governmental authorities would tend to favour migrants against indigenous or host communities (Krou, Bété). Even in areas with few migrants such as Katiola, the administration was perceived by local people to be biased in favour of Peul pastoralists. And it must be stressed that in the rural areas during the PDCI single party period, the chiefs themselves were part of the administrative and party elite; as in colonial times, they represented state authority. Thus they would be equally mistrusted by those who had a grievance which involved groups or individuals favoured by the regime.

In the south-west, however, a particular ethnic dynamic was at work, involving host communities, and different migrant groups – Baoulé, northern Ivorians (the latter two termed '*allochtones*') and non-Ivorian migrants (called '*allogènes*') from Mali, Burkina Fasso and Guinea, who came in large numbers in the late 1980s and 90s. Initially, host communities used their power to grant land to northern sharecroppers and labourers as a counterbalance to the Baoulé. It was seen as way of securing land quickly against further settlement. They believed that their status as '*tuteurs*' of the migrants (a kind of landlord relationship involving social loyalty and recognition of indigenous ownership of the land) would protect their lands (Chauveau 2005). According to focus group discussions, in cases of conflict between Baoulé and northern migrants, Krou *tuteurs* would even appear before the Prefect to speak for 'their' migrants (Affou *et al.* 2003). But this arrangement often concealed conflict within the local community as chiefs and elders were seen to have given land away with consulting community or family – a situation which became more tense as land grew more scarce and younger generations especially 'urban returnees' began demanding cocoa or food crop land of their own.

Thus the 'preference' for using chiefs, elders or administration to settle disputes was in many respects an exercise of power over those who had no other remedy. The interest of a Prefect called to resolve a dispute would be to both secure social harmony by persuading disputants to compromise, and to support government policy. And chiefs could easily be accused of having a monetary interest in favouring the migrants. Access to the courts – even supposing they could be trusted – was not, therefore, an easy option given the strong social and political sanctions visited on those who took this course.

3. Social sanctions against going to court: in Tabou and Grabo Sub Prefectures for instance, customary authorities have long had a formal sanction against going to the state court; any villager who tries to initiate a court action without first submitting the case to the chief or without informing the chief of an appeal, is fined (the current amount is one case of beer, one case of wine and 5,000 CFA francs). This is applied to all communities but is specifically aimed at dissuading migrants from taking locals to court (Affou *et al.* 2003). Social sanctions against members of the local community and against migrants from taking each other to court are also strong and are linked to use of religious and magical remedies including curses (bad luck and even death). These are particularly strong in both the Tabou and Katiola areas, where going against the chief and the community is considered a disrespectful and shameless act. Migrants risk being thrown out by force or otherwise punished by the host community. In general, the distrust which local communities have of the state administration, particularly in the south-west, has extended to the state courts, which have been seen as part of the same set of forces and thus as likely to be biased as the administration itself.

In towns like Bouaké the administrative authorities together with the Ministry of Construction have been dominant, coming into conflict with both the Municipality and customary authorities; this executive dominance is very difficult to challenge by legal methods.

Table 11.2 **Tabou Tribunal, distribution of land cases by types of disputant, 1990–2001**

Parties to the dispute	No. of cases	% of cases
Native of the locality *vs* native of the locality	33	48.5
Native of the locality *vs* foreigner	13	19.1
Native of the locality *vs* Ivorian of another locality	13	19.1
Ivorian of another locality *vs* Ivorian of another locality	3	4.4
Foreigner *vs* foreigner	2	2.9
Foreigner *vs* Ivorian of another locality	4	5.8
Total	**68**	

11.3.2 Accounting for the rise in land cases, 1995–2000

The brief rise in the number of land cases coming up in the Tribunal of Tabou in the late 1990s – and their fall again after 2000 – can therefore be best explained by changes in the political situation and changes in local economic and ethnic dynamics.

1. The impact of political liberalisation: 1990 marked the introduction of legal multi-party competition in general elections and the open emergence of the opposition FPI, particularly in the south-west. Although the PDCI remained strong until after the 1995 elections, it was nevertheless the beginning of the end for the party, accelerated by the death of Houphouët-Boigny in 1993.These liberalising political developments coincided with the return of many young people to the rural areas as the economic crisis hit the big cities. Chiefs, formerly unchallengeable because of their integration into the PDCI authority system, began to be more openly challenged by youth and by opposition elements. It became more possible – and more desired – to risk offending village authorities by taking a case outside the village to a state court, and even to challenge decisions of the Prefect, which would have been unthinkable in the pre-1990 situation.

2. New conflicts within local societies: in the 1990s, new kinds of conflict also emerged within local societies around the sale of land and the terms on which much of it had been given out to migrants. This coincided with increased pressure as new waves of foreign migrants joined in the rush to the far south-west and enlarged their existing farms. These conflicts raised legitimate suspicions over the role of elders, councillors and customary authorities (village chief, land chief) in the settlement of disputes (see also section 15). Because they were first and foremost the 'guardians' and protectors of the migrants who had settled on village lands, these customary authorities were frequently accused of being both judge and party to the dispute. Accusations of corruption, illicit sales without family permission or of 'striking a deal' with the foreigners became common.

These kinds of social tensions were reflected in the kinds of cases coming to court. It is very significant that the majority of the rise in land cases going to the Tabou Tribunal involved disputes amongst locals themselves rather than between locals and migrants (Table 11.2) This was an indication of the more open mistrust of customary authorities emerging from local society, as well as the rise in intra-family and inter-generational disputes. Most of the cases coming before the Tabou tribunal concerned disputes over the 'legality' or propriety of land transactions, relating to who has the proper authority to transfer a right over land and disputes over what has actually been transferred. The remedy sought from the Tribunal was legal recognition – or denial – of the transfer itself.

The perspective of the migrants was somewhat different. When foreign migrants settled in the Tabou area, they lived in separate villages near their farms (*campements*) and tended to deal with their own affairs; if their relationship of protection and subordination to the local customary authorities broke down, they had no reason to trust them to deal with that dispute. So in practice they continued during the 1990s to look predominantly to the administration to protect them.

Box 11.1 **Assoumankro 'class action'**

Between 1987 and 1990, the village chief demanded a payment of 25,000 CFA francs per inhabitant to divide up the village land into plots. Not everyone paid, so that the sum collected was only sufficient for a limited number of plots, of which one-third was distributed between the Prefecture of Bouaké, the town hall and the army battalion of engineers which had participated in the work of dividing the land. Thus, by 1998 several people who had made their payments had not received their plots of land. They therefore took the case to the Tribunal. The Tribunal declared that the action of the plaintiffs was admissible and that the action was partly based on the fact that they had paid the 25,000 CFA francs demanded for the assignment of a plot of land. The Tribunal ordered the defendants to pay these persons a total of 3,100,000 CFA francs in reimbursement of their payments and for damages and interest.

The sample of litigants in the Tabou Tribunal who were interviewed confirmed this picture of a more open dissatisfaction with local forms of dispute settlement. Typical reasons given for taking their case to the Tribunal were:

- Refusal to accept the decision of the local court – combined with
- A strong motivation to 'fight to the end' to protect ancestral land rights
- Slowness of execution of the customary judgement
- Refusal of the plaintiff to implement the decision of the local court
- Dissatisfaction with the judgement of the local court
- Slowness in the implementation of the locally made agreement by one of the parties
- Repeated absence of the defendants from the local court when summoned.

This distrust was not confined to Tabou, however. In Bouaké, as in Kumasi in Ghana, the process of urban development also produced conflict between local populations and customary authorities, accused of illicitly profiting from the allocation of urban plots without sharing with their communities. One notorious case involved a 'class action' by four plaintiffs on behalf of 38 villagers of the peri-urban village of Assoumankro against the chief, his secretary and the chairman of the village committee.

More generally, the urban cases in the Tribunal involved both locals and migrants to the city in dispute with customary authorities over alleged fraudulent and double sales, usually without proper documentation. But the legal code applied in the state courts puts a premium on written documentation; in the cases reviewed, a party could lose even an apparently well-founded case if they could not 'prove' the transaction with the correct documentation.

3. Increasing challenges to the state administration: the changing political situation also had an effect on perceptions of the administrative authorities, particularly the Prefects. In Tabou, local support for the FPI made people much less willing to trust government representatives as impartial arbiters of disputes In Bouaké, the 1990s saw growing dissatisfaction amongst the local population including the customary chiefs about the actions of both the Prefects and the Municipality with regard to urban zoning into development plots (*lotissement*). The administrative authorities were accused of ignoring the claims of customary authorities and local communities in allocating plots to outsiders and foreigners. Unlike Ghana, of course, the Ivorian state has a much stronger and more direct legal control over urban development through the Ministry of Housing and Urban Affairs (Ministère de la Construction et de l'Urbanisme) and BNETD (Bureau National d'Etudes Techniques et de Développement). The new political climate after the political liberalisation of 1990 and the emergence of opposition political parties created a much greater willingness to challenge these authorities in court.

4. Post-2000, the politics of direct action: after the election of the FPI government in 2000, the dynamics of the local political situation shifted again. In Tabou, the local population undoubtedly felt they now had a sympathetic administration in power. It is possible that this accounts for the sudden falling off in the number of land cases coming to the Tribunal. Given the history of the Ivorian state and its relations with the peoples of the south-west, the new situation encouraged not legal action but the settling of old scores and 'renegotiation' of land deals through direct action. By the same token, migrants, particularly foreigners, would have become too frightened to take a case to the Tribunal, given the real risk of reprisals which might follow. With the outbreak of civil war in 2002, direct and increasingly violent action became widespread even against formerly protected Baoulé groups.

11.4 Accessibility and inclusiveness of the Tribunals

The socio-economic breakdown of litigants at the Tribunal shows that the state courts are by no means the preserve of just the wealthy and privileged sectors of society. As shown in Table 11.2, in Tabou more than half of all land case litigants over the period 1999–2001 were from local communities, who by the 1990s can be considered to be a generally underprivileged and less prosperous group than migrant farmers (particularly Baoulé) who had accumulated capital from cocoa farming. Although not representative in any statistical sense, a small random sample of 15 litigants who had had cases decided in the Tabou Tribunal also provides some confirmation of the 'non-elite' character of local litigants. Of these, 47 per cent (seven) had had no education, and another 20 per cent (three) had only primary education. The vast majority of them were farmers by occupation. In gender terms, however, the male domination of cash crop farming and family affairs is illustrated by the fact that all of the sample were male. However, women were not entirely absent from the Tabou Tribunal; of the 69 cases heard during the period 1990–2001, four went to appeal of which two involved women plaintiffs.[29]

The costs of court proceedings did not seem to be a major disincentive either; of the 15 litigants interviewed, 11 reckoned they had spent between 50,000 and 250,000 CFA francs (around £50 to £250), accounted for by the extra costs of bailiffs, transport, surveys and witnesses, over and above the official fee of 30,000 CFA francs. These are not huge sums and even if large in relation to local incomes, they did not dampen the strong motivation of litigants, virtually all of whom said they were willing to appeal all the way to the Supreme Court to win their case.

Nevertheless, the procedures used in the Tribunals cannot be said to be adapted to the needs or perceptions of a rural society or of illiterate litigants. They are highly formal and much more heavily based on written submissions (in French) than those in the equivalent courts in Ghana. So even illiterate litigants have to employ, if not lawyers then educated intermediaries who can submit their case in writing. Opportunities for public hearing are also quite limited; the Tabou Tribunal holds public hearings on only two days each month (every second Wednesday). Most of the arguments and evidence involved in a case are heard in private, reflecting the active prosecutory or investigatory role of the judge in a civil law system. If a plaintiff brings a case to court and a writ is issued, the parties would normally experience the following procedures.

The plaintiff, using a bailiff, has to serve a copy of the writ on the defendant, which constitutes a summons to the first hearing. A deposit of at least 30,000 CFA francs has to be lodged at the court, with the introductory dossier. The writ can be served on the defendant by the bailiff himself, which is known as 'serving to the person'. The bailiff may deliver the defendant's writ to one of his acquaintances, which is known as 'serving to neighbour'. He may serve the writ at the offices of the *commune* or municipality, known as 'serving to the town hall'. Or he may serve the writ at the office of the Tribunal's public

29 Amany N'guessan *vs* Oueriko Véronique, *Jugement no.03/01du 14 fév. 2001*; Nemlin Houandé Henriette *vs* Ouyou Toubbaté Bernard, *Jugement no. 08/01 du 28 mars 2001*, in the Tabou Tribunal.

prosecutor, known as 'serving to the prosecutor'. A defendant living within the same Tribunal jurisdiction has only one week to present him/herself; or two weeks if he/she lives in the area of a different Tribunal, so in principle the case can at least begin very rapidly. But the subsequent exchange of written submissions can make it very cumbersome and slow.

The first or preliminary hearing is in public. The judge states the plaintiff's charge to the defendant (based on the writ which was used as the summons). The Tribunal then refers the case to another hearing, to give the defendant time to make a response in the form of a written statement (three copies). Consideration of the 'defendant's response' is held in chambers by the judge. After receiving the statement of the defendant, the plaintiff makes a written response to uphold his charge. The Tribunal then delivers the plaintiff's response to the defendant and refers the case. This process of written submissions and responses goes on until one party fails to respond. Once no further response is forthcoming, the Tribunal orders a 'case management' hearing, again in the judge's chambers rather than in open court. But parties are allowed to bring up to three witnesses to this hearing in chambers. The result of this procedure is usually a provisional court order, signed by the judge and the clerk of the court. It is at this point in a land case that the Tribunal can order a survey. The survey is entrusted either to the local police, to the local administrative authorities (the Ministry of Agriculture or the Prefect), or to land property experts. They would normally travel to the locality concerned and question local customary authorities, neighbours and inhabitants affected by the disputed land. These surveys are conducted at the expense of the parties to the dispute.

In the final stages of the case, the case management report and the experts' survey report are passed up from the judge of the section to the senior judge of the Tribunal – the Public Prosecutor – for his/her opinion and summing up. The section or 'sitting judge' gives the final verdict in court.

These procedures are indicative of the heavy reliance on exchange of written submissions and meetings of the parties with the judge and other officials in private. Unlike the Magistrates Courts in Ghana, which are relatively informal, open and public, the Tribunals have nothing whatsoever in common with the highly public and socially participatory character of traditional African dispute settlements, and there is ample room for suspicion to grow that 'deals' are being done. Some evidence from the equivalent area in Ghana (Asunafo District) suggests that disputants using ADR techniques may prefer the privacy of a forum which avoids the 'embarrassment' of giving all their evidence in public. This may be so, but in village societies discussion of disputes can never be kept private and a public event is usually needed to effect reconciliation and even 'apology' if necessary. ADR procedures are also much more informal and 'user friendly' than the Tribunal's written exchanges. This is one of the reasons, perhaps, that dispute settlement by customary courts and by Prefects or other administrative officers, for all their flaws, remain the more popular method of dispute settlement – especially given the popular assumption that political power and influence is what counts in the end.

11.5 Effectiveness of the court process

In spite of the apparent lack of pressure on the local courts, the procedure is undoubtedly slow, partly because of the reliance on written exchanges between the parties. Of the litigants interviewed, virtually all had been pursuing their case for more than two years, and three of them for more than seven years. From the archives, it is evident that these are not unusual figures, with the average time between two and five years. As with the cost factor, however, the strong motivation of litigants meant that they did not mention the length of time as a major barrier to taking legal action; they were more concerned with getting a result.

The excessively formal process does however have benefits as well as costs. The procedure is careful and exhaustive, and all available evidence is documented and collected – unlike in the courts of Ghana where lawyers are routinely poorly briefed and prepared and cases constantly adjourned for lack of proper evidence. In the Ivorian system, the survey is regarded as essential in a land case and the time is taken to do this correctly. On the other

Box 11.2 **The case of Kinagbo *vs* N'Guessan Ilé**

This case arose in the village of Lomibo, Tabou in 2000 between Mr Lamine Kinagbo on the one hand, and Mr K. Koffi (farmer) and Mr K. Kouadio (chief of the village of Lomibo, deceased) on the other. In the 1970s the then village chief had assigned a plot of land to Kinagbo which he developed in 1994. Meanwhile a dispute had arisen between Mr Kinagbo and one of the villagers, N'Guessan Ilé. Chief Kouadio and his son took Ilé's side, and asked Kinagbo to leave the plot of land. Kinagbo lodged a complaint and demanded three million CFA francs in damages and interest for dispossession of property, namely mango cultivation, various food crops, and 30 heads of cattle.

The judge decided that Mr Kinagbo had not provided proof of his property and hence of his dispossession. The action brought by Mr Lamine Kinagbo was admissible but insufficiently supported; his case was dismissed and he was ordered to pay costs.

hand, the system privileges written documentation to such an extent that many customary land transactions are dismissed, not because of their lack of validity according to local practice, but because of lack of documentary evidence (see the typical case of Kinagbo *vs* N'Guessan Ilé in Box 11.2).

11.6 Overall perceptions of the experience of using a state court

Taking a case to the Tribunal in a rural area such as Tabou or Katiola is very much a last resort because of the political and social considerations which have to be weighed against the possible benefits of any legal action. Other things being equal, Ivorian farmers, whether indigenous or migrant, prefer to settle things 'informally' at the local level or through administrative action. This reflects either a fear of the consequences of trying to challenge or evade local social sanctions and the local political authorities, or more positively because they trust these local powers to be sympathetic. Until the mid-1990s, migrants in the south-west felt most secure with these non-legal options. This preference has been equally strong in the urban setting of Bouaké, where virtually all of the land issues which arose during the pre-civil war period were dealt with through the exercise of administrative powers whether cooperatively or through dispute resolution mechanisms. It was only during the 1990s, in Tabou at least, that distrust of local political and administrative authorities on the part of indigenous communities became so strong that disputants began taking their cases to the court more frequently. But this seems to have been a short-term phenomenon, at least in the context of the post-2000 breakdown of civil order.

Once having taken the step of launching a formal court case, litigants have a very strong commitment and motivation to go the bitter end – perhaps because of the fear of what has been unleashed, and the fact that the dispute has already become too entrenched for peaceful compromise. Thus few express any interest in 'out-of-court settlement' and most of our interviewees said they were prepared to go up to the Supreme Court if necessary to win their case, using emotive language to ascribe deep symbolic and social significance to the disputed land, beyond any economic considerations, as in the examples of these three interviewees:

> It is worth it because I will go to the utmost limits of the law to have the forest. I have 11 children. Tomorrow, if I don't do it, they won't have any plots of land to cultivate. But above all, I cannot let my forest fall into the hands of someone who already has his own and who wants to add mine to his property. I trust the judges, especially as they have asked the agricultural experts to draw up a statement of boundaries so that the truth may appear.

> This piece of land was given to me by the chief of the tribe in 1968. Today, the young people want to take the land away from me. I will fight to keep it, especially because all the heads of families, and the chief of the tribe, support me in this action.

> As for me, I have to make an effort to keep it. Those are the lands of my ancestors. They went to war for them. I can't just give in and let a thief take that land. I have to continue, no matter how long it takes.

This kind of commitment is perfectly explicable in terms of the situation in which the disputants find themselves. They have gone beyond a certain point in the possibilities of peaceful resolution. But legal action is not necessarily the end of the story either, as other comments show. Legal action tends to be seen as a hostile act which is only one step away from direct action, rather than an alternative to it. Many are prepared to give judges the benefit of the doubt and express confidence in the ability of the court. But this is a conditional trust; if it works, fine; if it does not, local direct action is the next step. Thus the customary landholders of the Tabou area have tended to distrust the state courts only slightly less than the state administration and other local agencies including the police. As one commented: 'Today, we are the victims of our own hospitality. Foreigners have no respect for us and we get defrauded by the local police and the tribunals.'

The direct and increasingly violent actions which have been growing in the Tabou area since 2000 – burning or destruction of farms and eventually attacks on villages and driving out of the population – are not therefore essentially new in their logic, only more frequent and more extreme because of a perceived change in the local political balance of power, and a politicisation of intercommunal relations caused by the civil war.

12 Mediation and arbitration by state or state-supported agencies in Ghana

12.1 Formal arbitration by land sector agencies

12.1.1 The Land Title Registry Adjudication Committee

The Land Title Registry was set up in 1986 in order to tackle the issue of 'insecurity of tenure' through a progressive and systematic registration of titles for all landholdings in the country. It was also intended to convert the old Deeds-based records held in the Deeds Registry to registered titles. (The Deeds Registry dates from early colonial times). By rejecting the idea of transaction-based registration, the enormity of the task of initial registration, in a country where the majority of land even in urban areas is still held through customary or informal/unregistered titles, had to be managed through the device of piecemeal declaration of registration districts. Since 1986, title districts have been established only in Greater Accra and Kumasi; in these areas, it is a legal requirement that all land be registered. Meanwhile the Deeds Registry has continued to operate for formal titles outside the registration districts. The process of initial or first registration, which involves mapping and ensuring that there is a good root for the title claimed, is almost bound to lead to disputed claims, and hence the Registry was obliged by statute to establish a Land Title Adjudication Committee in each district to rule on disputes over title registration.[30] The Committee consists of a Chairman and two others 'appointed by the Secretary [now the Minister of Lands] on the advice of the Board [Title Registration Advisory Board]'.

Unfortunately, the record of the Title Registry in processing claims and dealing with disputes has been even worse than expected. After more than 15 years of operation, only 12,000 titles had been registered and a backlog of 47,000 applications had built up, increasing each year. Worse, of the 12,000 titles registered, it is estimated that half have been disputed in

30 PNDCL 152, section 13(2) and section 22.. Appeal against an Adjudication Committee ruling is to the High Court.

Box 12.1 **The Kaase case**

The Kaase Stool Land (located in an inner suburb of Kumasi Metropolitan area) was de-vested from government control in 1996. The Kaase Stool and the Asantehene then came into dispute over who had the allodial interest. In 1997 the Kaase Stool took its case to court and won against the Golden Stool in the Court of Appeal. As a result, the Asantehene lost his legal role in concurrence or confirmation of land transactions in Kaase. Because of the enormous difficulties this created with the established patterns of land transactions in Kumasi, the Arbitration Committee initiated a hearing and invited the Kaasehene. The Committee got the Kaasehene to agree that in spite of the legal position, he should nevertheless send land transactions approved by him to the Asantehene out of respect for 'traditional practice' and recognition of the Asantehene's 'overlordship'.

the courts (Toulmin, Brown and Crook 2003). The Adjudication Committees themselves have been severely hampered by lack of resources and basic equipment, made worse by the fact that parties bringing cases are not charged any fees, whilst Committee members are paid only notional allowances. Many cases collapse due to non-appearance of counsel and inadequate briefs. It is estimated that by 1998, there was a backlog of 200 cases, but only 34 had been dealt with the previous year. With the ending of World Bank Urban II funding in 1998, the Adjudication Committees in Accra and Kumasi virtually collapsed, and the Kumasi Committee has not to date been reconstituted. As of 2004, a list of nominations was still awaiting approval by the Minister (Yeboah 2005a).[31] It may be concluded that disputes over title registration have led to a serious slowing down and even disillusionment with the system. Potential title applicants have either abandoned the system, simultaneously lodged a deed in the Deeds Registry (the preferred alternative) or taken their grievance to the High Court.

12.1.2 The Lands Commission Settlement and Arbitration Committee

The Lands Commission as provided under Article 258 of the 1992 Constitution and the 1994 Lands Commission Act, consists of a national Commission (appointed by the President) with a Secretariat and ten Regional Commissions, each appointed by the Minister for Lands and Forestry. Each Regional Commission has a discretionary power to set up a Settlement and Arbitration Committee, which can settle disputes over land transactions and land claims on a voluntary basis. Before 2000, the Ashanti Regional Lands Commission operated such a Committee, which consisted of five members: a paramount chief, the Town and Country Planning officer, a legal practitioner and two officers of the Lands Commission.

The process of arbitration in this Committee was informal, in keeping with its voluntary character – the parties had to agree to attend. As most of the evidence is already available in the written documents before the Commission, there was no formal presentation of evidence, although the parties could, however, be represented by lawyers. The aim of the process was conflict resolution through an agreed settlement.[32] But the records show that the services of the Committee were not widely known or used and only a few cases had been dealt with since 1996, at a rate of one or two per year. One particularly successful piece of conflict resolution involved the Asantehene and one of the subordinate Kumasi chiefs, the Kaasehene (see Box 12.1).

Since a new Regional Lands Commission was appointed by the new NPP government in May 2002, no new Arbitration Committee has been set up. The current Commissioner, who is a lawyer, prefers to have a 'Technical Committee' (consisting of the Chairman, the Regional Lands Officer and a paramount chief) to deal with any problematic cases.

31 Interview with Land Title Registrar, Kumasi, 12 April 2002.

32 Interview with Deputy Regional Lands Officer, Kumasi, 13 December 2002.

The reason why the Arbitration Committee in Ashanti was so little used and eventually abandoned would seem to derive from the fact that most disputes which arise over transactions or claims submitted to the Commission are dealt with informally by individual officers. These officers use their specialist knowledge and discretion to offer a solution. The Lands Commission itself is the repository of all documentation (except of course for titles registered with the Land Title Registry) and the Deeds Registry is also physically located in the same offices. As one senior officer put it: 'We have all the evidence anyway which is required and which will be called upon by any court, so why go to court? It is cheaper to get a Lands Commission officer to do it, if both parties agree.'[33]

12.2 Informal mediation and conflict resolution by officers of land agencies

As noted above, officers of the Lands Commission at both regional and district levels are routinely engaged in sorting out problems with disputed land allocations. As Lands Commission officers they are exercising a discretionary authority which is inherent in the role of their agency; they have access to the documentation, specialist expertise and the power to make administrative decisions with legal consequences. But at the district level, much of this work involves inter-agency collaboration (and conflict) with the Lands Commission, Physical Planning (formerly Town and Country Planning) Department (TCP) and the Survey Department as well as with chiefs. One of the legal reasons for this is that under the law requiring Lands Commission 'concurrence' to all customary land transactions, the Commission must clear all transactions with the local planning authorities before giving its concurrence. There is therefore a continuing need for communication and collaboration between the two agencies.

Another reason is that before Lands Commission offices were set up in a rural district such as Asunafo, or even in the regional capital town of Wa, the TCP was in effect approving allocations of plots especially where there were urban layouts, with the help of the Survey Department. Thus many individuals assumed that the site plans or surveys they obtained, after getting a chief's permission, gave them legal title. And it is clear that in Asunafo these other agencies as well as the chiefs are still allocating or approving land transactions, a situation made more complicated by the fact that the Asunafo lands are still vested in the state and hence in theory should all be managed by the Lands Commission not the chiefs. (In Kumasi, the chiefs have to give approval as part of the first stage of the formal approval process.)

The kinds of disputes that come up before these officials therefore fall into the following main types:

- Double sale or allocation (the same piece of land allocated by these agencies to two or more parties)
- Disputed ownership of allocated land which leads to multiple claimants to the profit generated by the lease or development, or government compensation (particularly prevalent in Kumasi and more recently in Wa). Often individual members of families have used a TCP document to sell land without the permission of the family
- Contested demarcations in the site plans
- Development of land allocated but left undeveloped by the original allocatee
- Injurious activities on allocated plots.

The Lands Commission office in Goaso (Asunafo District) is actually staffed by peripatetic staff from the Sunyani Regional Commission, who visit up to twice a week – usually one officer and an assistant. The four qualified Lands Officers based in Sunyani cover all 13

33 Interview with Deputy Regional Lands Officer, Kumasi, 13 December 2002.

districts in the Region. The officer who covers Asunafo appeared to work closely with the other agencies by allowing their (technically illegal) allocations to continue on a basis of mutual information, which minimised disputes. This strengthens the officer's ability to deal with disputes, which is based on their power to offer alternative plots or pieces of land to aggrieved parties, and to regularise transactions by arranging processing, surveying and preparation of leases. Where chiefs have been allocating land, either traditionally or in collaboration with village allocation committees, the officer helps regularise the transactions or resolves challenges by giving access to their documentation and can then ensure that the chiefs get their revenue. Nevertheless, the multiplicity of agencies all purporting to allocate land remains a potent source of uncertainty and conflict in the area. The Commission is now engaged in a process of what is called 'stakeholder mapping', initiated in Sunyani, which aims to agree and map landholdings in specified areas (e.g. along the Goaso–Kumasi road) in collaboration with traditional authorities.[34]

In effect, the Lands Commission officers are offering the equivalent of a court settlement in terms of the authority and certainty with which they can execute or implement possession of a piece of land, whether the original piece or an alternative piece. It is rapid, effective and of course much cheaper than going to court, even when the 'informal' payments to the officers are taken into account. The officers of other agencies are also taking informal payments for services rendered, but they do not have the ability to offer legal possession to the same extent.

The Lands Commission office in Wa was faced with a much more difficult situation caused by rapid urban development in an area where de-vesting of all northern lands in 1979 had left a situation of virtual anarchy, caused by the total absence of records of who had been the traditional owners of the land which the colonial government had appropriated in 1927 and then developed in the years since.[35] The only recent documentation consisted of allocations and site plans by the TCP. Thus whenever a lucrative urban development was begun in or around Wa, a number of families, segments of families and rival *tendana* would spring up to claim it as their traditional property. The Lands Commission here has been trying to deal with these disputes 'in house', often revisiting the allocations made by the TCP. But it has been unable to deal very well with newly virulent disputes between *tendana* and chiefs, the latter now claiming 'Akan' type powers of allodial ownership, which have tended to end up in court (see below, section 14 on chiefs' courts).[36]

The dispute settling activities of the Town and Country Planning officers in Kumasi and Goaso have also been of some importance either because of their connection with Lands Commission work (including concurrence) or in their own right on planning and control issues. In Goaso, although the Planning Officer was also covering two districts and only visited once a week, he claimed to have a large role in dispute settlement, which he regarded as a 'social responsibility'.[37] This arose mainly because of a popular misunderstanding that his involvement in preparing layouts for chiefs and their communities, or for individual developers, made him an official allocator of land, rather than the Lands Commission. In practice, although the surveying and mapping function is part of the official role of the TCP this had been extended into much more of a semi-official private service such is the pressure of demand. He identified three typical sources of complaint which came to him:

- Complaints from chiefs and landowners when they see surveyors or other individuals apparently demarcating land in their area. They suspect the TCP is behind some allocation of land or a development plan which they don't know about.

34 Interview with District Lands Officer, Goaso (Asunafo District), 28 November 2002.

35 The Northern Territories Land and Native Rights Ordinances of 1927 and 1931 vested all lands in the Governor 'in trust' to be used for the benefit of the peoples of the area. But most government building and development was from then on implemented without any reference to local landholders.

36 Interview with Regional Lands Officer, Wa, 24 February 2002.

37 Interview with District Town and Country Planning Officer, Goaso (Asunafo District), 12 December 2002.

Box 12.2 **Two cases dealt with by the Kumasi TCP Department**

The parties involved were invited by the department and at a meeting presided over by the Head of the Department, the Deputy and some Technical staff, each of the parties was requested to state his case and to tender any supporting documents in evidence. Site visits were undertaken to make measurements and to make personal observations, and the parties were shown the relevant zoning maps and planning regulations.

In the case of damage caused by a developer, it became clear to the parties during the explanations, 'without the need to explicitly state it', which of them was flouting the law and was at fault. In the end the guilty party admitted his fault and decided to cooperate in resolving the issues amicably.

In the case of a development objected to by residents on the grounds that it blocked an access road, the evidence of the re-zoning map demonstrated that the developer was right in that no access road had been provided in the original layout. Before the re-zoning, the area was an open space that was used by the residents as an access road. In fact the process had to be adjourned to allow tempers to calm down and to provide the parties time to digest the official reflections on the issue. The officials did then succeed in brokering an amicable settlement between the developer and the complainants. Instead of a road access, the developer agreed to leave a portion of her land for a pedestrian access (not vehicular) to the properties in the vicinity.

(Yeboah 2005a)

- Complaints about encroachment on lands, which may have been allocated many years ago – sometimes 15 years previously – but not developed. This is often the source of many trespass cases.
- Complaints from family members who claim a share of land which has been allocated by the Lands Commission. As soon as the landholder begins development, they spring up to demand their share.

His role is really that of a 'fixer'; he knows how to sort out a problem by talking to his colleagues in the Lands Commission, the TCP office or the District Assembly administration and the Survey Department and (for a 'contribution to his costs') can provide maps, site plans and documentation which will help the parties to get a regularised settlement. His explicit offer is that he can save the expense and uncertainty of a court action, and this is a justifiable claim. He provides an effective avenue of dispute resolution for local people who are completely mystified by the institutional complexity of the land administration and land transaction system and do not know how to pursue a legal claim.

The TCP Department of the Kumasi Metropolitan Assembly also engages in informal conflict resolution, primarily over planning and land use issues in the urban area. Issues that are not concluded at the departmental level are usually referred to the Regional Planning Committee, which has a bigger composition of officials from related departments in the region.

One major set of problems derives from the constant pressure of development activities, where developers damage drainage and neighbouring structures, or close access roads and block drainage in residential areas. Where whole communities are involved, the potential for illegal action and violent conflict is quite high, if petitions to the TCP do not result in amicable settlement. Box 12.2 describes the procedures followed in two such cases .

These dispute resolution activities undertaken by officials are informal, in the sense that they are not documented by the TCP Department, and the department does not possess any legal authority to enforce mediations. The parties involved in such disputes are not normally given any documented evidence that the issue has been heard and resolved. Nevertheless, officials claim that parties have tended to respect the arrangements arrived at.

12.3 Informal mediation and conflict resolution by officers of other state agencies

12.3.1 Ministry of Agriculture and Forestry Department

In Asunafo District, the chiefs of the case-study villages confirmed that officials of the Ministry and Department played a very helpful role in the preparation of maps and boundary markers, which are crucial elements in dispute resolution. In Ayomso for instance, the Forestry Department helped the Stool to prepare topographic maps of the Stool lands and their allocations. In the case of allocations to individual farmers, officers of the Cocoa Services Division, who are 'on the ground' in the area and know the farmers well, help farmers to prepare farm plans for approval by the chief.[38]

Dispute resolution by officials of the Ministry, however, was limited to very local and informal 'friendly advice'. Assistant Agricultural Officers (AOs) who work at the field level as Extension Agents reported that insofar as they got involved in land disputes it was to help divorcees to divide their land (through their knowledge of the topography and the crops) and saw it as their role to persuade men that their ex-wives should be given their fair share. But they admitted that with more serious intra-family land allocation and inheritance disputes, they were rarely able to provide amicable settlement and that these cases tended to go to court.[39]

In the Nadowli District, the District Agricultural Officer of this remote rural area was clearly deeply engaged in land management and agricultural development issues – partly because he had remained in his post for an unusually long time and knew the area and its people very well. He had been particularly involved in dealing with the consequences of disputes arising between chiefs and *tendana* over use of land for new cash crops such as cashews.[40] In a sense he had become an 'advocate' for farmers' interests in the local development debate.

The popularity of the Agricultural Officers in both Asunafo and Nadowli was confirmed quite strongly in the village surveys: 44 per cent of respondents in Asunafo and Nadowli Districts said they would trust the Agriculture Officer to settle a dispute, giving him a rank of 7, compared to 17 per cent in Kumasi. Nevertheless, whilst their activities are likely to continue as an integral part of the job, they cannot realistically be seen as the basis for any more systematic form of local ADR. The Agricultural Officers may well be seen as 'friends of the farmers', but they do not for professional reasons want to be more openly involved in local disputes, for fear of the consequences of being associated with one side or the other. And the understaffing and under-resourcing of their agency is such that they would not want to take on any extra burdens.

12.3.2 The District Administration and Assembly

To some extent, the colonial tradition of rural district government officials resolving disputes outside the formal judicial system remains a part of Ghanaian district administration. Two officials can be involved: the District Coordinating Director (DCD) (a civil servant who acts as head of the District Assembly administration and the decentralised district civil service agencies) and the District Chief Executive (DCE), a political appointee who directs the District Assembly. The evidence from the two rural districts suggests however that these officials tend to remit any minor land cases to what they see as the appropriate technical Ministries – Agricultural Officers, the Lands Officers or even the Department of Social Welfare (if they are 'family' cases).[41]

In the case of more serious land disputes involving chiefs or whole communities, there are two more formal bodies which might be involved: the District Security Committee (DISEC) and the

38 Interview with Ayomsohene and elders, 13 June 2003.

39 Interview with Acting District Agricultural Officer and 2 Assistant AOs, Goaso.

40 Interview with District Agricultural Officer, Nadowli, 26 February 2003.

41 Interviews with DCD Asunafo District, 19 Feb 2002; DCD, Nadowli District, 26 February 2003.

Justice and Security Sub-Committee of the District Assembly (JSSC). DISEC is primarily involved with conflicts that could become violent and a threat to the peace and security of the district, which is reflected in its membership. As well as the DCD and the DCE, it includes the District Commander of Police, the Bureau of National Investigation, and representatives from the Immigration, Customs and Excise and Fire services.[42] It would be involved for instance if illegal timber felling in forest areas spilled over into violent confrontations and necessitated police action, or if chieftaincy disputes began to involve the confrontational mobilisation of supporters. Its remit is to try to resolve conflicts before they pose a threat to security.

The JSSC is one of the statutory sub-committees of the District Assembly and has a list of prescribed functions:

- To examine related conflict areas in the district
- To recommend ways and means to resolve disputes to the Executive Committee of the Assembly
- To ensure ready access to the courts for the promotion of justice in the district, e.g. ensuring that premises are available for use by the Magistrates Courts and that police logistics are adequate
- To initiate the drafting and enactments of by-laws to address specific problems in the district.

It normally includes Ghana Police and Department of Social Welfare representatives, and again has a mandate to try to resolve disputes before they assume more serious proportions, or result in legal action. In that sense, it is another avenue for informal dispute resolution although it is not a judicial or even quasi-judicial body with any land-related function. There is little evidence that it has so far played a significant role in our case-study areas, although investigations in the neighbouring Brong-Ahafo district of Ahafo-Ano North revealed that it had dealt with a number of land-related disputes such as the very common peri-urban issue of chiefs attempting to give out land to urban developers on which their citizens still had cocoa farms (Yeboah 2005b). Unlike the more informal practices of the officials in the land agencies, these dispute resolutions are documented and filed in District Assembly files. There is therefore a potential here for the development of some kind of district-level 'alternative' tribunal with a popular (elected) membership – with the caveat that it is a state body closely associated with the security and governance functions of the local government authority. It is not offering a voluntary mediation, but is carrying out what is sees as an official duty to resolve conflict through political intervention.

12.4 ADR by a state-supported agency: the Commission for Human Rights and Administrative Justice (CHRAJ)

A properly constituted ADR system should combine the characteristics of voluntary mediation or the search for an agreed settlement, with the recognised autonomy, trustworthiness and impartiality of the third party entrusted with the mediation (Brown and Marriott 1999; Grande 1999). A state agency can provide these characteristics provided it has been given sufficient independence of operation and the necessary institutional resources. In Asunafo District, it was discovered that the District CHRAJ office has developed, perhaps unexpectedly, into a highly successful dispute settlement institution offering a simple, cheap and honest service which could be taken as a 'best practice model' of what an ADR mechanism should look like. Since the mid-1990s, the CHRAJ staff have been offering a professionally impartial and informal mediation service with written documentation of decisions, settling around 200 cases a year of which around 30 per cent on average each year are land cases (see Table 12.1).

42 See The Security and Intelligence Agencies Act 1996.

Table 12.1 **CHRAJ, Asunafo District, Goaso: Land-related cases brought for settlement to the District Office as a proportion of total cases, 1994–2002**

	*1995	1996	1997	1998	1999	2000	2001	2002
Total cases submitted	251		257	180	235	146	157	
Cases settled	195			123	188	113	129	
Land cases:								
Estate matters**			42	43	31	17	23	
Sharing of farm or crops		13	8					
Recovery of possession	31	6						
Unlawful sale		4	1					
Inheritance		3	6					
Landlord–tenant	28		21	13	22	24	21	
Trespass		11	7		4	2	9	
Confiscation								
Destruction/Damage		8	13		1	1		
Total land cases	**78**	**70**	**104**	**56**	**58**	**44**	**53**	
Land cases % of total cases	**31**		**40**	**31**	**25**	**30**	**34**	

* includes 60 cases September–December 1994.
** Before 1997 'estate matters' includes a number of other types of case using categories which were discontinued.

The CHRAJ, which was set up under the 1993 Act, is a constitutional body provided for in Chapter 18 of the 1992 Constitution; its autonomy and independence are constitutionally guaranteed. In some respects it is the successor to the previous Ombudsman, but has much greater powers. It 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. Nevertheless it is empowered to go beyond 'legalities' to find settlements which are in accord with the 'dictates of justice', and is enjoined to seek negotiation and compromise.

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. Since it started work in the early 1990s it has been extremely proactive and has attracted large numbers of cases. By the year 1999 it had disposed nationally of 27,975 cases (out of 29,011 received), over half of which seem to have been about unfair dismissals, another quarter about property (inheritance cases, family disputes and landlord–tenant relations), and a further quarter about wrongful arrests and ill treatment by state officials (Human Rights Watch 2001; Asibuo 2001). It had also been involved in some high-profile confrontations with the NDC government over corruption allegations against three ministers and a Presidential staff member, which raised its public profile considerably (Asibuo 2001). Under the administration of Emile Short, it acquired a reputaton for being proactive on issues such as prison conditions and abuse of women, which also enhanced its profile in the media.

It is very unusual amongst national human rights agencies of this kind, however, in that under its founding legislation it is supposed to have offices in all regions and districts of Ghana, thus giving it, in aspiration at least, a 'grass roots' level of action. Not all districts actually have an office yet – mainly because of the financial constraints suffered by the agency, which have made it difficult to spread its staff across the whole nation in this way. Indeed, it seems to have difficulty retaining qualified legal staff in its national offices, especially as all Regional Directors have to be legally qualified (Asibuo 2001). In practice it has indeed sought to broaden its activities beyond its formal mandate and has acquired a reputation for being willing to assist rural people with 'advice'. This is perhaps why so many

of its cases have involved complaints against private individuals or companies – employers, landlords, family members (Human Rights Watch 2001). And this may also explain how it came to be involved in ADR for land cases in Goaso, the headquarters town of a rural district in Brong-Ahafo.

The Goaso office, which was set up in 1994, has four officers – a District Director and three assistants including a Bailiff. Their investigation of cases and dispute resolution service is free, supported by government through payment of their salaries. The office began by dealing with mainly family matters – domestic violence, child maintenance and inheritance disputes. Many of these inevitably involved lands and other property and after a short time the office found itself dealing with a steady stream of land cases spontaneously referred to it by disputing parties who had heard about its dispute resolution service. By 1995, the number of cases involving landed property had already risen to 78, or 31 per cent of the total, and it has remained around that proportion up to 2002 (see Table 12.1). As can be seen from the Table, the majority of the land cases concern 'landlord–tenant' relations (mainly *abunu* – a sharecropper contract in which the harvest is shared half and half between the landowner and the tenant – and *abusua* contracts), reflecting the character of the district's agriculture where many migrants came to farm cocoa in the 1960s and 70s. Inheritance disputes and allegations of trespass have formed the other main types since 1997.

Why have so many people started to bring their cases to such a new and still relatively unheard of body in the district capital, a body which does not even advertise itself as being a specialist in land cases as such? The CHRAJ is not that well known, although it is better known (as would be expected) in Asunafo. In our village-level popular survey nearly 30 per cent of Asunafo respondents said they would trust CHRAJ ('a lot' plus 'to some extent') to settle a land dispute, compared with 16 per cent in Kumasi and 18 per cent in Nadowli. But overall, it ranked 15th out of 17 kinds of person trusted to settle a dispute, and 12th in Asunafo.

- The first and most obvious reason is that it is free; but this, it would seem, is not the only or even primary factor. In fact, one officer commented that its free character puts some people off. In a chief's court, people have to put down a 'stake' which is lost if the case goes against them. So winners can recoup some of their expenses. But with CHRAJ, everybody has to find their own expenses, for travel and other minor costs such as helping their witnesses to attend, and for Survey Department fees if required.

- A second main explanation for its attractiveness is in fact its speed and simplicity. A case starts by the complainant making a written complaint, which Commission staff will help them with. The CHRAJ office sends this to the respondent, who has ten days to make his or her own response, which again the CHRAJ will help them with. If both parties agree to a hearing, a date is fixed by mutual agreement and witnesses are also informed. The preliminary hearing is in private in the CHRAJ office, with only the parties, their witnesses and a CHRAJ officer present. The parties' respective statements are read out to each other (translated if necessary into the appropriate languages). Questions and discussion are encouraged and officers make sure that all is explained fully to the parties. With a land case, a site inspection date is agreed and the Survey Department informed. After site inspection a second hearing (and third or more, if required) is held to try to resolve the difference amicably. Once a settlement is agreed the Survey Department is required to map the agreed demarcation. The agreement is documented and signed by each party in front of the witnesses who also sign; everybody gets copies. The docket is then sent to the Regional Office for monitoring and filing. Records of previous cases show that a settlement had been reached in some cases in *as little as three weeks*, where all parties cooperated. Others take longer especially where witnesses or parties do not turn up and hearings have to be rescheduled.

- A third factor in the success of the district CHRAJ is undoubtedly its professionally impartial, informal and non-intimidatory atmosphere. A number of cases were observed, and it was obvious that officers try their best to be patient, helpful and neutral between the parties, explaining whenever necessary. The proceedings are

conducted in Twi or in other Ghanaian languages (staff at this office spoke other languages from both the northern and southern regions, an important factor in an area with lots of migrants). Officers took their time to explain issues to the parties, and parties were obviously comfortable with asking questions. This is especially important when parties feel that the others are lying, or feel surprised by the story they are telling; tempers can get heated. A calm and professional attitude is critical to prevent the process from collapsing. It was observed however that on the whole the parties did show respect for the officers.

The weaknesses of the CHRAJ operations are perhaps those inherent in any ADR procedure, and may be responsible for the apparent decline in the overall number of cases coming to the Goaso office.

- They depend very much on the voluntary consent of the parties. If they become aggrieved with the process, they can walk away at any time. The enforcement depends on the parties' genuine acceptance of the agreed settlement, and there are no costs to be gained as there is no 'judgement' of who is at fault.
- As the settlement hearings are in private – which in one respect is an advantage as it perhaps permits a franker exchange of information – there is no 'public witnessing' of the agreement and hence the social pressure and cultural or moral sanctions associated with more traditional forms of dispute settlement are absent. What is regarded in the Western tradition as the 'advantage' of external impartiality may be seen in the Ghanaian rural context as the disadvantage of using strangers who do not understand the local reality.
- The status of CHRAJ settlements is also ambiguous. What happens to CHRAJ judgements if they are later brought to court has not been very much tested. If the officers are not experts on land law, errors could be made which a court might overturn. But they are *prima facie* evidence of an agreement which it would be impossible to deny.

These weaknesses apart, however, the CHRAJ can be regarded as a highly successful model of ADR. It is supported by the state for the benefit of citizens, but manages to avoid the usual negative connotations of state institutions, such as difficulty of access, expense and delay and, by comparison with the courts, a non-technical and flexible approach to getting a settlement. Like any good ADR, its primary focus is on getting agreement. And it does not suffer from the problems which are often associated with community-based ADRS, such as perfunctory or summary procedure, unequal power relations or 'crony justice' dominated by local power holders. The fact that it is supported by the state without being 'of' the state (indeed its mission is to challenge executive power if necessary) is one of its strongest features, insofar as it enables a professional and cheap service to be offered to poor people who otherwise could not afford lawyers or even other traditional forms of dispute settlement.

13 Mediation and arbitration by state or state-supported agencies in Côte d'Ivoire

13.1 Formal arbitration institutions

13.1.1 The 1998 Rural Land Law local land management committees

Under the provisions of the 1998 law, the formal committees at village and sub-prefecture level which are charged with investigating, establishing and mapping all customary local landholdings also have the power to settle any disputes which arise over the attribution of land rights. The Prefects and Sub-Prefects have the main responsibility for setting up these committees, beginning with the Comité de Gestion Foncière Rurale (CGFR) at the sub-prefecture level. The membership of the CGFR comprises six official members, representing the Ministries of Agriculture, Environment and Forests, Housing and Urban Affairs, Economic Infrastructure and the Survey Department (Service du Cadastre), with the Sub-Prefect as Chair, and six village representatives. In order to choose the village representatives, the Sub-Prefect is supposed to organise a meeting of at least two representatives from each village in the sub-prefecture, which then chooses the six people to serve on the CGFR for three years.[43] The CGFR can coopt 'non-voting' members for advice, representing the local PFR agency, if one exists, representatives of the parties concerned in the question under discussion, especially from the village committees of the relevant villages, and anybody else considered relevant. At the village level, the Comités Villageois de Gestion Foncière Rurale (CVGFR) are set up by the Sub-Prefect, the only requirement being that the members include the *chef de terre* (land chief or land priest) of the village. The secretarial functions and administrative support for both levels of committee are provided by the local offices of the Ministry of Agriculture. The members of these committees do not receive any remuneration.

If these committees had been set up and operated as intended, they would have provided an alternative to both the 'traditional' dispute resolution procedures offered by local chiefs, and the official agencies such as the Prefectoral service, the Ministry of Agriculture and the local courts themselves – the Tribunaux. But the reform has been plagued by major problems ever since its promulgation:

- Interviews with officials of the Ministry of Agriculture and the Prefectoral administration confirmed that there had in fact been no implementation of the provisions of the law in the areas studied, and no training of the cadres who would have to operate it.
- There has been virtually no effort to make the public aware of the law through public information campaigns. At the time of the discussion of the law in the National Assembly, parliamentary delegations composed of both government (PDCI) and opposition parties (RDR, FPI) went on missions to explain the bill to all the regions of Côte d'Ivoire. (The bill had almost unanimous support in the National Assembly.) But they only held meetings in the administrative centres of the Prefectures, in practice excluding the majority of rural inhabitants.[44] Focus-group comments in the village case studies confirmed that most villagers had not heard of any of the main provisions of the law (particularly the provision for Village Land Management Committees), or had only a few vague or mistaken ideas about it. The commonest misapprehension was

43 See *Décret no. 99-593 du 13 octobre 1999*, and *Arrêté no. 041 du 12 juin 01*.

44 According to Chauveau, customary authorities were also invited by their Prefect to complete a 'questionnaire' for the information of the National Assembly (Chauveau 2000).

that the law prevented non-Ivorians from holding any kind of land right whereas it does in fact permit foreigners to obtain 99-year leases or to rent land; what they cannot get is a rural land title (Certificat Foncier). Another misapprehension which worried chiefly authorities especially was that the law gave the 'right' to any Ivorian to get a piece of land anywhere in the country without reference to local customs and procedures relating to strangers of Ivorian origin (*allocthones*).[45] Other worries focused on the tax implications and costs of formal registration of title, and the confusion over which member of a family would be given the title – and hence have the capacity to evade traditional family controls over land. Another issue arises from political suspicion: the fear that committees for the management of land matters would be politicised and favour members of whichever party the local notables belonged to (a realistic fear given the history of the PDCI).

- The supposed intentions of the law became the subject of virulent political contestation during the upheavals of 1999 (the first military coup), the elections of 2000 which brought the FPI to power, and the attempted coup of 2002 and ensuing civil war. This politicisation to a large extent accounts for its non-implementation.

Although one can hardly blame an unimplemented law for the conflicts which erupted in the cocoa-growing areas after 1998, it is clear that rumours and anticipatory fears sparked by the lack of public understanding fed into the emerging political conflicts.

One provision which was constantly cited by the rebel movements involved in the Marcoussis peace negotiations in Paris in January 2003 was the clause (Article 26) which took away the right of foreigners who had obtained a land title before 1998 to pass that title on to their heirs. Once that foreign owner dies, the title is given to the indigenous or allodial land owners and the heir (unless he or she has become an Ivorian) has three years to negotiate a lease – which the owners are not obliged to give. The government agreed to amend this clause, although in practice its provisions affect only a handful of individuals (72) owning 2,093 hectares. It has little relevance to the vast majority of migrants whose rights are based on local 'customary' arrangements, regarded by the law as occupiers 'in good faith'. These secondary or 'derived right' holders are in fact protected by a clause in the law which provides that when a land certificate is given to a customary owner, the certificate must include a list of the other occupiers and their rights which the owner is obliged to respect.[46] That this clause could become the subject of negotiation between rebels and government reinforced the firmly held conviction of the FPI and local communities in the south-west that Ouattara's RDR party not only represented northern Ivorian migrants but also the 'foreigners' (Burkinabés) accused of being behind the rebellion.

From the perspective of migrant communities, attacks on their farms and attempts to 'renegotiate' land use arrangements since the late 1990s had increasingly ignored the distinction between northern Ivorian migrants and foreign migrants; and local communities had begun to use the supposed ban on 'foreigners' owning land as a legitimation of these attacks. According to one foreign migrants' focus group, the Kroumen began to habitually taunt them with such phrases as: '*Alassane Ouattara est votre frère, on va vous chasser*'.[47] This in turn sparked much of the violent resistance and even retaliation on the part of migrant communities. The coup and ensuing civil war of 2002 thus marked a turning point in relations between migrants and host communities in the south-west, consolidating and deepening local hostility towards to foreigners and migrants and jeopardising the security of migrants' land rights. In this context, the prospects for implementation of the 1998 law will depend upon a very long and uncertain process of political settlement and reconciliation.

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45 See the report of the Stakeholders' Workshop held in Bouaké: *Rapport de l'atelier de concertation, Bouaké, le 14 mars 2002*.

46 *Décret no. 99-594, article 14*.

47 'Alassane Ouattara is your brother so we are going to throw you out'. Focus group of foreign migrants, village of Konékro, Grabo Sub-Prefecture, September 2004.

13.1.2 Local Commissions for the settlement of farmer *vs* cattle-herder disputes

In the Katiola area, one major cause of conflict over land comes from the clash between transhumant Peul cattle herders, and local settled farmers. Each year, mainly during the dry season, the cattle herders are accused of causing damage to farms which then become the subject of demands for compensation and renegotiation of what are long-standing traditional arrangements. In the Sub-Prefecture of Katiola, the Sub-Prefect estimated that 9 million CFA francs (around £9,000) of damage had been caused in the previous year (2001) alone.[48] As in the south-west, for a long period the local communities perceived the government administration (the Prefects), the courts and even their own chiefs as friends of the cattle herders, and not always to be trusted for impartial resolution of conflict. In 1996 a set of formal 'Commissions' was introduced under a new law (*Décret no. 96-433*) which were intended to provide an officially supported ADR solution to the problem. There are three levels of commission: at village level, the *commission villageoise de règlement à l'amiable*; at the Sub-Prefectoral level, the *commission sous-préfectoral de recours et d'arbitrage*; and at the Prefectoral level, the *commission préfectorale de recours et d'arbitrage*. The village commission consists of the village chief as chair, two 'notables' (elders), one representative of the farmers, one representative of the cattle herders and one 'influential person' or opinion leader from the village. The law is a significant step in Ivorian legal practice in that it specifically requires that disputes between herders and farmers over damage to farms must first be submitted to this form of mediation or negotiated settlement – in effect, an ADR body. If the village commission is unsuccessful, within eight days the case must go to the Sub-Prefectoral Commission, which is presided over by the Sub-Prefect and includes representatives of the local Ministry of Agriculture office as well as the village representatives.

The evidence from the Katiola area suggests that the disputes nearly always end up on the Sub-Prefect's desk, primarily because of the difficulty in getting any agreed damages actually paid. Ministry of Agriculture officials are used to assess damages and a sum agreed. But the Peul herders are, almost by definition, elusive and always on the move and the delays in procedure mean that once the Peuls have left the area, it is difficult to get them to pay up, even after the Sub-Prefect has taken up the case. Thus the elaborate hierarchy of Commissions has not fundamentally altered the nature of the problem; where traditional relations of mutual collaboration break down, it requires strong executive action by the Sub-Prefect or even the Prefect to enforce agreed compensation.

13.2 Informal mediation and conflict resolution by officers of land administration and other agencies

13.2.1 Principle state agencies for planning, development and allocation of land use

In the urban areas (defined as the built-up and scheduled areas of the communes or municipalities) the principal state agencies in Côte d'Ivoire concerned with the planning, development, allocation, and titling of land are:

- The territorial administration (Prefectoral service) under the Ministry of the Interior
- The Ministry of Housing and Urban Affairs (Ministère de la Construction et de l'Urbanisme – MCU)
- The local government or municipal authorities (*communes*)
- The BNETD (Bureau National d'Etudes Techniques et de Développement), a special agency directly under the Presidency, before 1998 known as the DCGTx (Direction et Contrôle des Grands Travaux).

48 Interview, Sub-Prefect of Katiola, 27 June 2002.

These various agencies have overlapping or competing functions and there is a constant interplay of cooperation and conflict amongst them. Abidjan remains a special case in that in spite of its '*communalisation*' in 1980, when it was divided into ten municipalities, its territory is predominantly state land apart from a few peri-urban areas still under customary tenure and its housing and land management is run directly by the Ministry of Housing. Most of its modern development since 1960 was pushed through by central state agencies – the SETU (Société d'Equipement des Terrains Urbains) until 1987, and thereafter a special unit within the DCGTx, as well as state-owned housing corporations. The showpiece capital, Yamoussoukro, was also built by these agencies in the 1980s. The BNETD continues to produce the main urban planning documents (*Plan Directeur d'Urbanisme – PDU*) for Abidjan and secondary towns throughout the country. In the secondary towns and municipalities outside Abidjan the Prefects remain a dominant force, in that they preside over the multi-agency Commission d'Attribution which allocates plots of urban land, oversees the process of registration of title, and gives permission to develop. As President of the Commission, the Prefect in practice allocates land on behalf of the other agencies – which in the smaller towns would have no local presence – and the elected municipalities are left with only the technical task of creating a register of plots for the urban layout (*lottissement*). In some towns, there are two registers in operation, the Prefect's and the Mayor's! (Ouattara 2002; Diahou 1990; Dubresson 1993; Dembele 1997). In Bouaké, which is the second largest town in the country with nearly 700,000 inhabitants, the Prefecture still has a department which deals with land allocations and building permissions, the *Service de domaine*. It is the Prefect who issues the *lettre d'attribution* which serves as the first stage of documentary proof that an applicant has a right to the plot.

In the rural areas, the principal agencies are:

- The Prefectoral service, which is equally as dominant as in the urban areas.
- The Ministry of Agriculture (Ministère de l'Agriculture et des Ressources Animales). The Ministry has a special department which deals with land management and land tenure, the Direction du Foncier Rural et du Cadastre Rural, formerly known as the Direction de la Règlementation et des Affaires Domaniales. The local offices regularly provide farmers with documentation on the extent of their farms and the agreements they have made with the chief or local landholders – so-called '*attestations de plantation*'.
- The local government authorities (*communes*), which manage significant amounts of agricultural peri-urban land.
- Special central agencies: the PNGTER (Programme national de gestion des terroirs et d'équipement rural), which is a division of BNETD and was given the job of extending the implementation of the Plan Foncier Rural in 1998; and ANADER (Agence nationale d'appui au développement rural), which is the national rural development agency.

13.2.2 Kinds of land disputes dealt with by administrative officials

As in Ghana, many of the land disputes which arise in Côte d'Ivoire are caused by the actions of the governmental agencies themselves, either because of conflicting or unauthorised allocations of land rights and development permissions, or because of conflicts with communities themselves over abuses of power by the administrative authorities in the division and sale of land. Thus the ability of officials to resolve disputes depends very much on whether they are accepted as 'appropriate' arbitrators. The evidence from Bouaké and the other cases shows that the administrative authorities are only used in the following circumstances: (1) if they are seen as capable of resolving inter-agency problems, particularly between the Prefect and the local government authority (hence the dominant role of the Prefects); (2) if they are not a major party to or cause of the dispute, e.g. through maladministration of compensation claims or plot divisions; (3) if they are seen to be politically sympathetic (this is particularly the case in the rural areas). A particularly interesting trend in Bouaké noted in the period just before the civil war (to some extent

Table 13.1 **Land disputes in Bouaké dealt with by the administration**

Type of neighbourhood	Place	Source of dispute
	Oliénou	1. Land reserves occupied by third parties 2. Problems of clearances with a view to legal occupation
Peri-urban	Tolakouadiokro	Disregard of the procedures for dividing up the land on the part of the inhabitants (one plot for three acquirers)
	Fètèkro	Division of land by villagers but plots not assigned
	Konankankro	Land occupied by villagers without a title to the land
	Koffikro	Disregard of the procedures for dividing up the land on the part of the administrative authorities
	Houphouet-ville (Banco)	Site divided up but letters of assignment not sent to applicants
Urban	Hippodrome	Administrative land reserves divided up and/or occupied by third parties who refuse to cede them to the rightful proprietors
	Diézoukouamékro	Spontaneous settlement, inhabitants threatened by clearance

replicating what has happened in Abidjan), was a re-appropriation of control of over particular kinds of land allocation disputes by local communities led by their chiefs, in defiance of the administration.

13.2.3 Land disputes in the urban/peri-urban areas

In Bouaké, the main disputes involving communities within the municipality (which includes an extensive peri-urban area of rural villages) can be divided into two types: (1) those involving illegal or informal settlement and irregular division and allocation of plots, which have been dealt with by administrative officials, and (2) those involving claims against the governmental authorities for compensation or maladministration, which led to the communities themselves taking over the management of the plots. These takeovers have generated further intra-community disputes over the resulting plot allocations.

The case-study areas of Bouaké yielded the following kinds of cases which had been settled (or were in process of settlement) predominantly by officials of the Prefecture (Table 13.1).

The Diézoukouamékro and Houphouet-ville cases are particularly interesting in that they are examples of an 'informal settlement' or shanty town on a very poor site, where the inhabitants have persuaded the authorities to regularise their occupation. This has happened in many important areas of Abidjan e.g. Koumassi in Zone 4 during the 1990s.

Another set of cases arose from disputes over the process of plot layout, which under the laws relating to urban land generates compensation to the community landholders for the extinguishing of customary rights. These cases relate to the neighbourhoods of Tiêrêkro, Amanibo, Assoumankro (peri-urban villages) and Kongokro in the main urban area. Although compensation had been ordered as a condition for dividing up the land in these areas, the inhabitants had been neither consulted nor involved, so that their interests were not taken into account by the administration. After the layout had been created and plots began to be sold, the inhabitants had to stand by and see the administrative authorities appropriating some large plots for themselves, assigning others to non-locals, and generally

operating the urban plots as a business. Resistance amongst the local communities led to the customary landholders (headed by the chiefs) taking over the task of distributing plots at Bouaké from 1985 onwards, and launching a campaign for the appropriate compensations to be paid.[49] Since then, the communities have been running their own plot allocations and settling their own disputes without reference to the administration. This did nothing, however, to reduce the number of disputes over plot allocations, since local procedures were perhaps even less respectful of legal niceties. By 2002 there were estimated to be disputes raised over 10, 410 plot allocations in ten different layout areas of the city.[50]

In another village, an informal settlement founded by a Baoulé migrant who named himself chief (Adiéyaokro), the plot allocations made by the migrant chief were challenged by the indigenous land chiefs of the area, who did not want to take the case to the administration (see below, section 15).

This process of re-appropriation of control by customary authorities and communities in the urban/peri-urban area may be attributed to the weakening of the grip of the state authorities during the liberalisation reforms of the 1990s. As with the increasing willingness to resort to the Tribunals with land cases, the open emergence of opposition meant that people were less willing to have cases settled by an administration which they saw as politically unsympathetic or as compromised with regard to the specific issue in dispute.

13.2.4 Land disputes in the rural areas

The main agencies involved are the Prefects– mainly the Sub-Prefects – and the officers of the Ministry of Agriculture. But because of the legacy of PDCI rule, when the local organs of the party were also an important player in any dispute, it should be noted that disputants always look for political support in dealing with the administration, on the assumption that Prefects have to be sensitive to this factor, especially on the part of the ruling party (PDCI up to 1999, FPI since 2000). The Sub-Prefects also continue colonial traditions (they are still called *M. le Commandant* by local people) in that they seek to hold public meetings with the community concerned if the dispute has any broader implications for social peace.

The role of the Ministry of Agriculture is always subject to that of the Prefect. Even when they are asked to resolve a dispute directly, they will always refer the complainant to the Sub-Prefect so that he can refer it back to them officially. The resultant procedure is generally the same. The Sub-Prefect always involves the Agriculture officials when he is asked to resolve a land dispute, and asks them to undertake a local site inspection and assessment. Their local knowledge is good, and their procedure for assessment usually involves meetings with the disputants and their witnesses, the village chief, and the local political party representatives.[51]

In the Tabou area, the resort to sub-prefectoral arbitration was often determined by the character of the dispute, particularly the ethnicity of the parties and the kind of land use arrangement which had been made. In this area, there are three main sets of ethnic actors: the indigenous communities (Kroumen), *allocthones* (migrants of Ivorian origin, mainly Baoulé, Agni, Abron, Lobi and Senoufo) and *allogènes* (foreigners, mainly Malians and Burkinabés). It should be noted that the difficulty of dealing with the impact of foreign migration has been exacerbated by the sheer numbers of foreigners in the area, who appear to overwhelm the local population. In the district of Grand Béréby foreigners represent 52 per cent of the rural population; 57 per cent in the district of Grabo, 44 per cent in that of San Pedro and 51 per cent in that of Tabou. They tend to live in their own separately created settlements and villages.

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49 1985 marked the end of the oppressive regime of the former Mayor Sounkalo Djibo following on the political liberalisation reforms of the period.

50 Archives of the Commune de Bouaké and the local office of the Ministry of Construction and Urban Affairs.

51 Interview with the Head of the Ministry of Agriculture office, Grand Béréby, 10 September 2004.

Box 13.1 **The case of Besséréké (Tabou)**

In 1999 foreign migrants resisted being cleared off an area which had been obtained by the local youth association for a government palm oil project. The migrants had, by all accounts, obtained their concessions legitimately from local landholding elders, but the latter were afraid to resist the political pressures coming from the youth. Violent responses to attempts by the local chiefs to mediate, provoked a wholesale expulsion of foreign and stranger farmers from the area by enraged local communities. A temporary truce was only assured through the intervention of the Head of State, General Guéï, together with the Burkina Faso Ambassador. But since then, 12,000 Burkinabés have left the area and local resistance to their return is strong.

The kinds of disputes which most often came to the Sub-Prefect tended to be:

- Those brought by Baoulé migrants against local landholders
- Those between Baoulé or other Ivorian migrants against foreign migrants.

The first kind of case was usually the result of accusations that the local landholders had resold or leased 'fallow' land, originally granted to the migrant, to foreign migrants who arrived in the area a decade or more later in the late 1980s and 90s. Before 1999, it is clear that the Baoulé migrants would make every effort to ensure the support of local political elites before bringing the case to the Sub-Prefect, and they tended to be victorious. Local landholders who complained that the migrants had themselves leased some of their original land grant to the new foreign migrants, without asking the permission of the '*tuteur*', were less often successful – unless they were cooperating with the foreign migrant themselves to contest a Baoulé claim, when it became an example of the second kind of case.

The second kind of case arose when foreign migrants were accused by the Ivorian migrants of encroaching on land which they claimed as having been granted to them. In these cases, local landholders would often come before the Prefect to support the legitimacy of the later lease or tenancy to the foreigner. The motive was often that the locals were making more money from the lease to the foreigner – often charging a rent per hectare compared to earlier arrangements which had been based on a gift of drink and a small labour obligation.

After 1999/2000, the spread of these disputes amongst the different groups into more general communal violence frequently took them beyond the competence of the Sub-Prefects or local political elites and brought in national political elites. The violent incidents associated with disputes between locals and migrants in the villages Besséréké and Jbkro resulted in large-scale expulsions of migrants which interventions by national politicians and the Head of State were unable to resolve even before the civil war.

In the Katiola area, as noted above, the main role of the Prefects has been to intervene in disputes between Peul cattle herders and local farmers.

Box 13.2 **The case of Jbkro (Grabo Sub-Prefecture)**

This village was founded by Baoulé migrants in the mid-1970s. In 1999, disputes arose because local landholders (heirs of the original *tuteurs* of the Baoulé) leased large amounts of the land to new migrant settlers, refusing to recognise the original contracts. The then President, Konan Bédié (PDCI) was asked to intervene together with the MP for the area, but was unable to resolve it. The expulsion of the Baoulé farmers has become permanent since the civil war, as the Kroumen accuse Bédié of supporting the rebels.

13.3 Overall assessment

The evidence from studies of formal arbitration and informal mediation by state officials in both urban and rural areas shows that the prefectoral service remains the primary agency for land dispute resolution at the local level, much more important than the state courts. There are however, some serious problems with their role.

The dominant assumption in Ivorian political culture that political patronage and connection is what matters for an effective settlement, means that they are not necessarily seen as impartial arbiters by those locally who are opposed to the dominant political order (indigenous landholders in Tabou until 2000, the Bouaké indigenous community chiefs until 2002). The increasing politicisation of land conflicts in the Tabou area in the 1990s, and the loss of power of the Ivorian state during this same period of liberalisation, further reduced their authority. The continuing division of the country since the civil war has made their position in the southern half still controlled by the FPI government even more subject to political control.

Formal institutions of dispute resolution involving the Prefects, which have attempted to introduce ADRMs into the field of land dispute resolution have not been very successful partly because of the tradition of administrative dominance which they represent. In the case of the 1998 land law committees, lack of implementation remains the main problem.

In many issues involving administration of land allocation and urban development, their executive role is still so crucial that they are often too compromised to be seen as neutral arbitrators in cases involving their own actions. The Prefects can, however, play a constructive role in resolving problems caused by inter-agency conflicts (e.g. where actions of the municipality and the Ministry of Housing and Urban Affairs and their own office cut across each other) or where customary authorities have created injustices. In many areas, citizens have recently been more willing to take such cases to the Tribunal.

14 Non-state mediation and arbitration at the local level: customary courts and informal dispute settlement institutions in Ghana

14.1 ADRS and customary forms of dispute settlement: some important distinctions

Alternative Dispute Resolution Systems (ADRS), or Alternative Dispute Resolution Mechanisms (ADRMs), as they are sometimes termed, are currently extremely popular in justice sector reform programmes throughout the developing world, and have been officially introduced in India, Bangladesh and various Latin American and African states in recent years (see Penal Reform International 2001). They are primarily seen as a method for relieving the crisis of overburdened state courts facing impossible backlogs of unresolved cases. More positively they are also advocated as offering a cheaper, faster and more accessible form of justice for ordinary citizens, particularly the rural and urban poor, who do not have access to state justice either because of lack of resources, social exclusion or lack of physical access (distance).

The essence of the ADR concept, as developed by its European and North American advocates, is the idea that a better form of justice can be obtained by focusing on mediation or the search for an agreed settlement, rather than on binding adjudication by an external

(usually state) authority. Both state and non-state institutions or mediators can offer ADR; what makes it different from formal courts is the procedure, which is 'delegalised', relying on an informal search for an agreed and just solution (Brown and Marriott 1999; Silbey and Sarat 1989; Nader 2001). There is, however, a strong tendency in many of the justice sector reform programmes adopted by donors to equate customary forms of justice or chiefs' courts with ADRS, an equation which has become widely adopted by African advocates of ADR themselves. An ideal of 'African village justice' – the meeting under the tree in which a dispute is resolved through a search for community consensus – is often cited as a basic inspiration for ADR in Africa. But some caution must be exercised before assuming that customary courts can be used as the basis for an ADR-based reform.

The European ADR concept is focused on individual rights and agreement between the parties, and is appropriate in urban societies where one cannot assume a 'community public' with an interest in social harmony or groups which will somehow police the settlement between the parties. It also assumes that a neutral mediator will help the parties to bargain freely to reach an agreed settlement without pressure or intimidation – an assumption which has provoked much criticism from those who argue that ADRS enthusiasts too often ignore differences in status and power between the parties (Nader 2001).

In Ghana, however, and many other parts of West Africa, dispute settlement involves building the consensus of the whole relevant community, and the individuals in dispute are not seen as abstract individuals but members of groups – families, clans, age sets, ethnicities – with a particular status and known position within the community (both gender and age as well as wealth and office may be relevant). Even if mediators are not chiefs or elders, they are not expected to be strangers or unknown to the parties, and therefore 'impartiality' may be less valued than intimate knowledge of the circumstances of the case (see Grande 1999; Kees van Donge 1999). If a case is settled by the chief, the chief has to reflect a broader agreement between these groups which will ensure social harmony and avoid feuding in future; but in doing so he will be fully aware of the power status and social position of those groups. This is because the effectiveness of the agreement – its acceptance and enforcement – depends upon social sanctions, such as shame, hostility and social pressure on the parties.

It should also be remembered that in Ghana the chief is himself a political authority, and the chiefs' courts (Native Courts) were until 1958 an official part of the hierarchy of state courts (see above, section 4.1).[52] The chiefs themselves form hierarchies with substantial differences between the high ranking divisional and paramount chiefs (former Native Court holders), and the lowest level village chiefs. The former include powerful monarchs such as the Asantehene (King of the Ashanti Confederacy), the Okyenhene (King of Akyem Abuakwa) or the Dagbon King (Ya Na) who are figures of national political importance. Their courts retain highly formal and often intimidating procedures. Only the village chiefs can really be seen as the equivalent of an informal and popular mode of dispute mediation. The chiefs also continue to wield considerable social and economic power through their role as allodial land custodians, their management of land allocation again observing a hierarchy of permissions (except in parts of the Volta and Upper Regions). Thus the idea that parties who come before a chief's customary court have equal bargaining power, or that the mediator is somebody without coercive power over them, is not a necessary element in the situation.

14.2 The causes of land disputes at the local level

In the three case-study areas, 22.6 per cent of respondents in the village-level surveys said that they had personally experienced a land dispute.[53] (This group of 153 respondents will

52 The colonial authorities in the 1940s and 1950s viewed the Native Courts as hopelessly corrupt and had decided to do away with them even before Kwame Nkrumah and the nationalist party, the CPP, demanded that the chiefs be stripped of their powers (see Rathbone 2000).

53 Defined as a non-trivial problem with the potential to become a 'justiciable event' (Genn 1999; Pleasance, Buck, Balmer, O'Grady and Genn, 2002). This is quite high compared to the 13 per cent of respondents who had had a recent dispute in Koné's survey of two villages in West-Central Côte d'Ivoire (Koné 2002).

Table 14.1 **Popular survey sub-set: cause of dispute**

Cause of dispute	Valid percent
Trespass	34.6
Unlawful sale	3.9
Inheritance	2.6
Disposition of rights	11.1
Family dispute	23.5
Dispute with another farmer	13.1
None specified	9.2
Dispute with landlord	1.3
Other	0.7
Total	**100.0**
	(n= 153)

hereafter be referred to as the 'popular survey sub-set'.) A breakdown of the disputes which village respondents said they had experienced shows a striking contrast with the kinds of cases which tend to come before the state courts. The largest causes of dispute were trespass (encroachment on or misuse of the owner's land), or some kind of difference with a neighbouring farmer – much the same kind of thing – which accounted for 47.7 per cent of disputes (Table 14.1). Family and inheritance matters, by contrast only accounted for 26.1 per cent (compared to the 52.7 per cent of court cases). The experience of disputes came disproportionately from villages in the Asunafo area, which accounted for 63 per cent of the sub-set (three villages in particular from the six surveyed in that area). To some extent this can be attributed to the fact that this is a cocoa growing agricultural area with a large population of migrants, although the Kumasi peri-urban areas might have been expected to have been even more conflictual. But Asunafo is also an area where migrants have been established for

Table 14.2 **Popular survey sub-set: cause of dispute by origin of respondent**

	Origin		
Cause of dispute	**Local (N/%)**	**Non-local (N/%)**	**All (N/%)**
Trespass	38 36.9%	15 30.6%	53 34.9%
Unlawful sale	2 1.9%	4 8.2%	6 3.9%
Inheritance	2 1.9%	2 4.1%	4 2.6%
Disposition of rights	11 10.7%	6 12.2%	17 11.2%
Family dispute	24 23.3%	10 20.4%	34 22.4%
Dispute with another farmer	15 14.6%	5 10.2%	20 13.2%
None specified	11 10.7%	5 10.2%	16 10.5%
Dispute with landlord	0 0%	2 4.1%	2 1.3%
Total	**103** **100.0%**	**49** **100.0%**	**152** **100.0%**

Table 14.3 **Popular survey subset: dispute settlement institution by location**

Dispute settlement institution	% use by location			Total
	Kumasi	Asunafo	Nadowli	
Not specified	3.3	14.4	19.2	13.1
Court	13.3	11.3	3.8	10.5
Traditional court	40.0	22.7	23.1	26.1
Family gathering	20.0	22.7	15.4	20.9
Police	3.3	0.0	0.0	0.7
Not resolved	6.7	1.0	0.0	2.0
Between concerned parties	3.3	10.3	15.4	9.8
Arbitration	10.0,	16.5	23.1	16.3
CHRAJ	0.0	1.0	0.0	0.7
Total	**100**	**100**	**100**	**100**

a long time and the survey tends to show that relations with the host communities are, at the present time at least, relatively peaceful. Thus there were surprisingly few cases of disputes with a 'landlord'. And, even more significantly, analysis of the origin of those who reported a dispute showed that migrants – grouped as all those from outside the locality – were involved in similar kinds of disputes as locals, comparing the main categories of trespass, dispute with another farmer and family disputes (Table 14.2).

14.3 The choice of local dispute settlement institutions (DSIs)

When the sub-set of respondents (those who had experienced a dispute) were asked where they had *first* gone to resolve their dispute, a surprisingly wide range of DSIs was revealed. The contrast between these village-level disputants and those who had become litigants in the state courts was striking; of the latter, 47 per cent overall (and over 50 per cent in Kumasi) had gone straight to court, without using any other procedure. But particularly noteworthy is that *only a minority of the village respondents* – just over a quarter overall (26 per cent) – *had used a 'traditional' court* (chief, chief and elders, or land priest – *tendana*). And there were significant differences between the Kumasi peri-urban villages and the other locations: in Kumasi, chiefs' courts were much more popular (40 per cent) compared with Asunafo and Nadowli (23 per cent). In spite of the generally good relations between host and migrant communities, strangers or non-locals were also much less likely to use a chief's court – 16 per cent of them had used a chief's court compared with 31 per cent of the locals. This can be interpreted as a preference for using their own community leaders or resolving matters between themselves, as well as a degree of lack of trust in the local chiefs.

The next most-used types of DSI were in fact a family gathering (21 per cent) and an 'informal arbitration' (16.3 per cent) – that is, the parties sought the help of an 'informed' or respected person, who could be an elder, their landlord, or the local elected Unit Committee Chair or a respected District Assembly member.[54] An unusual case was the predominantly migrant village of Ahenkro in Asunafo, where the Unit Committee Chair was also the head of the Pentecostal Church, which incorporated the main elected leaders of the community (Krobos, Ewes, and Kwahus from the Eastern Region) and effectively combined religious and secular leadership. The community was very peaceful and well run.

54 The Unit Committee is the lowest level of the District Assembly elected local government system, created in 1989 as amended by the Local Government Act of 1993 and Legislative Instrument (L.I.) 1589 of 1994. In theory based on population units of around 500–1000 people instead of 'villages', they are partly nominated (one-third) by the political head of the District, the District Chief Executive and partly elected. But they have never attracted much electoral competition and in many areas exist on paper only – over 65 per cent of the Unit Committees were uncontested in the 1998 elections. But where they do function, they tend to be composed of leading members of the community who are coopted or self-selected rather than elected and, depending on their political affiliation, may represent a counter-balancing force or even rival to the chief (see Crook 1999).

Table 14.4 **Who would you most trust to settle any dispute? 'Trust a lot'**

'Trust a lot' in	% respondents	Ranking
Village chief	62.1	1
Heads of families	61.4	2
Court judge	35.4	3
Unit Committee Chairman	34.2	4
Paramount Chief	32.1	5
Divisional Chief	28.8	6
Tendana	26.2	7
Lawyer	19.8	8
Police	14.2	9
Agriculture Dept. officer	13.8	10
District Commissioner	13.2	11
School headmaster	11.4	12
Lands Commission officer	11.1	13
Town and Country Planning officer	10.4	14
CHRAJ	8.6	15
Church leader	3.4	16
Elders	1.6	17

Table 14.5 **Who would you most trust to settle any dispute? 'Not at all'**

Trust 'not at all' in	% respondents	Ranking
School headmaster	47.6	1
Police	38.2	2
Agriculture Dept. office	28.0	3
District Commissioner	25.4	4
CHRAJ	22.0	5
Town and Country Planning	19.2	6
Unit Committee Chairman	18.3	7
Lands Commission officer	17.2	8
Lawyer	16.9	9
Court judge	15.1	10
Paramount Chief	12.0	11
Divisional Chief	8.1	12
Heads of families	7.0	13
Village chief	6.5	14
Tendana	0.3	15
Church leader	0.3	15

As to *why* they chose the DSI which they had used, the most frequently cited reason amongst villagers was to 'maintain peace and harmony with neighbours'; but a close second was the need for a 'final' settlement (most of those who had gone to court), followed by the need to 'respect' the elders and respect local norms of behaviour.

14.4 The legitimacy of the different forms of DSI

All respondents (not just those who had had a dispute) were asked who they would most trust to settle any problem they might have concerning their land. The people named most frequently as 'trusted a lot' (an unambiguously positive choice) were *first*, village chiefs (62.1 per cent), *second*, family heads (61.4 per cent) and *third*, court judges (35.4 per cent), with Unit Committee Chairmen coming a close fourth (Table 14.4). Even more surprisingly, lawyers figured on the list at a respectable number 8! If we add in the 'to some extent' responses, to get an aggregated positive scoring, we find village chiefs and family heads in first and second places with virtually equal scores (named by 80.6 and 80.5 per cent of respondents), Unit Committee Chairmen third with 65.6 per cent, and court judges fourth with 58.5 per cent! On the other hand, the people they were most *unlikely* to trust were village school headteachers and the police (except in the Upper West) (Table 14.5).

14.4.1 The legitimacy of chiefs' courts

Although it is clear chiefs remain an important source of dispute settlement at the local level, and enjoy high levels of respect and trust, there are important ambiguities and difficulties surrounding their role, as well as differences amongst the three areas of study (Table 14.6).

Respondents in all areas made a clear distinction between the village chief and Paramount and other important chiefs. Everywhere the village chief was highly trusted, although in Nadowli the *tendana* and family heads were recognised as most appropriate for land issues. In the Asunafo district, however, the big chiefs were ranked lowest and the popularity of

Table 14.6 **'Trust a lot' rankings by location**

	Location		
'Trust a lot'	**Kumasi % (Rank)**	**Asunafo % (Rank)**	**Nadowli % (Rank)**
Village chief	61.2 (1)	55.6 (2)	71.3 (3)
Heads of families	52.7 (2)	47.7 (3)	87.1 (1)
Court judge	20.9 (5)	57.1 (1)	21.5 (6)
Unit Committee Chair	37.8 (3)	27.4 (4)	39.2 (5)
Paramount Chief	28.4 (4)	15.8 (5)	56.5 (4)
Tendana	n/a	n/a	84.7 (2)

the district judge confirmed by a top ranking, above even the village chief. As might be expected there was a difference between expressions of trust in response to a general opinion question, and what people actually did when they had a dispute. The lower general trust expressed in chiefs in Asunafo was in fact matched by the figures for actual dispute resolution institutions used by those who had experienced a dispute – only 23 per cent had used a traditional court. By contrast, in peri-urban Kumasi, chiefs have a more powerful and prominent role but even here the paramount and big chiefs were not so trusted. One explanation for these figures could be the involvement of chiefs in land management allocation, and the politics of chieftaincy in Brong-Ahafo Region.

In Asunafo, there have been and continue to be long standing disputes between the major chiefs of the Ahafo Traditional Council and the Asantehene's Kumasi 'caretaker chiefs', and between big paramountcies such as Mim and Kukuom (see Dunn and Robertson 1973). Although the lands have all been vested in the government, ordinary citizens are fearful of coming up against or being involved in any kind of a dispute that might engage these 'major players'. As regards the position of the many migrants in the area, since the crisis over the Busia government's Aliens Expulsion Order of 1971 relations between hosts and migrants have settled down and are relatively peaceful. But it is clear that trust in the chiefs depends on a 'virtuous circle'; it is maintained so long as relations are good and, if there are no major problems, migrants are happy to acknowledge the rights and status of the allodial owners. The new government of the NPP is perceived to be and is in fact a direct heir to the Busia government of 1969–72, and some fears were aroused in many southern 'Akan' areas about the future position of migrants. Some of the chiefs interviewed in Asunafo (and chiefs at government seminars on land management – see GTZ 2002) referred to the new Constitution of 1992 as giving them the right to turn all tenancies granted to strangers and foreigners into 'leases' – something which the Lands Commission has been doing, even though it is legally suspect. But migrants in the village focus groups all regarded their customary tenancies as giving them the land in perpetuity and heritable by their heirs. They do not see this as threatened at the moment, but this could change depending on the progress of the legal reforms associated with the LAP. Hence the greater reluctance of non-locals in the Asunafo area to use a chief's court to resolve an actual dispute (see below Table 14.8).

In the peri-urban areas of Kumasi, there is continuing conflict over the role which the chiefs play in the appropriation of village lands for sale as urban plots. Where a Land Allocation Committee (as recommended by the Asantehene) has been set up and works effectively, the community (the customary landholders) can ensure that some of the capital raised (and the plots) are retained for the benefit of the citizens themselves. But in many places this does not work – for instance, in one of the case study villages in Kumasi, Esereso, the Land Allocation Committee had collapsed after a dispute over the succession to the Queen Mother post, and the Queen Mother herself was selling plots illicitly in the teeth of resistance and opposition from other factions in the village. In some villages (e.g. Appiadu) the chief is trusted, but the system is fragile and accountability structures are generally not robust enough to avert the constant danger of abuse, or rumours and suspicions of abuse. This is strongly supported by comparative evidence from Ubink's linked studies of peri-urban villages in the Ejisu

Box 14.1 **Loho–Charia case**

The dispute arose over land described as 'Gopaala Lands' when a parcel was granted to the Catholic church for development. The land is on the Wa–Kaleo road on the outskirts of Wa and thus potentially valuable. The ensuing counter-claims by the two villages degenerated into serious conflict. The Loho side of the case is that the elders of the two villages met on a number of occasions to make the claims and try to resolve the issue. When they failed to resolve the dispute by that means, they mutually agreed to invoke the gods to determine the case. According to the Loho elders the gods decided the case in their favour and the people of Charia suffered retribution from the gods as evidenced by strange deaths in their community. Notwithstanding the verdict from the gods the people of Charia still remained adamant and held on to their claim. The Regional Administration had to intervene by setting up a committee of enquiry in 1995 chaired by a prominent chief, the Lambussie Kuoro. The Report of the Committee established that Charia is under Wa, but Loho is indeed part of the Kaleo chieftaincy, and hinted that the Wa-Naa was trying to extend his domains. The Report also noted that the two communities have close blood ties and are traditionally closely intertwined. Nevertheless the Charia people did not accept the Committee's Report of 1995, and subsequently resorted to the High Court.

paramountcy south of Kumasi (Ubink 2005). In such situations, the chief may be regarded as having too much personal interest to be trusted as an impartial judge of a local land case.

Although people in Kumasi (as elsewhere in Ashanti) look to the Asantehene to resolve these issues, the new Asantehene's attempt to deal with the land dispute problem in the region by ordering that all disputes should be withdrawn from court and sent to him for settlement, has not so far produced many results. It is clear from the research done at the Kumasi High Court that not all land cases have in fact been withdrawn and remitted to the Asantehene. This is because in current circumstances they are even less likely to be heard quickly at the Asantehene's palace than in the state court system. In November 2004 the Asantehene set up four new courts (labelled A–D) to deal with the hundreds of outstanding land cases; for each court, there are Lands Sub-Committees of sub-chiefs and officials appointed to carry out all the preliminary investigation work and report to the court. It is envisaged that the proceedings in the courts (which have only deliberative functions) will be videotaped and then the notes of the decision and the tape sent to the Asantehene and his 11 Councillors for review and final decision. A decision is pronounced with the parties present at a full Asantehene's traditional court with all his Councillors and sub-chiefs present (up to 200 people). So far, however, few cases have been actually dealt with through this new procedure, which has been three years in gestation, and little evidence could be obtained on how many cases have been heard. The Asantehene's Lands Secretariat, located in the palace (*Manyhia*) is still a small and very traditional office with few professional staff and no modern record systems. Development funding from the World Bank and the UK Department for International Development (DFID) has been allocated to upgrade and modernise the administration which could help in the processing of the land cases.

Even in Nadowli, where respect for traditional institutions is still apparently very high, the legitimacy of a chief's court is not always sufficient to ensure acceptance or enforcement of a decision. In one of the case-study villages, Loho (on the northern border of Wa), a serious land dispute with a neighbouring village, Charia, has been through various stages of arbitration beginning with elders and land chiefs, a Committee of Enquiry chaired by a chief of the Regional House of Chiefs (the Lambussie Kuoro) and finally the High Court, all of which found in favour of the Loho claim.[55] Yet the Charia people continue to contest the results, including the 'wrath of the gods' which (according to the Loho people) was called down upon them when they flouted the traditional ruling. The Loho people however, claim the moral high ground in that they have refused to retaliate either with direct action or a

55 The Lambussie Kuoro Committee of Enquiry into the Charia–Loho Dispute, Final Report, 1 October 1995.

Table 14.7 **'Trust a lot' rankings by sex**

'Trust a lot'	Male % (Rank)	Female % (Rank)
Village chief	60.7 (2)	63.9 (1)
Heads of families	62.8 (1)	59.4 (2)
Court judge	39.0 (3)	30.6 (4)
Unit Committee Chair	33.6 (5)	35.1 (3)
Paramount Chief	34.1 (4)	29.5 (5)

new court case (Hammond 2005). The dispute was undoubtedly entrenched by the fact that two important chiefs spoke for each village: the chief of Wa (the Wa-Naa) who rules Charia, and the Kaleo-Naa for Loho.

Another case involving urban land in Wa has been even more resistant to resolution. Here, some land was acquired by the Ghana SSNIT (the government social security fund) for an office building, generating significant financial returns for whoever could establish their claim to be the 'customary owners'. Again, the dispute between rival traditional claimants (descendants of rival 'settler' lineages) has gone through every form of dispute resolution ending in the Supreme Court. The faction which lost in the arbitration offered by the Waala Traditional Council (the Kabanye) refused to accept the chiefs' verdict, went to court and won all appeals up to the Supreme Court. The losing faction (the Danaayiri), feeling they had traditional right on their side, broadcast on local radio after the Supreme Court's decision to announce that they had won and were the true owners of the land. There are political overtones to the case, in that the faction which won in court (Kabanye) has long been associated with the former ruling party, Rawlings' NDC, which is now in opposition. The losing faction, although associated with a minor opposition party, the People's National Party (PNC), engaged an NPP lawyer to fight their case, a man who subsequently became a Deputy Minister of Lands in the NPP government. It is likely that they imagine that a connection with the governing party may help to overturn all previous verdicts and they have submitted a petition to Parliament.

Overall, in this area a professed respect for traditional norms is not followed through into practice, primarily because of the chaotic legacy of the de-vesting of Northern lands in 1979. There is little or no agreement on who owns particular parcels of land and an almost total absence of historical records. Traditional norms quickly crumble in the face of the growing marketisation of land, and factions defy all authority, whether traditional or state, where there is a prospect of making some money from a claimed right of land ownership.

14.5 The inclusiveness of different DSIs

Although traditional institutions such as chiefs' courts are frequently criticised for being gender biased (against women), the general trust rankings showed very little difference in levels of trust between men and women (Table 14.7). And not many significant differences emerged by age or education, except that of the very small number of post-secondary educated respondents (8 out of 676), only two (25 per cent) said they trusted the village chief a lot. Only

Table 14.8 **'Trust a lot' selected rankings by origin**

	Origin				
'Trust a lot'	**Locality %**	**District %**	**Region %**	**Other region %**	**Foreign %**
Court judge	31.2	29.3	27.5	57.4	100.0
Unit Committee Chair	35.6	36	25.5	30.6	57.1
Paramount Chief	34.7	41.3	21.6	22.2	0.0

Table 14.9 **Popular survey subset: choice of DSI by origin**

		Origin	
Dispute Settlement Institution	**Local %**	**Non-local %**	**Total %**
Not specified	11.7	16.3	13.1
Court	11.7	8.2	10.5
Traditional court	31.1	16.3	26.1
Family gathering	20.4	20.4	20.9
Police	0.0	2.0	0.7
Not resolved	1.9	2.0	2.0
Between concerned parties	7.8	14.3	9.8
Arbitration	14.6	20.4	16.3
CHRAJ	1.0	0.0	0.7
Total	**100**	**100**	**100**

the origin of respondents produced some interesting differences in the extent to which they trusted paramount chiefs and judges; migrants from a different district or region showed much less propensity to trust a paramount chief, and were more likely to trust a judge. (The figures for foreigners refer to only seven respondents so not too much reliance can be put on them.)

These small differences in attitudes to the traditional authorities were once again confirmed more conclusively through analysis of the sub-set of those who had experienced an actual dispute. Here, origin was the most significant predictor of the choice of a dispute settlement institution, rather than sex or education. Non-locals were only half as likely to have used a traditional or chief's court, and were much more likely to have used arbitration by respected persons or to have to sorted out the issue through negotiation with the other party (see Table 14.9).

The actual procedures of chiefs' courts varied enormously according to their level and the kind of case. A settlement by a village *tendana* in Nadowli is very different from a chief's court in Ashanti, and much more non-hierarchical in its lack of distance from the disputants. Appearing before an important Ashanti chief and his councillors (a chief above the rank of *odikro* or village headman) is, for village people, to appear before officials who must be shown the full respect due to persons of high status and power. The Asantehene's full court, which is in effect an appeal court for the whole of the Ashanti kingdom, is highly formal and traditionally accessed through the solemn swearing of the 'Great Oath of Ashanti'.[56] Although the traditional procedure aims at persuading the winning party to publicly accept an apology and reconciliation from the other party, it can be experienced as intimidating, partly because of the high status and wealth of the royal judges and partly because it is an enforced procedure not a voluntary mediation.

14.6 Conclusions

An obvious conclusion from the village surveys is that a lot of potential conflict, particularly over boundaries and land use, is typically solved by very local forms of conflict resolution involving family heads and village chiefs or elders and other respected persons including elected opinion leaders. These are trusted because they are not coopted by or associated with unpredictable external forces; and chiefs' formal traditional courts are only one mode amongst many others for resolving disputes. Nevertheless, community-based ADRS can suffer from many well-acknowledged problems, such as perfunctory or summary procedure, unequal power relations or 'crony justice' dominated by local power-holders.

56 In pre-colonial times, use of the Oath could bring death to the one who used it wrongly.

The research evidence shows that if a case cannot be solved peaceably at the local level there is certainly a thirst for a legitimate authority (a trusted external arbiter) and some certainty – a need which is often fulfilled by going to the state courts or institutions such as the CHRAJ. Beyond the village level, the customary courts of the important paramount chiefs are not necessarily more trusted or user friendly than the state courts, and cannot so easily be offered as a form of ADR. Many, especially in Asunafo District, clearly trusted the court judges particularly the District Magistrate more than they trusted a chief. Yet the state does not have the whole answer either; as some of our cases from Nadowli demonstrate, in Ghana even a ruling of the Supreme Court is not necessarily respected and does not bring peace if the parties are still in conflict. Any ADR system created must somehow offer an informal but authoritative and impartial dispute resolution system; the chiefs' courts can only provide that if they combine socially and culturally rooted legitimacy with more effective and respected procedures.

15 Non-state mediation and arbitration at the local level: customary courts and informal dispute settlement institutions in Côte d'Ivoire

15.1 ADRS and the customary system in Côte d'Ivoire

As noted in section 14, there are a number of difficulties involved in attempting to transfer European concepts of ADRS into Africa which apply as much to Côte d'Ivoire as to Ghana. The role of social sanctions and pressure and the lack of voluntariness or power imbalances make local-level customary forms of dispute resolution quite different from the imported notion of ADR. In Côte d'Ivoire, however, the main problem in the Tabou case-study area is not the formality or political power of chiefs' courts, so much as the loss of authority and disintegration or fragmentation of the local traditional systems. Any discussion of the regulation of land relations and land disputes in south-western Côte d'Ivoire has to recognise the impact of the commercialisation and massive inward migration associated with the cocoa boom of the past 20 years, and the subsequent economic and political crises. The area has in effect been colonised by foreign populations, to the extent that large communities of foreign migrants live in their own villages and run their own land affairs. What remains of the customary land system of the indigenous populations has been changed dramatically by these economic and social pressures, giving rise to the feelings of loss of control and betrayal which have spurred so much of the conflict between indigenes and migrants over the past five years.

In Bouaké, by contrast, the traditional authorities seem to have revived their role in the past few years, as witnessed by their new activism in the urban and peri-urban land market. But their procedures do not have much resemblance to ADRS either. In Bouaké, the chiefs in various quarters of the town have reclaimed control over land development (especially the emergence of informal settlements) and over plot allocations for which the state has still not paid compensation (see above, section 13). A general council of Bouaké chiefs was also becoming an effective, politically active lobby in city affairs during the period leading up to the civil war. A key case involving the shanty town of Adiéyaokro was settled, not by the Prefect but by the council of Bouaké chiefs.

In Katiola, if dispute settlement by village chief or Prefect has failed, the land chiefs, who are (as in Tabou) the spiritual guardians of the land and have precedence over the administrative village chiefs, still use magical ceremonies which are respected and feared.

Box 15.1 **The case of Adiéyaokro**

Case of the heirs of Adié Yao against the land chief: Adiéyaokro, a shanty town in the Bouaké conurbation, was formerly a camp built by Adié Yao, a Baoulé who was not a native of Bouaké. The lands for this camp had been ceded to him by the natives of Bouaké. When Adiéyaokro became a village, Adié Yao, the first resident of the district, assumed the functions of village chief. After the death of Adié Yao, his heirs divided up the village land. It was at this point that the heirs of the land chief expressed their opposition to the ambition of the heirs of the village chief to claim ownership of the village land. According to the heirs of the land chief, the status of 'foreigner' belonging to Adié Yao and his heirs deprived them of the right to own land in the village, in the absence of any legal documents proving such a right. The case was settled before the Bouaké chiefs who insisted on recognition of the right of the land chiefs, but agreed to 'legalise' the settlement.

The disputants swear an oath on the disputed land, in the presence of the chief and witnesses, saying they accept that the earth gods will kill them within one year if they are in the wrong. Either a small mound is constructed or a special forbidden tree called 'Kadjol' is planted for the swearing. The tree is associated with evil and death, and will kill the party who is lying or in the wrong. Once such a death has occurred the family of the guilty party has to sacrifice a bull to placate the land gods. This kind of procedure is clearly quite intimidating and is only resorted to if agreement cannot be reached. It is a threat intended to force agreement.

15.2 Changes in the customary land regulation system in Tabou

In this region, the societies collectively known as Kroumen in fact consist of a multiplicity of small separate tribes or groups of villages. Traditionally, there was no strong political authority at village level: collective affairs including any dispute resolution were managed by a council of family or lineage elders which included the land chief. In Ouedjéké for instance there are five main lineages each of whom send an elder to the council. The land chief was a sacred or spiritual official who had secret knowledge of the words needed to address sacrifices to the earth gods and to assure fertility. He was not in any sense a land owner. He was selected from the family of the acknowledged 'first settlers' of the village. Only at the 'tribal' level (e.g. the Ouampo occupy 15 villages around the head village of Ouedjéké) was there a chief who managed inter-village affairs and questions of peace and war, or social conflict. Colonial rule imposed on these societies administrative or political chiefs: the village chief and the cantonal chief (authority over several tribes). Since colonial times the village chief has been included in the village council of elders, but in land matters the opinion of the land chief is, according to traditional norms, authoritative because it has spiritual backing. After independence, the village chiefs were absorbed into the PDCI ruling party system wherever possible.

There were two main systems for allocating land to strangers when the first Baoulé migrants began to arrive: first, when a migrant from another locality arrived in a village, he could place himself under the protection of a local family head and ask him to be his '*tuteur*'. The *tuteur* would present him to the village leadership who would appoint someone to find him a piece of land. Certain people were known as 'compassmen' ('*boussoliers*'), because they had an expert knowledge of the village lands and worked under the authority of the land chief. Secondly, the stranger could work directly through the *tuteur* and his family, asking for a plot of land without going through the village council. In return, the migrant was obliged to work a number of days for the *tuteur*, to give some gifts (drinks, chicken) and to 'help' his *tuteur* in case of need e.g. with school fees for children. Any problems or disputes with these arrangements could be handled either through negotiation with the *tuteur's* family, or before the village council. In more serious cases involving different villages, a tribal council could be called under the tribal chief.

In the 1980s, however, as the chain of migration built up, migrants began to go directly to one of their ethnic compatriots who was already settled and ask them for land or for an introduction to a local *tuteur*. This rapidly led to accusations that local landholders were being cut out of the process altogether; and when the huge waves of foreign migrants descended on the area the allocation of cocoa farm land began to fall into the control of the migrant communities themselves (initially through labour contracts). As noted above (section 13) the local landholders then tried to regain control over the activities of the migrants by selling land themselves (which they still claimed under the rules of the *tuteur* system) to the new foreigners under new, more commercial conditions.

The impact of these developments on the land regulation system has been to fragment control. Land transactions have increasingly devolved to family sections within lineages or to individuals within families, acting without reference to the village councils or land chief. Conflicts erupt over who has the authority to call themselves a land chief at all. Within families, the revenue to be made from land has led to further conflict as people contest the allocations made by elders or other individuals. Generational conflict is particularly bitter as the young accuse the elders of selling their birthright. Indeed, evidence from the case-study villages showed that many of the village chiefs are now young people with little experience or authority (the new chief of Ouedjéké is only 36 years old). A typical chief of the older generation was interviewed in Deblablai-Ahoutoukro (Grabo): a 69-year-old man who combined the roles of village chief and land chief, had been Secretary General of the former PDCI local committee, held the *médaille de l'Ordre National*, and was currently a municipal councillor in the Grabo *commune*. As the owner of large plantations, he still exercised considerable authority in the area, but very much represented the 'old order', especially because of his role in the PDCI. He admitted that the traditional tribunals were not automatically respected – or were simply sidestepped.

15.3 The impact of changes in land regulation on customary dispute settlement institutions

One clear result of the developing crisis in land-use regulation and inter-ethnic relations is the loss of authority of customary institutions at village and clan or tribal levels. It is probably for this reason that village authorities in the Tabou area have attempted to prevent land disputes being taken to external authorities such as the Tribunal or the Sub-Prefect, either through a formal system of fines (see section 11.3.1), or invocation of social and spiritual sanctions. These sanctions have succeeded to some extent in that though cases going to the state courts increased during the late 1990s, it is still evident that the courts do not deal with many land cases. Although local people are still reluctant to go outside their community, migrants are fearful of a process which could result in them being subjected to severe sanctions such as expulsion from their lands – as began to happen in the late 1990s. Even before then, when migrants were summoned to the village council for the customary settlement of a land dispute, they would require the plaintiff to inform the police and the Sub-Prefect and demand that they attend. Migrants increasingly use the chiefs of their own communities to settle their own affairs, a function of the fact that they live in separate settlements and villages, not with the host communities – a measure of the 'colonial' character of the migration.

As village-level tribunals have become more contested, the role of the Prefects and other political authorities has become more important. As noted by all focus group informants in the village studies, migrants almost always take any dispute to the administrative authorities directly anyway. The role and authority of chiefs and village councils is often dependent on the support of the Prefect and remission of cases to them. One particularly well-respected chief of the Ouamo tribe has been used by Prefects as a 'pacifier' of conflicts between the local communities and foreigners, in attempts to prevent the wholesale expulsion of those who grow a large part of the country's cocoa crop. A review of local disputes brought before the village authorities showed that many cases come to the Sub-Prefect first, who then remits them to the relevant village chief with an injunction to find a peaceful solution. In a sense, the authority of the Sub-Prefect stands behind the chief.

In one case, for instance, a grant of land by the commune of Tabou to a woman in Hombloké for the purpose of setting up a project for young girls was challenged by two different families. The Sub-Prefect, after hearing the case and failing to get agreement, remitted it to the village customary tribunal. But one of the parties refused to appear before the customary tribunal and the woman had to suspend her project. Without the Prefect's authority, the customary procedure was ineffective and lacked authority.

In two other cases in the Tabou area, villagers in dispute with outsiders who had been granted land (employees of SOGB – a rubber plantation company – and a PALMCI technician who had granted land to a Burkinabé) were unable to resolve the disputes to their satisfaction. In both cases results were obtained after the intervention of the *Député* (MP) for the area – although not necessarily ones which the village parties found acceptable. In the rubber plantation case, the local landholder accused of illicitly taking back the land which had been granted was able to use his family connection with the MP to establish the claim of a different village. In the other case, the Burkinabé called on the MP and at the resulting settlement managed to get half of the disputed land, which she had obtained from the stranger technician without the village authorities having been informed.

Cases which village or tribe-level tribunals have been able to resolve more successfully have tended to be about local (indigenous) intra-family disputes between, for instance, children and the family head, or between neighbouring villages over boundary markers.

15.4 Popular perceptions of the customary dispute resolution institutions

Amongst the youth of the villages in Tabou, focus groups showed that there is considerable suspicion of both the land chiefs and the elders and family heads of the village councils. This is primarily because they are seen as having profited from the management of land allocations in the past through the *tuteur* system. Deals have been done with the migrants, which means that when they began to be challenged during the upheavals of the past decade, the elders are seen as having an interest in the dispute which disqualifies them from being impartial judges. Unfortunately the administrative authorities, in the eyes of local youth, were not regarded as a fairer authority, either, because of their duty to support the policies of a government seen as hostile to local interests. Since 2000, however, the pressure has been on the customary authorities to act more decisively in favour of local interests and youth in particular.

Migrants in Tabou, whether Ivorian or foreign, also have a negative view of local customary procedures, regarding them as inconsistent (arbitrary) and liable to be biased in favour of local interests. At the same time, they always profess loyalty to their *tuteur*, if they have one, and suggest that most problems can be resolved on a person-to-person level (i.e. by making a mutually convenient economic arrangement). For them this is much more effective than relying on the uncertain norms of 'customary law' as pronounced by the village tribunals, which often aim at renegotiating past agreements.

In Katiola, on the other hand, the traditional system is still broadly supported and is linked to the capacity and willingness of communities to deal with what they regard as unsuitable behaviour by migrants or strangers. Expulsion, cancellation of rights, the use of magical punishments are weapons in their own hands. Only the Peul herders are too difficult for them to deal with.

In Bouaké, local communities are engaged in series of intense battles with the administrative agencies and the municipality over control of wealth generated by marketisation of urban and peri-urban land values. The chiefs are supported as a relatively effective force for reclaiming local control, especially in view of the weakening of state authority which has occurred since the 1990s. But families and individuals, especially those with the means and business or political connections, will still pursue other avenues if they seem more effective. Disputes over controlling 'informal settlements' can be trusted to the chiefs (see the Adié Yao case). But disputes about formal plot allocations by customary authorities are more than likely to be taken to the state Tribunal or to the Prefects to prevent biased or legally weak judgements. Here, the paperwork is crucial, as many of the Tribunal cases showed.

16 Conclusions and policy implications: legitimacy, effectiveness and inclusiveness of land dispute settlement institutions in Ghana and Côte d'Ivoire

The main questions posed by the research led us to investigate the reasons why, in a situation of legal pluralism, people involved in land disputes use different forms of dispute settlement institution (DSI). Is it because of the kinds of disputes which arise, or because of the values which people are looking for in the procedures and outcomes? In order to answer these questions we studied public perceptions of the legitimacy and effectiveness of the various DSIs (from the point of view of both actual users and the general public), looking at what they expected from a DSI. Was it certainty and enforceability? Or are disputants more concerned with social peace and reconciliation? Do they value impartiality and fairness, or look only for political support and a favourable outcome? Is the inclusiveness and comprehensibility of procedure important? How much do disputants value speed of settlement and low costs? The conclusions compare the different DSIs in the two countries with respect to their legitimacy, effectiveness and inclusiveness, and suggest the policy implications which arise for each category of DSI, particularly with respect to the introduction of Alternative Dispute Resolution Systems.

16.1 State courts and formal state law

16.1.1 Causes for the resort to legal action

Intra-family and communal cases dominant: in Ghana, intra-family disputes were the commonest kind of court case, by contrast with the cases dealt with by local-level informal and customary institutions, which were more about boundary and land use disputes. The fact that so many Ghanaian litigants made the state court their first choice suggests that family disputes can themselves be so bitter that the traditional extended family mechanisms based on respect for family heads and elders can no longer cope when land, especially valuable land, is at stake. This is particularly so when inheritance cases pit matrilineal kin against widows and children.

Although in Côte d'Ivoire the state court was the last resort for disputants, especially in Tabou, family disputes were probably also behind the rise in court cases in the 1990s in that area. These disputes involved mainly indigenous or local people, evidence of the increasing strain in intra-communal and intra-family relations caused by the eruption of disputes between locals and migrants in which elders and family heads were often accused by younger generations or other family members of having illicitly profited from land deals. Generally, however, disputants in Côte d'Ivoire settled disputes informally either through local customary institutions or more commonly through appeal to the political and administrative authorities (Prefects, party officials and politicians). This reflects the Ivorian expectation that political favour and connection is the most effective way of dealing with disputes rather than formal law. Thus indigenous communities only began to resort to the courts when social conflict brought local customary authorities (normally deemed sympathetic) into question; migrants preferred the administrative authorities to courts, also on political grounds (which could change according to local and national political situations). The changes in the political situation in Bouaké in the 1990s, for instance, produced more cases which challenged the administration's land allocation procedures.

The search for authority and finality: in both countries going to court required, or was evidence of, a very strong commitment to pursue the dispute to the bitter end. Willingness to consider out-of-court settlements was very low in both countries. In Ghana, the search

for declaration of title was a primary motive, as it was in Côte d'Ivoire where documentary evidence has always played a more decisive role in court decisions even before current policies for certification. But the decision on choosing formal court action as against other methods had different motivations. In Ghana, the formal legal route was much more popular (as evidenced by the sheer volume of cases and the extent to which litigation was a 'first choice').[57] The belief in legal solutions is strong, even though in many kinds of cases the administrative authorities can give sufficiently strong title. In Côte d'Ivoire on the other hand, going to court was very much a last resort, with considerable dangers and drawbacks for the parties. Social sanctions against going to court are strong and could lead to direct retaliation or expulsion, especially although not exclusively for migrants. The decisions of courts are not necessarily respected. The litigants could also bring political trouble upon themselves if they challenge the administration. Thus court action is perceived as a very hostile act, and in many respects is seen as an alternative to direct action or a prelude to it.

Costs and delay do not deter legal action: although the problems of high costs and delays and inefficiency were much more serious in Ghana, they did not seem to blunt the appetite of disputants for legal action. The commitment to litigation made people prepared to hang on for a long time even though constant adjournments were undoubtedly a source of extreme irritation and despair on the part of litigants. In Côte d'Ivoire, costs were not cited as a major disincentive, although delays were – mainly to do with the cumbersome slowness of the written procedures. But courts were so little used anyway that these cannot be taken as the main explanations for the popularity of other modes of dispute settlement.

16.1.2 Inclusiveness and accessibility of state justice

In Ghana, the state courts still have the potential to offer popular and acceptable forms of justice. The kind of adjudication experience offered by the courts is not as alien or inappropriate as many of its critics would have us believe, particularly in the Magistrates Court. Although litigants are infuriated by the delays caused by constant adjournments, they generally respect the way the judges deal with them and most are not excluded by language or other factors from understanding what is going on. Litigants in our survey included a general cross-section of the population both by sex and by class (although not by age), and even the least well educated had a generally positive view of the process, seeing it as an essential path to establish what they felt to be of deep importance to them.

In Côte d'Ivoire, on the other hand, the court experience is highly formal and technical, almost bureaucratic in its emphasis on written submissions and responses considered by an investigating judge in chambers. The legal profession and judiciary have virtually no acquaintance with the concepts of ADR and little sympathy with it when it is explained. The benefits of the state court system lie mainly in the effectiveness, professionalism and carefulness of its procedures; but it offers little in terms of accessibility.

16.1.3 Policy implications

For Ghana the main lessons to be drawn are:

- *Alternatives to the state courts and the remedies they offer are difficult to find:* the demand for authoritative remedies, fairness and enforceability is such that solutions based on 'easing pressure' on the courts through greater use of ADRs or customary institutions are unlikely to be successful if they fail to offer equivalent authority. The LAP

57 The results of our surveys may be compared with the AfroBarometer national survey of Ghana in 2005, which showed that 63 per cent of the population say they trust the law courts 'somewhat' or 'a lot', with only 8 per cent 'don't knows'. However it should be noted that the survey also showed that most people (72 per cent) believe that some or all of the judges are involved in corruption, even though very few could say they have any personal experience of such behaviour. 81 per cent believe the police to be corrupt (AfroBarometer 2005). The surveys conducted in our research focused on the experience of respondents who had actually experienced a land dispute.

programme as it rolls out is likely to increase these demands as greater emphasis is put on establishing legal titles and recording the great variety of customary titles. People will be led to expect a legally certain settlement, which ADR cannot necessarily provide. This suggests that it would be most unwise to try to enforce a 'no appeal' rule on customary and other forms of arbitration and ADR.

- *The Magistrates Courts are the key 'front line' institutions* at local and rural levels. They have the most potential to offer flexible, rapid and accessible justice; yet their current resource position is totally inadequate. Funding of appointments and other support would offer immediate returns. A new Land Division of the High Court is highly desirable but may not make much impact on the mass of new cases emerging.

- *There is potential for state-supported and enforced ADRs.* ADR attached to the courts (in effect a formalisation of out-of-court settlements) is currently under consideration, but will require enormous changes of attitude and aptitude amongst the legal profession. More promising is the system already developed by the CHRAJ which our research showed to be working so effectively in Goaso. At the community level, experiments with dispute-resolving NGOs have reportedly achieved some success, supported by local governments with training offered by the Judicial Service (retired judges). Even local government bodies such as the Unit Committees, or District Advisory Committees on land, have been used and could be developed more systematically although there are considerable political dangers. But the limitations of ADR have to be recognised; in situations where there are strong market pressures (a lot of money at stake) or where there are large inequalities of power, they cannot necessarily protect the rights of vulnerable people. Ultimately, the state courts cannot be bypassed; they serve a very real need (and right) for authoritative justice.

- *Reform of the court management and procedures is essential:* the above findings suggest that the courts themselves must be reformed and given more capacity to deal with at least some of this strong positive demand, rather than bypassed. Our analysis of cases and of the reasons for delay leads to the strong conclusion that a lot of improvement can be made by simple administrative reforms – the scheduling of cases for instance – and more use of legal remedies for striking out cases which are not being prosecuted properly. Informal changes in the role of judges towards a more investigatory and active stance, which are currently officially frowned upon in the 'adversarial' English model, could be encouraged and legitimised.

For Côte d'Ivoire the main lessons to be drawn are:

- *Courts as an alternative to political conflict:* given the level of political and communal conflict in Côte d'Ivoire, and the dominance of political–administrative dispute resolution mechanisms, the formal courts appear almost as an 'alternative' system. Although the best way forward for land disputes would be implementation of the local land committees mandated by the 1998 Rural Land Law, the prospects for their success are currently slim because of the level of conflict which they would generate. Thus the commitment of the courts to rules and formal procedure could satisfy demands for impartial justice, provided enforcement was effective.

- *The capacity and flexibility of the courts would require considerable change* if they were to become more widely used. Written procedures have benefits in terms of objectivity and fairness in consideration of the evidence, but they could not cope with much extra demand, and flexibility is low. The codes in application are themselves very formal with little room for equity considerations.

- *ADRS will be difficult to develop* but could be considered. Judicial ADRS are virtually unknown in Côte d'Ivoire, although the Prefectoral Commissions for settling conflicts between farmers and cattle herders are a recent example of an attempt at ADR, which failed in practice because of the tendency for every system to become

dominated by the Prefectoral service. For this reason, court-annexed ADR might be a way of avoiding such dominance, although as noted the judicial service clearly lacks the capacity and the knowledge to go very far with such reforms at the present. The 1998 Rural Land Law Village and Sub-Prefecture level Committees are the most elaborated and well-thought-out form of ADR already on the statute books, and should be implemented as far as possible. Their success, however, will depend upon a resolution of current political conflicts.

16.2 Mediation and arbitration by state agencies

16.2.1 Formal institutions for arbitration

Formal arbitration or adjudication committees attached to administrative agencies in both countries did not have a good track record. They were little used (as in the case of the Land Title Registry and the Lands Commission in Ghana), or were adjuncts to the exercise of administrative power as with the Prefectoral Commissions for settling conflicts between farmers and cattle herders. A major reason for their lack of use is that officials of land agencies which have the power to allocate land and/or permission to develop land, and to certify its legality, can use their discretion to informally settle disputes and appeals involving their own actions.

16.2.2 Informal dispute resolution by officials

In Ghana, these methods are frequently used because of their flexibility, cheapness and amenability to personal deals which are at the same time effective in terms of their legal status. They are relatively accessible although in the larger offices in the urban areas, they deal mainly with literate people. In the rural areas, individual officers can be very sympathetic and adept at dealing with poor or illiterate farmers, but this cannot be guaranteed – it depends on the individuals. Abuse of position and specialist knowledge is always possible. Lands Commission officers, for instance, are offering the equivalent of a court settlement in terms of the authority and certainty with which they can execute or implement possession of a piece of land. It is rapid, effective and of course much cheaper than going to court, even when the 'informal' payments to the officers are taken into account.[58] But the discussions are not documented and so the outcome can be undone if a party later objects. Officials of the Town and Country Department are basically acting as 'fixers', helping people through the jungle of the land regulation system. District Administration and Assembly politicians do not play a very important role as they tend to remit land questions to the technical agencies, including Agriculture, although the latter Ministry does not involve itself in anything other than very local 'friendly advice'.

In Côte d'Ivoire, the principal agencies which deal with disputes are the Prefectoral administration, and the technical land agency departments of the local municipal authorities, the Ministry of Housing and Urban Affairs and the Ministry of Agriculture. As in Ghana, these officials exercise considerable power because of their ability to make legal allocations and to certify possession. The Ministry of Agriculture plays a much bigger role than its counterpart in Ghana, and has a major part in the planned 1998 Rural Land Committees. The conflict and overlap amongst the different authorities is perhaps even worse than in Ghana with the difference that the Prefects have an ability to cut through problems caused by inter-agency conflicts and confusions. However if the Prefectoral service is itself the cause of the problem, there is little way of getting a resolution except by going over their heads to the political authorities, or attempting a court action. Because of the legacy of PDCI one-party rule, political authorities are resorted to more routinely than in Ghana for local matters. (In Ghana major local conflicts over chieftaincy and land have of course been politicised over the years.)

58 According to the AfroBarometer national survey of Ghana, 67 per cent of the population believe that some or all of national and local government officials are corrupt. But only 15 per cent said they had had any experience of bribery over the past year and 39 per cent said 'never' (AfroBarometer 2005).

16.2.3 Policy implications

- *The dangers of abuse of power:* both in Ghana and Côte d'Ivoire (as elsewhere), the routine exercise of discretion and informal problem solving by officials is both inevitable and to some extent desirable, and it is unrealistic to think that it can be prevented. It provides rapid and flexible solutions to problems that might otherwise end up in court, or lead to social conflict. But some doubt should be raised about encouraging officials to expand these discretionary activities. Questions of impartiality and conflict of interest could arise where individual officers are acting informally within legally constituted state agencies which have responsibility for granting legal status to land transactions. Corruption is a real danger, especially if they are acting as judges in their own causes. And illiterate or vulnerable people could easily be abused by unscrupulous officials.

- *Regularisation of informal official activities:* in Ghana, there are already proposals for an official Dispute Resolution Advisory Committee as part of the rationalisation of all the land agencies into a new Land Management Commission with a 'One Stop Shop' facility. It is planned that it would have to document decisions and include a legally qualified member, and have a provision for appeal to a court. Of course the record of such devices has not to date been very good, especially if the informal routes are easier and more convenient to the parties, and pushed by the officials themselves. But this should not prevent such a device being tried again, given the dangers inherent in the current informal system.

- *Reforming Prefectoral administrative power in Côte d'Ivoire:* the role of the Prefects in Côte d'Ivoire is so entrenched and so dominant in land dispute matters that it is completely impracticable to suggest that it be abolished or even seriously modified. It must also be recognised that it is an integral part of the political system and cannot be disentangled from both local and national political power configurations. Prefects are viewed as effective dispute settlers because of the power they wield. Prefects have only been challenged where the grip of the state seemed to be weakening, as during the 1990s, but the current situation in southern Côte d'Ivoire has politicised their role even more. The main possibility for reform would seem to lie in the fact that in practical terms, Prefects cannot actually handle all the matters which come before them and so they routinely refer them (in the rural areas at least) to the Ministry of Agriculture or to the customary authorities. Thus boosting the capacity of the courts, and recognising the role of the customary authorities more fully, especially in the 1998 Rural Land Committees, could provide some kind of alternative for dispute resolution.

16.3 Mediation and arbitration by customary and informal DSIs at local level

16.3.1 Legitimacy of the customary and informal systems

Customary and informal DSIs remain the dominant mode of settlement for ordinary villagers in rural areas in both countries, and to some extent in the urban and peri-urban areas of Kumasi and Bouaké. A lot of potential conflict, particularly over boundaries, land use and landholding agreements, is resolved at this level through agreed and customarily sanctioned procedures. Village chiefs in Ghana were still cited by the general population as most trusted persons for resolving a dispute; but actual personal experiences of dealing with a dispute showed a rather more varied picture. Chiefs accounted for only a minority of the DSIs resorted to, others being family heads, respected persons and opinion leaders including elected local government Unit Committee Chairpersons.

In Côte d'Ivoire, social sanctions and respect for traditional authority were strong in Katiola and Tabou and in Bouaké the power of the chieftaincy had even revived during the 1990s. But there is considerable evidence that traditional authority has been fragmented and diminished under the twin assault of colonisation by migrants and inter-generational and intra-communal conflict over marketised land.

16.3.2 Limitations on the legitimacy and accessibility of chiefs' DSIs

In Ghana, customary institutions are in general stronger both institutionally and economically, than in Côte d'Ivoire. This should give them many advantages as sources of authority and acceptable dispute resolution. But their historical strength is also a problem with respect to the provision of local justice. The evidence was that beyond the local level, the courts of the higher status chiefs were much less trusted. In the cocoa-growing area of Asunafo, people rated judges as more trustworthy than chiefs, and migrants in particular were only half as likely to have used a chief as opposed to another kind of arbitration by a respected person when settling a dispute. This is partly because historically they have an association with the colonial state, and are still regarded as part of the political power hierarchy. Another reason, however, lies in the power which chiefs have in local land allocation and management, and the development of customary law in response to marketisation and urbanisation. Chiefs have been using their allodial claims to attempt to gain control over the value of urban development land (and thus challenging the security of the 'customary freeholds' held by citizens of the political community). In the cocoa areas, there is a growing fear that apparently secure landholdings of migrant farmers could be converted to 'leaseholds' by chiefs citing the new laws. Yet the accountability mechanisms linking chiefs to their communities are fragile and frequently ineffective. Thus chiefs can be accused of defining the rules for their own benefit and as being 'interested parties' who cannot necessarily be trusted to offer impartial justice in local land disputes.

Even in the Nadowli area, chiefs have been attempting to gain control of land allocation from the traditional land chiefs (*tendana*), although it is the latter who are still given most respect in land dispute settlement. However, bitter conflicts over newly valuable land around Wa showed that not even traditional institutions could any longer count upon unquestioning respect.

In Côte d'Ivoire, similar social conflicts were emerging, primarily over the role of chiefs and family heads in the allocation of land resources to migrant communities in Tabou and the south-west generally. The younger generations, including youths returning from the cities during the continuing economic crises of the 1990s, were more suspicious of traditional authority, and families themselves were falling out over the disposition of lands in the past and the arrangements which had been made. Migrants, too, were more likely to trust the administrative authorities than the village customary authorities, whilst maintaining advantageous personal relations with individual local landholders. The migrant issue was much more serious than in Ghana, partly because of the sheer scale of the migrations, and partly because of the informal way in which so much land had been allocated during the boom years. Customary rules had been adapted enormously and without the backing of a state and a legal system which recognised customary law, as in Ghana. Hence the eruption of open conflict and violence and the politicisation of the land issue in a way which made the prospects for peaceful customary or even legal dispute resolution very poor. In the urban areas of Bouaké, the revival of chiefly authority was linked, as in Ghana, to attempts to appropriate the value of urban land allocation and development permissions.

16.3.3 Policy implications

- *Customary institutions and ADRS:* in Ghana, the courts of the higher chiefs do not really resemble ADR, given their formality and the authority and legal status of chiefs, even if they do search for 'consensus' solutions and reconciliation (apology) between the parties. There is also the problem noted of their 'interest' in the land. Perhaps one way to improve the form of justice offered and to enhance the accountability of the chiefs is to give more formal recognition to the dispute resolution tribunals which chiefs will be given with the new Customary Land Secretariats proposed in the LAP. As customary law is already a fully recognised part of the formal law of Ghana (as embodied in common law precedents) then courts which administer it should be (as in colonial times) part of the state court system and subjected to the normal rules of public accountability. At the same time, fuller training both in customary law and in

ADR procedures could be offered to create a very local popular court system, as has been done in many other African countries (although noting that in Uganda and Tanzania, local elected officials form part of the system which could be objected to in Ghana given the political power of the chieftaincy).

- *Strengthening customary institutions in Côte d'Ivoire:* the village-level councils in Tabou and Katiola are much less hierarchical and formal than those in Ghana (resembling more the traditional institutions of the Nadowli area) and would lend themselves more easily to an ADR-type approach. But within the well-entrenched political and administrative system of Côte d'Ivoire (highly centralised around Presidential patronage systems), they lack authority and credibility. Indeed in many ways they cannot stand over and above or separate from their communities. Thus in the south-west the indigenous customary authorities cannot deal effectively with the problem of the foreign and migrant communities, as they are too implicated. The restoration of good relations between host and migrant communities is now, as a result of the civil war, something which will require many years of political action for reconciliation. Their strength in places such as Bouaké and Katiola still lies in their ability to represent and act on behalf of a local public which is not totally fragmented and divided. It may be suggested that in rebuilding itself, the Ivorian state needs to give the traditional authorities some real resources and autonomy, such as would be provided by an implementation of the 1998 Rural Land Law, but continue to surround them with the support of legal and technical authorities. The latter can help to manage the inevitable conflicts whilst introducing some equitable considerations.

16.4 Overall conclusion

The research shows that forms of dispute resolution which provide fair and accessible justice to both the rural and urban poor *do* require state support for an effective yet legitimate and user-friendly court system. State courts serve a real need for authoritative remedies and should be enhanced and supported. In the development of a state committed to the 'rule of law', they also offer the potential for a balance or alternative to administrative and political power. Informal dispute resolution for agreed mediation at the very local level is best left alone, in terms of its inclusiveness. But some customary or chiefly based systems may lack legitimacy and inclusiveness; they are too formal and embedded in local power structures, or reflective of social polarisation, to offer genuinely voluntary ADR-type mediation and should be regulated by the state system.

Appendices

Appendix 1 Case-study areas

In each country, an area was chosen which corresponded to the following types:

- *Type I:* A situation of marketised, crop agriculture with competition between successive generations of migrants and host communities.
- *Type II:* A situation where there is a low degree of marketisation, no perceived land shortage and land is allocated at low cost according to local customs.
- *Type III:* Urban or peri-urban situations characterised by marketisation, severe competition and conflict among statutory, traditional and 'informal' (usually illegal) systems of land regulation.

Within each of these types of area, a group of villages or neighbourhoods was selected for detailed study including, in Ghana, a sample survey of popular opinion.

Ghana

Type 1 area

Asunafo District, Brong-Ahafo Region. District capital town: Goaso. Indigenous population are Akan-speaking Ahafos and Ashantis. This is a predominantly rural district, based on cocoa growing and timber extraction. Migration into the area reached its peak in the 1960s and 70s. The land in the Asunafo District was vested in the government in 1961, after the creation of the Brong-Ahafo Region and the Nkrumah government's attack on the power of the Golden Stool (the Asantehene). The lands in the district are split between Stools under the Kumasi chiefs and Stools loyal to the Kukuomhene.

Villages were selected in Asunafo District according to their mix of indigenous and migrant populations.

Mainly migrant populations:

- Ahenkro (land under the Fawohoyeden Stool)
- Bedabour (land under the Akrodie Stool)
- Adomako-krom (land under the Kukuom Stool)

Mainly indigenous population:

- Fawohoyeden: (mixed 70 per cent indigenous, 30 per cent migrant), chief serves Kukuomhene
- Akrodie: chief serves Golden Stool
- Ayomso: Divisional Chief, serves Akwaboahene (Kumasi clan chief)

Type II area

Nadowli South District, Upper West Region. District capital town: Nadowli, population only 2,890. A wholly rural district very sparsely populated with small dispersed settlements, based on traditional agriculture and some livestock. A variety of small ethnic groups including migrants. It stretches from the northern boundary of Wa, the regional capital. Discovered to be affected by peri-urban developments spreading north from Wa.

Four villages chosen, according to the following criteria:

- Tangasia: located on the west side of the district and close to Nadowli Town. This is a predominantly indigenous community that has been experiencing out-migration towards the east as the soil continues to lose fertility.
- Busie: This settlement typifies a community with very strong presence of migrants, particularly Konkomba.
- Tabiase: Inhabitants say they came originally from Damongo. A settlement with a good mix of both indigenes and settlers. Arable land is very plentiful here and in recent past has been attracting migrants mainly from the west.
- Loho: Located on the northern border of Wa, an important settlement for the Kaleo (local) people. This community has had a protracted land dispute in the recent past with its next door neighbour, Charia.

Type III area

Kumasi, Ashanti Region. Kumasi, with a population of around 1 million, is the ancient capital of the Ashanti Empire, now the administrative and commercial centre of the Ashanti Region, and a major West African transport and trading crossroads. Urban settlements and 'travel to work' area expanding rapidly to towns 20–30 km away.

4 peri-urban villages were chosen according the following criteria:

- Appeadu: 10 km south of Kumasi; boundary disputes with neighbouring villages have turned violent, but the chief had a reputation as good arbitrator.
- Fumesua: 10 km east of Kumasi on Kumasi–Accra road. Large areas of land taken by government, and major recent development project (Inland Port). Serious disputes with neighbouring villages.
- Esereso: 15 km south-east of Kumasi on Kuntanasi–Lake Bosomtwe road. Lands allocated by a Land Allocation Committee set up by town leaders with chief; but now major disputes between citizens and members of chief's family after collapse of Land Allocation Committee.
- Barekese: 25 km north-west of Kumasi on main road; land acquired by government for dam project but no major disputes.

Côte d'Ivoire

Type 1 area

The *département* (Prefecture) of Tabou in south-western Côte d'Ivoire (Bas-Sassandra Region), focusing on the Sub-Prefectures of Grabo, Tabou and Grand-Béréby. This Prefecture is a key cocoa producing area near the Liberian border with very large migrant populations who have arrived since the 1970s–80s. In the Sub-Prefecture of Grand Béréby foreigners represent 52 per cent of the rural population; 57 per cent in the Sub-Prefecture of Grabo and 51 per cent in that of Tabou Sub-Prefecture itself.

Villages chosen for special study and focus groups were selected according to their mix of indigenous and migrant populations.

Type of population	Village	Sub-Prefecture
Mainly indigenous (Kroumen)	Ouédjéké Besséréké	Tabou
	Ourso Takoro	Bérébу
Mainly migrant	Siahé Déblablai Jbkro (Baoulé) Konékro (Baoulé) Ahoutoukro (Burkinabé)	Grabo

Type II area

The *département* of Katiola, to the north of Bouaké (Vallée du Bandama region). An area of mainly traditional agriculture (Tangwana ethnic group) with some migration from surrounding northern areas and Peul transhumant cattle herders. Three Sub-Prefectures (S/Ps) were focused on: Fronan, Katiola and Niakaramadougou.

Case-study villages were selected from each S/P according to the following criteria:

- Fronan S/P: Niénankaha, Tiengala, Kanangonon and Darakokaha (predominantly indigenous populations, problems of inter-generational conflict and rivalry between land chief and village chief.
- Katiola S/P: Kationon I and Kationon II (predominantly indigenous populations, few disputes).
- Niakaramadougou S/P: Folofonkaha, Namogotogoda and Nadanankaha (predominantly indigenous but problems of cohabitation with Senoufo migrants).

Type III area

Bouaké, the second largest town in the country with nearly 700,000 inhabitants, is the capital of the Vallée du Bandama region, located at the central road and rail links of the long-distance trading system for the whole region of Francophone West Africa. It is multi-ethnic but with a large Baoulé community from the surrounding area, and until the civil war was expanding rapidly.

The following peri-urban and urban villages and neighbourhoods were selected for study according to the following criteria:

- Adiéyaokro: an area of recent informal settlement, conflicts between migrant Baoulés and indigenous land chiefs.
- Hippodrome: informal settlements, illegal occupation not recognised by the administration.

- Houphouet-ville: informal settlement, land sold by customary authorities but allocations not recognised by administration.
- Kouakro: peri-urban village, land situation managed peacefully.
- Nzuékro: conflicts between indigenous inhabitants and migrants, resolved by the administration.
- Tiêrêkro: conflict with the urban administration.

(Note: the field enquiries in Bouaké could not be completed due to the outbreak of civil war in September 2002. Bouaké was occupied by rebel forces and has since been part of the northern zone controlled by rebel forces. No full peace agreement has been achieved and the country remains partitioned at time of writing.)

Appendix 2 The surveys

A Ghana

A.1 Litigants survey

243 respondents were interviewed; the sample consisted of all those whose cases were listed for hearing during the period December 2002 to April 2003. Only 15 per cent refused to be interviewed. 55.6 per cent were plaintiffs, 44.4 per cent were defendants. The sample was distributed as follows:

- Kumasi High Court: 186
- Goaso Magistrates Court: 47
- Wa High Court: 10

The data was coded and analysed using SPSS for Windows, with the assistance of Jarrod Lovett of IDS, Sussex.

Full data sets can be provided on request

Litigants Questionnaire

Questionnaire for litigants/parties to cases ***No***

Location:

Type of court or tribunal:

1 Personal details

Sex	Male	
	Female	
Age	18–25	
	26–39	
	40–64	
	65+	
Educational level	None	
	Up to Stnd 7/MSLC	
	Secondary/ TTC	
	Post-secondary	
Occupation		

2 What was your case about?
[Tick one of categories]

Sharecropper contract	
Unauthorised disposition of rights in land: By stranger	
by family member	
by chief	
by Lands Commission	
Unauthorised sale of land	
Dispute over cultivation/crops	
Inheritance: wife *vs* children	
Amongst children	
Between different sides of family	
Trespass	
Boundary dispute	
Confiscation by government (CPO)	
Title or registration of title	
Development/failure to develop plot	
Other	

3 Are/Were you:

The plaintiff?	
The defendant?	

4 To where [to which dispute settling place] did you FIRST take your case?

5 When was that? (how long ago?)

6 Why did you choose to bring your case to this present court?

6a: *[IF SAYS DISSATISFIED WITH PREVIOUS COURT]* **how is the present court better than the one you tried previously?**

7 How long has your case been at this present court?

8 How many times have you had to attend this court for a hearing?

9 Have you employed a lawyer?

10 How much do you think you have spent on the case up to now?
[INTERVIEWER PROMPT IF NECESSARY]:

lawyer's fees	
transport	
witnesses	
fees	
costs awarded for non-attendance of self	
costs awarded for non-attendance of lawyer	

11 What language was used in the court hearings?

All in *[specify local language]*	
All in English	
Combination English/ *[local language]*	

12 Did you understand clearly what was going on in the trial?

13 During the hearings, what was the judge's speech to you like? [READ LIST:]

❒ Truthful ❒ Unhelpful
❒ Fair-minded/impartial ❒ Harsh/ strict
❒ Patient ❒ Hostile/unpleasant
❒ Helpful ❒ Biased
❒ Fast ❒ Too slow

14 Were you satisfied that all the facts of the case were heard and properly considered?

❒ Yes ❒ No ❒ To some extent

[IF CASE STILL ON-GOING, *GO STRAIGHT TO Q. 20*]
[IF CASE FINISHED, ASK:]

15 What was the judgement?

16 Concerning the judgement, did you feel that you:

'won'	
'lost'	
There was a compromise or agreement between you and the other party?	

17 What do you feel about the decision overall? *[fair /unfair etc]*

18 Were the reasons for the decision explained to you?

18a [IF LOST]: **will you appeal against the judgement?**

19 Has the other party accepted the judgement?

19a [IF NO]: **what has been done to enforce the judgement?**

19b [IF NOTHING DONE]: **what do you think should be done to enforce the judgement?**

20 All things considered, do you think taking this case to court is/was worth all the trouble? *[note reasons for respondent's opinion]*

A.2 Popular perceptions (village level) survey

676 respondents were interviewed, selected from 14 case study villages in the three main case study areas:

- Kumasi: Appeadu, Fumesua, Esereso, Barekese (201)
- Asunafo District: Akrodie, Ahenkro, Bedabour, Fawohoyeden, Adomako-krom (266)
- Nadowli South District: Loho, Tabiase, Busie, Tangasia. (209)

The sample was drawn by selecting households randomly on an area basis, then by quota categories (age, gender) from each household.

The data was coded and analysed using SPSS for Windows, with the assistance of Jarrod Lovett of IDS, Sussex.

Full data sets can be provided on request

Popular perceptions questionnaire:

Questionnaire on popular perceptions of institutions for settlement of land disputes

Location:

1 Personal details

Sex	Male	
	Female	
Age	18–25	
	26–39	
	40–64	
	65+	
Educational level	None	
	Up to Stnd 7/MSLC	
	Secondary/ TTC	
	Post-secondary	
Occupation		

2 Are you a native of this village? (Is your family from this village)? IF NO, ASK:

2a. Where are you from?

i. Another place in this District	
ii. This Region	
iii Another Region of Ghana	
iv. Outside Ghana	

3 Do you have ❒ a farm? ❒ Plot? ❒ House? in this village?

4 Who gave you the land/property?

5 Did you get any advice or help from anybody on how to get your land/property?

5a If yes, who?

6 If anybody started causing you problems with your land /property [give examples? E.g. threatening your possession, your relatives quarrelling about an inheritance, somebody farming on your land, your 'landlord'] **who would you go to to seek *advice* about the problem?**

7 If such problems turned into a *dispute*, who would you most trust to settle any dispute? READ LIST:

	Not at all	**To some extent, possibly**	**A lot**	**Don't Know**
Heads of the families				
Village chief				
Tendana [Nadowli only]				
Unit Committee Chairman				
School headmaster				
Divisional chief				
Paramount chief				
The Police				
DC				
Agric Dept. Officer				
Lands Commission Officer				
Town and Country Planning Officer				
CHRAJ Officer				
A lawyer				
A Court Judge				
Any other?				

8 Have you yourself ever been involved in a dispute over your land/property?
IF NO, ASK:

8a Why do you think it is that in this village you have been fortunate enough to have no quarrels over your land?

8b Do you feel sure that you will be able to continue enjoying your land peacefully in the future?

i. Yes I feel secure about my land	
ii. I'm a bit worried about the future of my land	
iii. I'm very worried that someone will take it from me or my heirs	
iv. Don't know	

IF YES, ASK:

9 What was the cause of your dispute?

10 How was the dispute settled or resolved? *[what kind of DSI?]*

11 Who were the members of arbitration/tribunal/panel/court which heard the case?

12 Why did you choose to take your case to this kind of arbitration/tribunal/panel/court?

13 How long in total did it take to hear the case?

14 How many times did you have to attend hearings of the arbitration/tribunal/panel/court?

15 Did you yourself present your case to the arbitration/tribunal/panel/court?

16 During the hearing, were you cross-examined (asked questions) by:

i. members of the panel?	
ii. other party?	

17 Were you able to question the other party? *[describe how]*

18 Did you understand clearly what was going during the hearing?

19 Were any of the proceedings written down?

20 Are you satisfied that all the facts of the case were heard and properly considered?

❒ Yes ❒ No ❒ To some extent

21 How much did it cost to use this kind of tribunal/panel/court?

22 How did the panel make their decision?

i. immediately, while you were present?	
ii. asked you to wait while they talked in private?	
iii. asked you to come back later?	
iv. some other method *(specify)*?	

23 Were the reasons for the decision explained to you?

24 Was the decision written down and recorded?

25 Has the decision been presented to a Court in writing, for Court approval?

26 How will the decision be enforced/respected?

27 What will you do if the other party refuses to implement the decision?

28 What do you feel about the settlement overall?

29 Do you now feel that you are secure in the peaceful possession of your land?

i. Very secure	
ii. A bit secure	
iii. Very worried about the future	
iv. Don't know	

30 All things considered, what do you think of the arbitration/tribunal/panel/court as a way of settling your dispute [read list and ask for choice]

a) 'it's the best way of settling disputes'

b) 'it is quite good but there are better ways'
[CAN YOU SAY WHAT YOU WOULD PREFER?]

c) 'its not satisfactory'
[CAN YOU TELL ME WHY YOU DON'T LIKE IT?]

B Côte d'Ivoire

Litigants interviews: 15 litigants who had brought actions in the Tabou Tribunal were interviewed, using the following questionnaire.

Questionnaire adressé aux parties prenantes dans les affaires en justice N°

Lieu:

Type de tribunal:

1 Caractéristiques individuelles

Sexe	Masculin	
	Fémin	
Age	18–25	
	26–39	
	40–64	
	65+	
Niveau d'instruction	Néant	
	Primaire	
	Secondaire	
	Supérieur	
Fonctions		

2 Quel était l'objet de l'affaire que vous avez portée en justice?
[Cocher une des catégories]

Contrat de partage de la récolte	
Disposition non conforme aux droits sur la terre:	
Par un étranger	
Par un membre de la famille	
Par un chef	
Par la commission foncière	
Vente de terre non autorisée	
Litige au sujet de l'exploitation/des produits	
Héritage: épouse contre enfants	
Entre les enfants	
Entre différentes branches de la famille	
Infiltration illégale	
Conflits de limites	
Confiscation par le gouvernement	
Titre de propriété ou enregistrement de titre	
Développement /échec à développer une parcelle	
Autres	

3 Etes/étiez-vous: ❒ **Le plaignant** ❒ **Le défendeur (le prévenu)**

4 Où (devant quelle instance) aviez-vous, pour la première fois, porté votre affaire?

5 A quel moment était-ce? (Y a-t-il combien de temps?)

6 Pourquoi aviez-vous choisi de porter votre affaire devant ce tribunal?

6a): [SI INSATISFAIT DU PRÉCÉDANT TRIBUNAL] **En quoi le présent tribunal est meilleur au premier?**

7 Depuis combien de temps votre affaire est portée dans le tribunal actuel?

8 Combien de fois *avez-vous dû assister aux audiences de ce tribunal*?

9 Avez-vous bénéficié des services d'un avocat?

10 Combien pensez-vous avoir dépensé jusqu'à présent sur cette affaire?

Honoraires d'avocat	
Frais	
Transport	
Coûts occasionnés pour non assistance de soi	
Témoins	
Coûts occasionnés pour non assistance d'un avocat	

11 Quelle langue était utilisée à l'audience?

Tout en *[préciser la langue]*	
Tout en français	
Combinaison français / *[langue locale à préciser]*	

12 Aviez-vous bien compris de quoi il était question au procès?

13 Pendant les audiences, comment avez-vous apprécié le réquisitoire du juge?

❒ Honnête **❒ Hostile/non satisfaisant**

❒ Impartial **❒ Inutile**

❒ Patient **❒ Sévère/strict**

❒ Utile **❒ Biaisé**

❒ Rapide **❒ Trop lent**

13 bis. Votre affaire a-t-elle été auditionnée? ou a-t-elle été ajournée?
13 bis a) Si oui, combien de fois l'a-t-elle été?

14 Etiez-vous satisfait de ce que tous les faits relatifs à votre cas soient auditionnés et considérés comme il le faut?

❒ Oui ❒ Non/ ❒ En quelque sorte

[SI L'AFFAIRE EST ENCORE EN COURS, ALLEZ DIRECTEMENT À LA QUESTION 20]
[SI L'AFFAIRE EST RÉGLÉE, DEMANDEZ:]

15 Quel était le jugement (le verdict)?

16 Au sujet de ce verdict, aviez-vous le sentiment d'avoir:

'gagné'	
'perdu'	
Y a-t-il eu un compromis ou un accord entre vous et la partie adverse?	

17 Que pensez-vous dans l'ensemble de la décision? *[juste /injuste, etc.]*

18 Les raisons de la décision vous ont-elles été expliquées?

18 a) [SI VOUS AVEZ PERDU] Allez-vous faire appel du jugement?

19 La partie adverse a-t-elle accepté le jugement?

19 a) [SI VOUS N'AVEZ PAS PERDU LE JUGEMENT] Qu'est-ce qui a été fait pour faire respecter le jugement?

19 b) [SI RIEN N'A ETE FAIT] Qu'est-ce qui pourrait être fait pour faire respecter le jugement?

20 Après tout, pensez-vous que le fait de porter ce problème devant le tribunal vaut/valait

Village surveys: in each of the case-study villages, focus group techniques were used (see Appendix 1)

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