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State courts and the regulation of land disputes in Ghana: the litigants' perspective

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Summary

The majority of land in Ghana is still held under a diversity of customary tenures, embedded in family, community and chiefly institutions; but land disputes may be adjudicated in a variety of institutions: informal arbitrations and family tribunals, chiefs' courts, quasi-legal state agencies and the formal state courts. Current debates on how to protect the land rights of the majority of customary land holders revolve around the respective merits of customary and non-state regulation (said to be accessible, flexible and socially embedded) versus state systems, which are said to offer more certainty, impartiality and non-discriminatory codes and procedures. In Ghana, however, customary and state legal codes have been integrated for some time, and the state courts, which are frequently used as first instance adjudicators, apply customary rules. Does this mean that in Ghana the merits of customary law can be combined with the certainty and enforceability of state court dispute settlement?

Based primarily on survey and interview data, the research analyses how litigants in three selected state courts perceived the experience of taking their land cases to court. It was found that, in spite of the problems and delays associated with the state courts, there was a very strong demand for authoritative and enforceable settlements which only the state could provide. It was also found that the justice offered by the state courts was not as alien or inappropriate as commonly supposed. Particularly in the Magistrates Court, judges were well respected and their procedures seen as sufficiently flexible and user-friendly. Moreover, the extreme reluctance to entertain out-of-court settlements casts doubt on the notion that proposals to move to more use of ADRs (Alternative Dispute Resolutions) will be successful if they fail to offer equivalent authority, fairness and enforceability.

Keywords: Ghana, Land, Litigation, Courts, Disputes, Land Law, Access to Justice, Legal Pluralism

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1 Regulation of land disputes in Ghana: legal pluralism and state vs "non-state" dispute settlement institutions

In Ghana, as in the West African region generally, contestation over land is particularly acute, and seems likely to intensify. The pressures of population growth, cash-crop led marketisation, large scale migration, and rapid urbanisation have produced increased competition and land scarcity, and increasingly politicised conflict over land (IIED 1999). Some of these conflicts – host communities vs migrants, inter-communal, inter-generational, 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 through its articulation with local regimes or through state attempts directly to control land; everywhere, these developments are deepening the marginalisation and exclusion of poor and vulnerable groups.

"Land regulation" regimes in such situations have a crucial impact on livelihood decisions concerning crop strategies, labour usage, and survival strategies in the city (DFID 2000). Although Ghana shares with other African countries, a situation characterised by high levels of legal pluralism, its particular history, both pre-colonial and colonial, has produced a set of deeply rooted, local social institutions of land regulation which have always been more strongly supported by the state than in many other African states. During the colonial period, British policies of Indirect Rule and for regulation of land exploitation led to the incorporation of local or "customary" laws into a unified common law system, through the institution of Native Courts (Crook 1986; Allott 1994; Crook 2001). Legal reforms in Ghana since 1986 have incorporated all forms of land tenure, including customary, into a single statutory and common law framework, and subjected transfers to both title registration and centralised regulation by a national Lands Commission. But this attempted centralisation and integration of different kinds of regulation has so far proved ineffective, and traditional institutions remain strong (Kasanga *et al.* 1996; Kasanga and Kotey 2001). Ghana's *National Land Policy*, published in 1999, now seeks, amongst other things, to harmonise the legal and regulatory framework for land administration through law reform, establishment of special land courts and strengthened customary land authorities, and comprehensive mapping and registration of land holdings and land rights, both customary and modern (Ghana 1999).[1]

A policy of "harmonisation" does not, however, necessarily imply an end to legal pluralism particularly in the institutions which deal with allocation of land and regulation of land disputes. Customary-based institutions remain a key element in the land regulation system, particularly at local level, side by side with the formal hierarchy of state courts and the state's land administration agencies such as the Lands Commission, the District and Regional Physical Planning Authorities, the Land Title Registry and the Survey Department.

In this context, a key question which the legal and institutional reform process must address is how to develop judicial and regulatory institutions which will be effective at reducing or managing growing conflict over land, and protecting land rights particularly of the rural and urban poor.

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[1] The policy is being implemented by the Land Administration Project Unit (LAPU) in the Ministry of Lands and Forestry.

Current debates in the literature revolve around two main themes: first, 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 the state and locally inequitable power structures? (Berry 1993, 1997; Basset and Crummey 1993; Chauveau 1997; *contra* Chanock 1991; Ruf 1985; Léonard 1997).

Second, does the plurality of legal orders offer useful choices for the ordinary citizen ("forum shopping") (Benda-Beckmann, Keebet von 1991; van der Linden 1989; Griffiths 1986) 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 (Farvacque and McAuslan 1992; Kasanga *et al.* 1996; van Leeuwen and van Steekelenburg 1995; Dembele 1997; Stren 1989)?

The most recent work is generally sceptical about modernisation schemes (including land registration) and advocates an "adaptation paradigm" which will respond to the expressed demands of farmers and the urban poor for more effective enforceability of customary or locally agreed tenures, and a reduction in "conflict" (Platteau 1996; Bruce *et al.* 1994; Atwood 1990). There is therefore a new interest in strengthening "locally based institutions" for dispute resolution and land management (Berry 1997; Fred-Mensah 1999; Firmin-Sellers and Sellers 1999; McAuslan 1998; IIED 1999). There is little work, however, on how such institutions might function. What happens when there is disagreement on which codes are authoritative, and the parties (as in most cases) are unequal? After all, there is not necessarily consensus at the local level, where the dominant legal order may be as contested – or more contested – than that of the state (Benda-Beckmann, Franz von 2001; Schmid 2001). This is a crucial question for protection of the rights of the poor and vulnerable, and one which neither rights-based "access to justice" nor alternative dispute resolution (ADR) approaches have fully addressed (Anderson 2003; Debroy 2000; Nader 1979; 2001).

Indeed, the debate over the problems involved in encouraging local, customary dispute resolution institutions and ADRs suggests for some commentators that the best way forward is in fact to strengthen the role of state courts and regulatory agencies within a reformed and more integrated system. "Institutional" analyses of judicial or regulatory bodies suggests that both the procedures adopted and the legal codes used have an impact on the outcomes – who gains, who loses in terms of access and security (cf. Kees van Donge 1999; Woodman 1996 and 2001). But it can also be argued that the authority and enforceability of decisions have a crucial impact on whether the outcomes of dispute resolution do in practice protect land rights. But which authority is most likely to protect the land rights of the poorest and most vulnerable? It may well be those, such as the state courts, whose decisions can override local power structures.

In our research on the institutions which regulate access to and dispute over land rights we therefore decided to pay as much attention to the state courts, in their capacity as regulators of land disputes, as to "non-state" (informal) and customary dispute settlement mechanisms.

In this paper, we report on survey-based research which examined the functioning of selected state courts, focusing primarily on how they are perceived and experienced by those who use them: – litigants

in land cases. How effective do people find these courts? Are they seen as capable of protecting land rights, do they produce results which are acceptable or legitimate in the eyes of the parties themselves and how far can they contribute to resolving or mitigating the levels of conflict associated with access to, use of and disposal of land in Ghana?

The state courts as provided under the **1992 Constitution** and the **Courts Act** of 1993, 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.

We focused on the work of selected courts in three case-study areas:

1. The Community Tribunal (now Magistrate's Court) in Goaso, which is the District capital of Asunafo rural district, an area of cash crop agriculture (mainly cocoa) with large migrant communities.
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. There are six judges sitting in the Kumasi High Court.
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 are very few land disputes, but those that are emerging are linked to the peri-urban growth of this Regional capital.

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. We therefore carried out a targeted or purposive survey of 243 litigants in the relevant courts, randomly selected over a specified time period. This is unique data in

that it is probably the first such survey in the history of research into the Ghanaian legal system. We also interviewed the providers of the judicial service – judges, lawyers, court officials and observed court proceedings over the same time period.

2 The court system: background to the current situation

The current court system in Ghana was set up by the **Courts Act** of 1993, 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 by Executive Instrument in 2002 and reverted to being Magistrates Courts under a single legally qualified judge. (The Tribunals were a legacy of the 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 Magistrate's 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. 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, 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 practices begin to advise their clients to use them on grounds of speed and cost.

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 others. It is thought that land cases themselves account for around 50 per cent of the total cases filed nationally (no recent accurate figures are available) (Wood 2002). 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 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! (Table 2.1) 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 – Mrs Justice Georgina Wood in a recent paper has estimated it to be around 5 per cent, a view supported by other judges and lawyers we have spoken with. 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![2]

Table 2.1 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%	
% cases settled (total)	6.7	6.0	8.9	4.0	2.9	
% cases settled (land)	1.5	0.6	4.5	0.7	0.6	
% new cases (land)	5.7	2.8	3.9	4.3	2.7	

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.

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 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

2 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.

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?

3 Litigants in the case study courts

Our intention in this study was to find out how the courts are used by citizens and how they view their experience of litigation. We therefore selected a sample of actual litigants in three courts: the Kumasi High Court, the Goaso Magistrates Court and the Wa High Court. The sample 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 follows.

Table 3.1 Litigants' survey: sex of respondents

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

Table 3.2 Litigants' survey: age of respondents

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

Table 3.3 Litigants' survey: 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 3.4 Litigants' survey: 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**

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/ MLSC 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.

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.

In the first place, we asked whether it was to do with the nature of the dispute; what kinds of land dispute were appearing in the courts? The survey provided a surprising answer: the largest single category of cases (over 52 per cent of the total) involved intra-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 4.1). The kinds of cases which receive so much attention in the literature on the problems of land tenure in Ghana – double sales and unauthorised disposition of land by somebody without proper title, allegedly caused by lack of boundary definition and registration of ownership – 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; what it shows is that family disputes 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 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. The obvious 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, is clearly proceeding without much legal challenge, unless the disposition of land is being dealt with locally, with or without consent.

Table 4.1 Breakdown of land cases by subject matter

	Valid percent
Intra-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 CPO	1.2
Total	**100.0**

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.[3] 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"

[3] 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 .

process. Only small numbers had used other kinds of dispute settlement, mainly family heads. 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 4.2), perhaps reflecting the more rural character of the catchment areas of those courts.

Table 4.2 Methods used to first 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%

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; 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 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!). Again there were some differences between Goaso and Kumasi on this issue, with Kumasi 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.

5 The efficiency and effectiveness of the court system

5.1 Delays

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 5.1). 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 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 who we 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 5.1 Time since cases were first brought to court

	Valid percent
Less than 3 months	7.5
3-6 months	7.5
6 months to a 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 he 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, and other more pressing engagements.

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; 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 77.5 per cent reduction in the land cases on the books! (Wood 2002). This outcome tells us little of course 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 over-optimistic 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?

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. 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.

5.2 Costs

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, 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 5.2). The modal amount was 2-5 million cedis, but only a small group (8.2 per cent) had spent more than 20 million.[4] 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, 70 per cent falling within the half-million to 5 million range.

[4] 20 million cedis is around £1,481 at current rates, or the equivalent of 4-5 years salary of a basic grade civil servant.

Twenty million is a lot of money for an average Ghanaian in regular employment, but the more common amounts (half a million to 5 million) 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.

Table 5.2 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**

6 The experience of going to court: how "user friendly"?

Perhaps one of the most critical issues in comparing land dispute settlement systems is to find a form of regulation which is simultaneously effective and yet also non-exclusionary, well understood and accepted as fair or legitimate. The only way to find out how litigants perceive the court system is ask them about their own experiences. But the court proceedings can also be observed in order to make a judgement on how the processes work in practice. We adopted both approaches.

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.

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 Magistrate's 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.

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 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 6.1)

Table 6.1 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%

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.

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 been 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', (Twi) he is 'patient', 'fair', 'helpful', and so on (Table 6.2). A few said he was 'fast' – meaning conducted proceedings in a businesslike 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; but the difference comes largely from the fact that Kumasi litigants were more reluctant to give an opinion at all on the grounds that they had not experienced a trial.

Table 6.2 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).

Whilst 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.

It is clear that in spite of difficulties, delays and adjournments, litigants in the courts which we surveyed did not, therefore, have wholly negative attitude to the process, 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 6.3).

Table 6.3 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**

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 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.[5]

7 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. Do the experiences of the litigants, lawyers and judges we spoke to provide any clues as to how to deal with this crisis?

1. 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 settlement which a court backed by the authority of the state can provide. People's commitment to litigation is very strong and when it is launched it is often to force others to a settlement by one means or another, even by the threat and inconvenience of court action itself.
2. The kind of justice offered by the courts is not as alien or inappropriate as many of its critics would have us believe. 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; this is particularly true of the more informal and flexible procedures which have developed in the Magistrates Court. Litigants include 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 from the case analysis that intra-family disputes are the main causes of litigation, rather than disputes between chiefs and their subjects or strangers/indigenes, which are not appearing in court in the numbers which might have been predicted.
3. These overall 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. Given the numbers, it is still probably unrealistic to think that the courts alone can deal with the backlog. The new Land Division of the High Court proposed in the National Land Policy is crucial and will undoubtedly be of help, and it could be suggested that plans in the LAP for the creation of District-level Local

[5] 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.

Advisory Committees on land matters could lead to the eventual creation of district land tribunals. Or, government could build on the good work which is clearly being done by the Magistrates courts in the rural areas to enhance their capacity.

4. Our analysis of cases and the reasons for delay leads to a 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.
5. In the debate over the role of Alternative Dispute Resolution systems (ADRs) which are being strongly supported by the LAP as a way of taking the pressure off the courts and focusing on local institutions particularly for rural land matters, the demand for authority, fairness and enforcement must not be forgotten. One strand of reform should be to develop state-supported and enforced ADRs (in effect a formalisation of out-of-court settlements) or other kinds of state supported tribunals such as CHRAJ. Even this might not succeed given the reluctance of litigants to entertain out-of-court settlements. But they might be persuaded by simpler forms of dispute resolution which offer the same authority as a court settlement.

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