

Land Grabbing, Land Rights, and the Role of the Courts

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Rights-based approaches to development tend to emphasise human rights, the right to participate in decision making, and rights to social services and goods such as water, housing, and even the city. They tend to exclude land, while land rights research tends to be focused on land law and law courts without analysing 'the right to land'. It is possible for the courts to play a key role to shape the current transformation of property relations, especially when private property appears to be failing its supposed role as a social trust but, as we show with an original institutional economics methodology, data from court cases, and results from Afrobarometer surveys, the contribution of the courts can be severely constrained. Existing approaches to contesting land grabs – centred on (a) popular protests (b) international guidelines and (c) national laws from the executive and the legislature – are inadequate without the courts, but what the courts can do is contingent on how well cases are presented, the orientation of judges, the resources of plaintiffs and, most fundamentally, the nature of their working rules.

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INTRODUCTION

Rights-based approaches to development have proliferated, but their engagement with the political economy of land, especially land grabbing, has been limited to date. Most of these approaches tend to emphasise human rights, the right to participate in decision making, and rights to social services and goods such as water, housing, and even the city (for a review, see Cornwall and Nyamu-Musembi, 2004; Gready, 2008). Such approaches – even those that emphasise housing - tend to exclude land (see, for example, Hohmann, 2013), while research on land rights (e.g., Ubink, 2002; Alden Wily, 2011a, 2011b) tends to be fixated on land law and law courts, neglecting the deeper, more fundamental question of 'the right to land'.

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Research on the transformation of property relations, often called ‘land grab’, has proliferated (see, for example, Boamah, 2014a, 2014b; Yaro and Tsikata, 2013; Tsikata and Yaro, 2014; Amanor, 2012; Nyantakyi-Frimpong and Kerr, 2016) - but they do not focus on the relationship between land rights and ‘the right to land’. How these related rights are claimed, who is entitled to claim them, and the outcome of securing these rights tend to be different. The right to land is not restricted to citizens; but land rights may have such restrictions. And, while the courts can give meaning to the ‘right to land’, it does not spring from national courts but rather from our humanity. Although crucially important, this global right to land and its relationship with land rights is often ignored in research on land grabs. Indeed, even those studies that focus on law tend to look at voluntary regulations, peasant movements, or wider general protests against land grabs and state reaction to such movements (e.g., Branch and Mampilly, 2015) or, as we see in other studies (e.g., Cotula, 2013a, 2016; Gilbert, 2016), focused on international land policies such as the *EU Land Policy Guidelines* (EU, 2004) and the *UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (UN-FAO, 2012). These latter documents are fixated on whether land registration will provide better protection for landowners, how best to design national investment laws to protect the interests of landowners, and the popular uprising of communities against land grabs.

There is an emergent research interest in the role of the courts to guarantee land rights. Some of this research tries to link the dispossession of land to human rights abuse and hence invoke the power of the judiciary to bring about social justice. The work of Jacobo Grajales (2015) on the role of the justice system in Colombia is, thus, focused. Grajales himself notes that the role of the justice system on land grabbing, that is, the ‘judicialisation of land grabbing’, is poorly understood. While Grajales (2015) then proceeds to look at the role of the courts in determining human rights abuses defined as land-based displacement of people, the question about the role of the court in *enforcing* contracts in *transactions* is pursued in Zhang and Elsner (2016).

This judicial turn in research on land relates to well-known theoretical debates about the role of the courts in ensuring the validation of the social theory of private property. If the social theory of property holds that private property exists because it serves the interest of society better, then it is the role of the court to ensure that property remains a ‘social trust’ by the use of its ‘police power’ (Ely, 1914, chapter 4, book 2). According to R.T. Ely (1914):

The police power is the power of the courts to interpret the concept property, and above all private property; and to establish its metes and bounds. The judges, in their decisions upon the accordance of legislative acts with the written Constitutions, tell us what we may do with property or what acts bearing on property are allowable. The police power shapes the development of the social side of property. It tells us what burdens the owner of property must bear without compensation (Ely, 1914, 206, italics in original).

By emphasising the power of the courts, this theory is significantly different from how Garrett Hardin (1968) and the generation of new institutional economists (e.g., Alchian and Demsetz, 1963; de Soto, 2000; Anderson and Libecap, 2014; Arezki et al., 2015) theorise the commons. Unlike that body of work, the commons is not only saved by marketisation, but also judicialisation (Grajales, 2015). Critics, however, note that this emphasis deflects attention from the class nature of the courts. Pierre Bourdieu (1987), for example, sees the entire legal field as an instrument of the strong against the weak such that a formalist, seemingly objective view of the law is untenable. In principle, either of these is possible. Indeed, it is plausible for the courts to be both a friend and a foe, but which tendency prevails generates a set of empirical questions: What role can the courts play to shape the current transformation of land rights? Can the courts as an institution act as a vehicle for economic justice? If so, should they? And if not why not?

We need to understand, but also transcend, what J.R. Commons (1924) called 'the legal foundations of capitalism' within the nation-state. In this sense, although the existence of non-binding regulations is often dismissed, it can be seen as offering wider avenues for seeking redress (Gilbert, 2016). This possibility is more so the case because some of the principles in the guidelines reflect binding human rights ideas to which powerful nations are signatories. More fundamentally, we need to probe whether the right to land is a constitutional guarantee, applied by the state, and dutifully guarded by the citizenry.

RESEARCHING THE JURIDICAL FIELD: THE CASE FOR INSTITUTIONAL POLITICAL ECONOMY

First, though, we need to understand the 'juridical field', to use Bourdieu's expression. Formalism and instrumentalism remain the two principal approaches to researching this field (Bourdieu, 1987; Fisher III, 1996; Banakar and Travers, 2002).

The formalist approach considers the law as purely objective and operates as a disinterested referee in society. Its key research methods are textual analysis and, in particular, formalist or literalist interpretation. In economics, this formalist approach is common in new institutional land economics with its focus on the minimisation of transaction costs through the formalisation of title (Coase, 1960; de Soto, 2000; Field, 2007; World Bank, 2011). This approach calls on the courts to guarantee security of land tenure.

The limitations of this approach have been widely discussed. Based on a conceptual bias for Western construction of property, this approach is inappropriate for societies where the property system is more complex with a mixture of individual, public, and customary systems of tenure (Elahi and Stilwell, 2013; Anderson, 2012, 2015). Indeed, even its construction of Western property rights is mistaken because it overlooks the history of the systems and mis-explains the key concepts of that

system.. The formalist approach is also limited because, although it purports to address insecurity of tenure, it offers a narrow analysis of the causes of insecurity of tenure. In turn, formalism neglects the many sources of insecurity and hence the diverse channels for possible policy intervention (Obeng-Odoom and Stilwell, 2013; Obeng-Odoom, 2013a). Accordingly, although still widely used, formalism is seen more as an ideological tool. So, although still widely used, it is seen more as an ideological tool.

Instrumentalism, the most well-known antithesis of formalism, is therefore gaining increasing attention. Here, the law is seen as a tool by the strong against the weak, an institution born out of the unequal relations between capitalists and workers (Collins, 2017). Strongly rooted in a Marxist-structuralist paradigm, it sees the autonomy of the law as limited. In the instrumentalist approach, both the transformation of property relations and the accompanying transformation of law occurs through what David Harvey calls 'accumulation by dispossession' (Harvey, 2003). In his methodological piece on studying the law, 'the force of law: towards a sociology of the juridical field' (1987), Pierre Bourdieu accepts this instrumentalist view, but faults its neglect of the symbolic power of, say, the text of the law. Bourdieu's interest in the symbols of the law because these symbols suggest meanings and intents not necessarily expressed elsewhere is crucially important. It helps to bring into focus legal texts, contexts, and structure which symbolise and embody unequal relations. It is particularly well-suited to societies that have long been subject to unequal power relations where colonial problems are being addressed by neo-colonial ideas (Anderson, 2015).

However, instrumentalism can also be quite deterministic in practice. For example, the determinism in Bourdieu's approach blinds it to individual and social agency or what J.R. Commons (1924) called 'artificial forces'. Besides, the institutions of change are not only class, but also race and gender. These institutions do not merely carve out of class either. And, instrumentalism can also show some really strong like-minded commitment to growth in ways that are quite compatible with capitalism tendencies to every growing expansion (Obeng-Odoom, 2017b).

Institutional political economy or original institutional economics is able to address the weaknesses of both formalism and instrumentalism. The methodology understands the legal field as a product of the economic system which is itself a product of the legal field. Institutional political economy takes a critical distance from title formalisation by drawing out its ideological character (Anderson, 2012; 2015). Although this feature is shared with some versions of instrumentalism, institutional methodology recognises that *the working rules* of society can be altered from within and outside of the system and from a combination of internal and external forces. That is, it is a methodology that helps to understand society by looking at how its rules of justice have been formed, how those rules currently operate and in what ways the rules are interpreted over time. Those *working rules* are both cause and effect of the economic structure (Vanberg, 1997). Since this approach insists on

simultaneously looking at the ‘reasonable value’ of both land and labour in transactions, it differs radically from the methodology of Bourdeiu, the formalists, and the structuralists. As a political economy approach, it also differs from existing economics approaches. For instance, unlike James Buchanan’s (1990) constitutional political economy which is merely differentiated from mainstream economics by studying individual exchange and co-operation, this approach also helps to study ‘joint action’ (see Bromley, 2015), conflict within exchange, and how the rules of conflict resolution become the focus of further conflict. In this sense, this constitutional political economy approach shares the general political economy methodology of focusing on conflict rather than equilibrium. ‘Thus’, as J.R. Commons notes, of a ‘volitional’ or political economic approach, it:

starts with the *purpose* for which the artificial mechanism in question was designed, fashioned and remodelled, and inquires, first, whether that purpose is useful or useless, legitimate or illegitimate, ethical or unethical, right or wrong. Then it inquires whether the artificial mechanism in question accomplishes that purpose in an efficient or economical way, and, if not, what is the limiting factor, out of the thousands of cooperating factors, that obstructs the operation, and to what extent that limiting factor can be, and requires to be, controlled in order to facilitate the mechanism and accomplish its purpose. Then it adopts or changes the shop rules, working rules, common law or statute law that regulate the actions and transactions of participants. It is a theory, indeed, a science, of an artificial and not a natural mechanism (p. 377).

The question of ‘cause’ and ‘effect’ is another way to distinguish this approach from others. While the formalists tend to correctly read patterns they confuse these for causes. Structuralists identify these issues quite well, but institutionalist methodology is also able to demonstrate how effects can give rise to new causes. So, both Myrdal and Veblen are able to discuss ‘circular and cumulative causation’, stressing how causes become deeper and deeper over time through certain effects (Fujita, 2007).

This approach is, therefore, useful in addressing the central questions of this paper. In particular, what role can the courts play to shape the current transformation of land rights? Can the courts as an institution act as a vehicle for economic justice? If so, should they; and if not why not? We study the *working rules, how they are perceived, and how they can transform social conditions* using data from court cases and the 2017 Afrobarometer Survey. The ‘Afrobarometer conducts face-to-face interviews in the language of the respondent’s choice with nationally representative samples, which yield country-level results with a margin of error of +/-2% (for a sample of 2,400) or +/-3% (for a sample of 1,200) at a 95% confidence level’ (Logan, 2017, 2), so they are particularly helpful. Specifically, our analysis is centred on what is ‘reasonable value’ from land transactions (Commons, 1924) considering opportunity cost, absolute cost, relative outcomes, and the congruence between promises and outcomes in terms of land, labour, and capital (Obeng-Odoom, 2016).

Land grab, in this sense, is the transfer of land from a producer or even indigenous group to a rentier class in ways that dramatically reconfigure property relations. It typically entails the takeover of Indigenous land mostly by transnational corporations but also by powerful states. ‘Rents’ in this conception of land grab is a social creation; not merely a reflection of the work of landlords. Indeed, rent is seen as arising from a multiplicity of social processes such as location factors, speculation, population change, the application of technology, general prosperity in the society, and wider public investment (George, 1871, 65-73; Harvey, 1973/2009; Nwoke, 1984; Collins, 2017). The reference to *grabbing* simply highlights dynamic nature of the process and emphasises the structural interlinkages between the act (land grab) and the action predicated on micro-actions and wider institutional configurations over time and space that facilitate the process (land grabbing).

LAND GRABBING IN GHANA

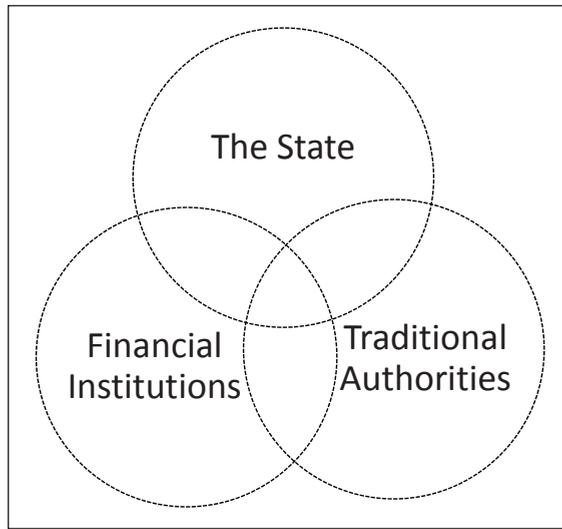
There is much evidence of foreign acquisition of land in Ghana. A synthesis of the evidence (see, for example, Schoneveld et al., 2010, 2011; Boamah, 2014a, 2014b; Nyantekyi et al., 2016; Obeng-Odoom, 2017a) suggests that over 1.5 million hectares of land have been acquired across various regions in Ghana for a period ranging from 25 to 50 years by some twenty foreign companies from countries such as Holland, Germany, and Italy.

Identifying the institutional facilitators of land grabbing in Ghana has not been the focus of research on land grabbing in Ghana. However, most papers (e.g. Schoneveld et al., 2010, 2011; Yaro and Tsikata, 2013; Tsikata and Yaro, 2014; Boamah, 2014a, 2014b; Nyantekyi-Frimpong et al., 2016) deal indirectly with the issue. This body of work suggests that the state, traditional authority, and financial institutions have all facilitated land grabbing in Ghana. Yet, through the Environmental Protection Agency, for example, the state can strongly regulate land transactions. But, in practice, as the work of Schoneveld et al. (2010, 2011) shows, EPA officials can relax onerous regulatory checks in order not to ‘impede’ land transactions which, in their view, are useful for the society. The activities of these institutions are sometimes complementary as depicted in figure 1.

Figure 1 emphasises the intersectionality of institutional actions in moulding property relations. State action together with the support of traditional authority can lubricate the re-distribution of land from communities to corporations. Through land title registration programs, for example, the state has directly brought vast tracts of customary land into market relations (Amanor, 2012). In this process, as managers, traditional authorities have been complicit in driving the Customary Land Secretariat wing of the land title registration program (Appiah, 2012; Akinsiba, 2013). Similarly, financial institutions have supported the process. To give an example, as the Ghana Land Administration Project, the official project to unleash full

marketization of Ghana's landed resources, is heavily financed by the World Bank along with the Canadian International Development Agency, the UK Department for International Development, the German Technical Assistance Corporation, Kreditanstalt für Wiederaufbau also in Germany, Nordic Development Fund, and the Government of Ghana (Obeng-Odoom, 2014), the nature of the structural links between the state, traditional authorities, and financial institutions becomes even clearer and the use of a three-set Venn Diagram even more appropriate.

Figure 1: Institutional facilitators of land grabs in Ghana



Indeed, so framed, these structural relationships suggest that any breaches of private property as a social trust for which legal intervention is needed can be examined within a much wider framework than given a state-centric focus. Certainly, human rights issues are better pursued in the high courts of Ghana (see *Edusei v Attorney-General* cited in Date-Bah, 2015) or even at the Commission for Human Rights and Administrative Justice. Depending on their nature, investment and contract issues can be addressed at various courts and some actions of chiefs can be checked at the Ghana House of Chiefs. The key point is that, with so much actors involved, multiple cases can be commenced against a diverse group of actors, including the investors but also their financiers and actors (Gilbert, 2016). Which actor is the focus of legal action depends on the implications of these transactions for economy, ecology, and society more widely and what it is that specific actors do to trigger or foil such implications.

There is a vigorous debate on the implications of these transactions. On the one hand, there are clearly beneficial effects such as job creation, the potential to develop stronger alternatives to hydro energy (see, for example, Boamah, 2014a; 2014b),

investment in school building projects and the offer of scholarships to students, the construction of roads to enhance mobility within and between communities, making contributions to the provision of water, electricity, and sanitation services (Kuusaana, 2017). But, on the other hand, there are major concerns about growing displacement and further marginalisation of minorities such as women and migrants (see, for example, Yaro and Tsikata, 2013; Tsikata and Yaro, 2014; Nyantakyi-Frimpong and Kerr, 2016). The difficulty is that these benefits and costs co-exist and transform over time. For instance, both the size of the labour pool created through land grabbing and the conditions under which such labourers work have been documented to decline over time, as in when agro companies shift from the cultivation of jatropha to growing maize (Kuusaana, 2017). Similarly, manual jobs that arise in the initial phases of land-based projects tend to be lost when the projects mature (see, for example, Obeng-Odoom, 2017a). And, while the precise quantum of land transfers, as Carlos Oya (2013) has shown, is difficult to ascertain in part because of the lack of care in collecting such data and in part because of the wide variation of ways in which land grab is conceptualised, it is well-established that much of the land grab in Ghana also transfers locally-grown food and raw materials overseas. Stefan Ouma's book, *Assembling Export Markets* (2015) provides a detailed account in this regard, stressing how, under new land relations, indigenous farmers growing local food for subsistence and local consumption now have to produce for external markets at the expense of their own food security. These dynamics make land grabs a major threat, but what makes the process even more fundamentally a threat is that it is the very processes of success that generate the failures.

The 'rent problem' is a case in point. While land rent is generated through factors and processes that are not entirely driven by landlords, such as (a) the fertility of land (b) the application of capital to land, (c) speculation (d) population growth (e) monopoly and (f) general investment in society, it is landlords who have mostly captured the rising rents of land (Obeng-Odoom, 2015). The so-called 'global land rush' is often read as a historical moment in the land grab debate or as a rush to avert food security crisis (see, for example, World Bank, 2011; Arezki et al., 2015), but it is also a rush to speculate and bet on land and hence generate rising levels of rent (Obeng-Odoom, 2015). Speculators create and worsen the problem by buying land, holding on to it, and selling it later. Speculators are also investors and the application of their capital to land also generates rent. In this process, the activities of both transnational and national speculators – through hyping the availability of quality land in suitable places in 'large' sizes – generate rent which, they in turn, can manipulate upwards by their own power as landlords. In-migration, state investment, and wider transformation of society through social activities all contribute to rising rents – but it is mainly landlords that appropriate these rising rents (Obeng-Odoom, 2015). This private appropriation of socially created rent, leads to serious social problems.

The empirical evidence of these dynamics is intriguing. As Kuusaani (2017) has shown, with the sudden rush of land investors and speculators to Ghana, landlords are charging minorities higher rent for no addition to land. This trend also increases land values, which are captured by landlords as a windfall while local governments capture a very small share as royalties, rents, and taxes (Kuusaani, 2017). As the chiefs do not usually account for these rents (Kuusaani, 2017), they become a rentier class, privately leaving off rent without producing anything. Moral appeals to traditional authorities to be more transparent, as Kuusaani (2017) does, are unlikely to achieve much better outcomes because there are structural reasons why chiefs have become so unaccountable (see, for example, Ubink, 2002; Lund 2008; Berry, 2009). In any case, chiefs are not the only rentier class: transnational agro companies are too (Elhardary and Obeng-Odoom, 2012). Similarly, emphasising the observed empirical reality of displacement and dispossession now can overlook possible future consequences such as how rising land rent can increase property prices and hence worsen existing housing crisis in the country.

In turn, there has been much popular reaction to the experience of land grabs. Both Yaro and Tsikata (2013) and Tsikata and Yaro (2014) document citizen action in the form of protests against agro-companies involved in land investment in communities in Northern Ghana such as Dipale. Researchers such as Cotula (2013b) and Kuusaani (2017) have drawn a direct link between land grabbing, food insecurity and local conflicts. As noted by Tim Hughes (2003) and Christian Lund (2008), conflicts have long been a feature of Ghana's land economy, but the surge in transactions involving land has further deepened conflicts. Some citizens attempt to re-enter what they hold to be their land but, in one case at least, a farmer was shot dead supposedly for trespass. And, often, citizens arm themselves or hire others to arm themselves to protect their land in what is usually called 'land guardism'. Others combine various approaches such as migrating to a new area to work the land, trading, or doing any other work in the urban areas (e.g., Nyantakyi-Frimpong and Kerr, 2016). These approaches have varied outcomes and the result of some of the activities (e.g., land guardism) can create further problems of insecurity and health hazards (such as the health implications arising from using dangerous chemicals and polluted water for urban farming, see Nyantakyi-Frimpong et al., 2016) for both those using the approaches and the wider society. But, together, it is these mechanisms that constitute some of the key non-legal responses to the loss of land.

The state can also provide a range of responses. It may act as a liaison officer buying land from customary owners and leases it to foreign companies. The advantage is that the state is presumed to be better able to negotiate with big capital and land with the state is seen to be permanently the property of the nation (Boydell, 2010). But is the state a more beneficial land grabber? Excessive long-term leases to companies, low payments to customary owners presumed to be less interested in money, and the turning of former holders of land into tenants or workers culminate in 'soft dispossession' (Anderson, 2015, p. 131) and hence raises questions about the rec-

onciliatory, middle-way model of state intervention through leaseholds (Anderson, 2015). In the Ghanaian case, there are numerous cases (for a detailed discussion, see Larbi et al., 2004; Elhardary and Obeng-Odoom, 2012) in which the state has failed to pay compensation to expropriated persons who are entitled to compensation and many more cases about inadequate compensation, paying compensation to the wrong people, and mis-using land compulsorily acquired for public purpose (e.g., leaving the land bare, using the land for private purposes, or locking the land in uncompleted projects). So, state-based land grabbing is not benign or necessarily better than private land grabbing.

CASE STUDY: NANA OPPONG V ATTORNEY GENERAL

It is within this context that Nana Oppong filed the case - *Nana Oppong Vrs Attorney General* - a landmark case seeking to use the Supreme Court of Ghana as a vehicle to force the Ghanaian state to rein in what is said to be an uncontrollable sale of large tracts of land to foreigners.

The plaintiff's argument can be divided into four. First, he argued that there is a massive stream of land take-over in Ghana by foreigners. Second, as a result of this land take over, Ghanaians are being made worse off. Third, the existing mechanisms for protection are hopelessly inadequate. In particular, the existing laws are not sufficient to offer protection. The existing laws do not stipulate the precise size of land that foreigners can take. The law limits foreigners to obtaining leases only and natives have the right of reversion. However, the law does not prohibit multiple renewals of leases, a mechanism which can be used to turn leaseholds into freeholds in essence, and can make the right of reversion guaranteed under law a meaningless right. Also, the market is poorly suited to bring protection to Indigenes because market value as determined by valuers does not capture the full range of values embodied in land. And, the state is not taking any steps to offer protection for Indigenes. Fourth, and as a result of the foregoing, not only the present generation but also the future generation of Ghanaians are likely to become tenant on their own land.

As the *social* purpose to which private interest in land is supposed to be put has been broken, the plaintiff invoked the police power of the judiciary, consistent with the social theory of property upheld in Article 36 (8) of the 1992 Constitution of Ghana: 'The State shall recognize that ownership and possession of land carry a social obligation to serve the larger community and, in particular, the State shall recognize that the managers of public, stool, skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin, or family concerned and are accountable as fiduciaries in this regard' (Government of Ghana, 1993).

The court, according to the plaintiff, had the powers to compel the state to act to first take control of the process through laws. Specifically, the plaintiff sought the following reliefs:

- A Declaration that the duty of the Government of Ghana to protect the welfare of Ghanaians pursuant to Article 1 of the 1992 Constitution places a duty on the Government of Ghana to take effective, immediate and continuing action to prevent 'foreign take-over' of the lands of Ghana and to ensure that most of the lands of Ghana remain permanently under the control, and management of indigenous Ghanaians for posterity.
- A Declaration that the Government of Ghana has breached the foregoing duty.
- An Order compelling the Government of Ghana to pass necessary legislation and to create and fund the necessary institutions to enable the Government to fulfil its duties as afore-described forthwith.
- Such further other reliefs as the Honorable Court may deem fit to grant.

The state, represented by the Attorney-General, admitted that the Government of Ghana would need to take some control by its statement that '...we agree with the Plaintiff's position that there is a need for some control over alienation of large tracts of land' (point 9, p. 5), but that the state has laws (such as the Administration of Lands Act, Act 123) and a forthcoming policy that touches on the issues raised by the plaintiff (see p. 5). The problem, again admitted by the defendants on p. 5, is the Act 123 is not targeted at foreigners at all, even though it specifies what size of land can be given for specific purposes (e.g., mining, timber rights).

The major objections of the state were based on two grounds. First, that there was no evidence of the details of the takeover that the plaintiff alleges. In its own words: 'The plaintiff in his statement of case, has mentioned names of companieswho have benefited from the sale and purchase of large tract of land but failed to indicate where and when these transactions took place' (p. 1, Defendant's statement of case). A second objection was more fundamental. The state argued that, as land in Ghana is mostly customary, it is not really possible to bind families and stools on how to administer their land. In other words, granting the plaintiff's case would entail major constitutional reforms (point 8 in the Defendant's Statement of Claim).

On these bases, the Defendants asked the Court to dismiss the plaintiff's case as 'late in the day, frivolous and vexatious' (p. 12 of the Defendant's case).

The issues before the Supreme Court, then, were:

1. Whether or not Article 1 of the 1992 Constitution is justiceable without proof of breach of any provision?
2. Whether or not the original jurisdiction of the Supreme Court was properly invoked?
3. Whether or not the Government of Ghana can be compelled to pass necessary legislation and to create and fund necessary institutions to enable the Government fulfil the alleged first relief being sought by the plaintiff?
4. Whether or not the Plaintiff has proof by way of documents or deeds to support his case of the foreign take-over of lands in Ghana?

5. Whether or not Article 266 (1) of the 1992 Constitution makes provision of how land is acquired by foreigners? (Memorandum of Issues, pp. 1-2).

Very little of the vast body of work and lines of analysis were actually used in the present case, so it is unclear how the plaintiff would respond if such issues arose in the trial. But, assuming that the plaintiff were to appeal to this literature, the court would face an uphill task of interpretation. For example, the very concept of 'land grabbing' is seriously debated (Boamah 2014a, 2014b). Also debated is the nature of the land that is taken. 'Marginal land' is what is often claimed (Exner et al., 2015), but there appears to be huge gap between what is claimed and actual experiences (Nyantakyi-Frimpong et al., 2016). Certainly, some people feel aggrieved, especially women and minorities (Tsikata and Yaro, 2014; Nyantekyi et al., 2016). To what extent this grievance is widespread is unclear (Boamah 2014a, 2014b).

What is clear is that the state is complicit in this transformation. Commoning, then, would become a strong third way. Differing from nationalisation, which is in the ambit of the state, commoning often lies outside hierarchical structures and can include a management collective popularly elected. As an institution, commoning can also entail the collectivisation of rent from land to be invested in public uses. But commoning is not one of the answers sought by the plaintiff. So, it may not engage the views of the judges. Whether the blanket statement of claims that invites the judges to grant 'such further reliefs as the Honourable Court may deem fit to grant' (memorandum of issues 'f', p.2) would enable the court to consider this issue too is unclear. Indeed, an *amicus curiae* can raise such issues, if they escape the court's attention. So many complexities have been left out of the case. The deprivation that the future generations would suffer because of land grab is a very important point but what about other opportunity costs for selling off the land to foreign and domestic capital? Are wages to those customary owners who are now wage labourers reasonable? What about the congruence between what is promised and what locals obtain? Is what is promised reasonable? How these questions can be answered or whether they are asked at all depends on the working rules of the courts.

THE WORKING RULES OF THE COURTS

The working rules of the courts – that is, the court's working philosophies, powers, procedures, symbols, and how they are perceived by the public - are contained in a variety of documents. In Ghana, the philosophy of the courts can be found in texts such as official speeches made during their establishment. The Constitution is another source of insights as are cases and judgements. These working rules provide the context for what courts can do.

Born out of the decolonisation experience, the philosophy of Ghanaian courts and legal system try to be anti-colonial. This anticolonial philosophy was outlined by Kwame Nkrumah (1962), Ghana's first post-colonial leader, at the formal open-

ing of the Accra Conference on Legal Education which also coincided with the formal opening of the Ghana Law School. According to him, the philosophy of the courts must be defined by Africanisation, dynamic interpretation of law, positive reconstruction of African action, prompt delivery of justice, and the use of the law to assist ordinary people ground the philosophy of the Ghanaian courts and legal system. Socialist in nature, it was also supposed to be activist. The courts departed from their racist colonial predecessors (for details, see Sackeyfio-Lenoch, 2014) and, instead, pursued a state socialist agenda of integration. This judicialised state socialism led to the confiscation of property for state-wide programs which, critics claimed paved the way for more effective governance by the market (see for a detailed discussion, Obeng-Odoom, 2014; Obeng-Odoom, 2017a).

Yet, judicialised neoliberalism has created even more dispossessions. There are now more market-based processes for the loss of land. As pointed out in the section on land grabs the transfer of customary land to transnationals has also become more common. In addition, landlords that benefit from socially created rent can evict their tenants who struggle to meet rental increases. Following Article 20 of the Constitution which protects individual property, the decisions of the courts have tended to affirm this idea and its related practices (see for a detailed discussion, Obeng-Odoom, 2014; Obeng-Odoom, 2017a). That is, as the *working rules* are pro-private property, the Supreme Court has tended to toe that line in its rulings. As the judiciary has been sucked into an orbit of greater property-based capitalism, its wheels are grinding more slowly amidst declining public trust in its rulings:

Table 1: Percentage of Ghanaians who trust the courts, perceive judges as corrupt

Year	2005/6	2008/9	2011/13	2014/15
Trust in the Courts	62	58	56	42
Perception of corruption among judges	36	29	34	49

Source: Logan, 2017.

Table 1 shows that, overtime, the trust in the Ghanaian courts is waning and a greater share of people perceive judges as corrupt. This pattern is quite common in Africa as the Afrobarometer survey of 2017 shows. Indeed, over the past decade, public trust has consistently declined. In the eighteen countries monitored by the CDD since 2005/2006, trust has dropped 6 percentage points, from 62% in 2005/2006 (and again in 2011/2013) to 56% in the most recent surveys. In countries such as Benin, Namibia, Zambia, and Zimbabwe, some modest gains have been made but, even in such countries, none has made consistent improvements (Logan, 2017).

Although these trends are based on perceptions, there are strong grounds that corruption is real. For instance, Anas Aremeyaw Anas, an investigative journalist, provided video and other evidence of some 174 members of the judiciary collecting

bribes. Of these, twelve were judges of the high court, while twenty-two were judges in lower courts and the rest were officials of the judiciary (Masengu, 2017).

Both the Afrobarometer surveys and Aremeyaw's evidence are partial. They do not cover all the courts in the judicial structure. For instance, the Supreme Court is not covered in Aremeyaw's investigations and the Afrobarometer surveys do not specifically refer to this apex court. With more careful processes for the selection of judges, a system of empanelment that encourages collective rather than sole-judge decision-making, and stringent constitutional protections of tenure, the Supreme Court is often held up to be the best of what the courts can do. According to S.Y. Bimpong-Buta (2005, 32), former editor of the Ghana Law Reports, 'The Supreme Court of Ghana has nurtured, promoted and asserted this democratic system of government as shown by some of its ground-breaking and epoch-making decisions'. In a study conducted by the Centre for Media Analysis (CMA) on the level of trust in the Supreme Court by Ghanaians (Bokpe, 2013), 72 per cent affirmed their trust in the supreme court for being impartial and fair – in contrast to the modest 56 per cent in 2011/13. It is unclear whether this level of trust represents a decline as it is in the case of the courts.

But even granted that there is now greater confidence in the Supreme Court, would that address fundamental questions of land rights? Certainly, greater trust, though useful, would not necessarily address structural problems of land. As with other rights-based approaches to development, the legal route to securing the right to land tends to be individualistic. The land rights focus can neglect wider questions of property relations related to land, labour, and capital. The right to land is a natural right that entitles everyone to access land. It is not granted by courts. The emphasis of this right is *collective* progress without poverty; not individual security of tenure. If the right to land is collective, property in labour is usually private, that is, the work done by labour should not be appropriated by anyone else, whether private capital or the state. These two rights must go hand-in-hand for their full effects to be realised, but right based approaches to development neglect these nuances.

Even more seriously, while land rights are guaranteed, 'the right to land' does not exist in Ghanaian law. So, the tendency of the courts is to look with disfavour migrants who lose their land because of the transnational take-over of land or because rents have soared so much. A change in the working rules to recognise this right, for example, through the taxation of land rents (not property rates), as Henry George (e.g., George, 1871) suggested for every society in the world, can radically change property relations. Rentiers will have to return the rent they have appropriated to the public and future rentierism is more likely to be checked. The nation state can obtain greater revenues to be able to grant even more rights whether to housing, water, or to wider social protections. Until such a time, however, the courts would be limited in their role.

These working rules can be changed, of course. There is room for pressure on the courts to improve the situation. In his contribution to the recent book, *Justices and*

Journalists (2017), W.J. Tettey (2017) sees the relationship between the Supreme Court of Ghana and the media as complementary with the Supreme Court opening up to invite the media to give coverage to its work. The media, on its part, extensively discusses judicial processes and decisions. While the Supreme Court has sometimes penalised journalists for contempt of the court, it has also improved its work by taking ‘judicial notice’ of the work of the media with direct implications for cases before the court. So, the two institutions have worked collaboratively.

Similarly, social pressure groups and think tanks contribute to agenda-setting, shifting, and change on a wider range of issues, including land, in Ghana. Such groups include the Ga Youth, Occupy Ghana, Committee for Joint Action (CJA), and the Alliance for Accountable Governance, Centre for Democratic Development (CDD-Ghana) and think tanks such as the Institute for Economic Affairs (IEA-Ghana) and IMANI Ghana. The activities of these identifiable groups are also widely covered in the media and percolate court decisions and actions. For instance, on Thursday 7th October 2010, *Modern Ghana News* published a ‘Statement on the allocations of government lands and assets to individuals and companies read at a press conference...in Accra’. The statement names people such as Jake Obestebi-Lamprey who was eventually the subject of a court decision (*Samuel Okudzeto Ablakwa and Dr. Omane-Boamah V Attorney-General and Hon. Jake Obetsebi-Lamprey*). Constitutional law in Ghana empowers the Commissioner for Human Rights and Administrative Justice (CHRAJ) to also deal with questions of labour abuse, so cases on the deteriorating conditions of labour on transnational landed projects can be directed to CHRAJ.

CONCLUSION

It is important to study land grabbing, land rights, and the role of the courts because rights-based approaches to development tend to overlook land in such research. Even more importantly, the promise of the courts as an avenue for the redress of injustice is logically plausible. The courts can play a key role to shape the current transformation of property relations, especially when private property appears to be failing its supposed role as a social trust. However, as this paper has shown, using original institutional economics methodology and data from court cases and Afrobarometer surveys, the contribution of the courts can be severely constrained. Existing approaches to contesting land grabs – centred on (a) popular protests (b) international guidelines and (c) national laws from the executive and the legislature – can usefully engage the courts, but what courts can do is contingent on how well cases are presented, the orientation of judges, the resources of plaintiffs and, most fundamentally, the nature of their working rules.

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