Introduction: Land, Customary Law, and Traditional Authorities

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Land reforms for poverty reduction

“Land remains an asset of great importance to African economies, as a source of income, food, employment and export earnings. As well as its economic attributes, land continues to have great social value – as a place of settlement, providing a location within which people live and to which they return–as well as symbolic and ritual associations, such as burial sites, sacred woodlands, and spiritual life.” (Toulmin and Quan 2000a: 1-2)

Access to land and the ability to make effective use of it are critical to the welfare of poor people worldwide. Since land is a key asset for the rural and urban poor, land policies are of fundamental importance for economic activity, poverty reduction, sustainable management, and the well-being of households. In the last decades, many countries in Africa have undertaken land reform in one guise or another, aimed at enhancing the security of property rights (Alden Wily 2003). Despite converging aims, these reforms have varied significantly in the methods applied to achieve them. In the first decades after independence, mainstream land reform ideology held that agricultural productivity was inhibited by customary law unreflexive to an agriculture that was capitalizing and adopting new technologies, and would increase through the creation of individual property rights. Private property was to solve the lack of tenure security which was considered to exist under customary law. Enhanced security would encourage farmers to invest in their land and hence lead to increased productivity (Acock 1962; Demsetz 1967; Feder and Noronha 1987; World Bank 1975).

This policy direction was taken, however, without rigorous empirical analysis of the hypothesized causal relationship between individual rights in land and improved tenure security and agricultural outputs in the African context. In the following years research showed that these causal links were not immediate and simple. Mounting evidence was produced that individual land registration and titling programs featured high economic and social costs and negative consequences for the poor (Bruce and Migot-Adholla 1994; Coldham 1979). As a result,
policy makers went back on land titling as a panacea for land tenure in Africa and realized that land policy must start from existing realities and systems. Customary systems thus came to be revalued as mechanisms for land access and employment creation (Deininger andBinswanger 1999; DFID 1999; Toulmin and Quan 2000c).

A return to the local arena as the place of action squared with the liberalization policies of the 1990s and donor calls for structural adjustment, emphasizing a smaller state, cuts in public expenditure, and the strengthening of civil society. The adoption of multi-party democracy and democratic decentralization and the trend to consider the state as just another actor in an increasingly complex and interwoven global order, all seem to have opened new public spaces for traditional leadership and local management on the basis of customary law (Englebert 2002: 59; Kyed and Buur 2005: 3; Oomen 2002). Notwithstanding this, the return to local customary realities as the starting point of any tenure reform can be largely attributed to the failure of registration and titling programs (cf. Woodhouse 2003: 1715) – just as the earlier policies of land titling were inspired by a disappointment with agricultural output under customary tenure. This shows that policy shifts are often driven by ‘default reasoning’ more than by thorough knowledge of the proposed alternatives, a danger that continues to be eminent in new policies.

Idealizing Research

Just as policy makers sometimes lack critical assessment of customary land management, some academic studies also seem to be “based on hypothetical models of how land was managed in traditional systems” (Amanor 2001: 63). These studies emphasize that customary tenure regimes embody important principles concerned with equity, social security and the maintenance of ecological balance, and that they are built on core values of negotiation and consensus-building. Kasanga, for instance, speaks of “the egalitarian tenurial systems” and claims that “customary land law offers the best security of tenure to individuals, families and local communities” and that “there are reasonable checks at the local level on almost everybody” (Kasanga 1996: 89-100). And Platteau, although claiming not to fall “into the snare of romanticism”, but rather displaying “a pragmatic attitude grounded in a realistic assessment of Sub Saharan Africa’s present predicament”, makes the following statement about informal village practices with regard to land: “(...) considerations of social security and equity usually dominate pure efficiency concerns (...) customary systems continue to generate a remarkable degree of consensus, in particular on the norms and values justifying land claims” (Platteau 2000: 72).
A comparable tendency to romanticize ‘traditional communities’ is found in the literature on chieftaincy, where assumptions abound concerning the egalitarian, inclusive structure of local communities, the democratic nature of chiefly administration and the well-functioning checks and balances on traditional authorities. For instance, Buur and Kyed describe two studies on the role of traditional structures in local government in Mozambique that emphasize the “depoliticized sphere of human relations that, despite colonial impositions, war and displacement, continued to have legitimacy and exercise profound authority. (...) Traditional authorities represent ‘the whole community, beyond political differences, embodying the will of all people and not excluding anyone’” (Buur and Kyed 2005: 11-12). These studies culminated in a Decree that recognized traditional leaders as community authorities without a single paragraph to set the terms for the relationship between community and community leader or to ensure the participation of community members in the selection of community authorities. Another example is found in Ayittey’s book Indigenous African Institutions in which he claims the following: “Political power or office in traditional Africa was not used as the basis to accumulate wealth”; “The repository of the greatest political power or influence was the Village Assembly of Commoners, giving true meaning to the phrase: ‘power lay with the common people’”; “the chief did not rule; he only led or assessed – an important distinction” (Ayittey 1991: 27, 78, 96). See for a last well-known example outside Africa Brody as quoted in Kuper: “For the peoples of the Northwest Coast [of Canada], as to any hunter-gatherer society or, indeed, any oral culture, words spoken by chiefs are a natural and inevitable basis for truth” (Kuper 2003: 391).1

Many of the above-mentioned studies on customary law and traditional authorities assert the positive attributes of customary law as ideal principles rather than show that they operate in practice, relegating all consequences of social stratification within communities to the background. According to Thornton (2003: 130) “most participants in these debates seem to prefer the ideology to the reality.” These ‘idealizations’ are not without danger, since assertions of a democratic principle of traditional land administration can serve the interests of the local ruling class as a means of ideologically justifying their demand for the state to leave local land administration to traditional rulers (Amanor 1999: 10; cf. Woodhouse 2003).

Commodification of Land

Studies revealing a lack of security of customary tenure in many areas in Africa challenge the ‘romanticized’ descriptions of customary law and traditional authorities. This lack of tenure security is often a result
of commodification caused by various factors such as population growth, the rising value of real estate and the expansion of urban residential areas, the development of new commercial export agricultural sectors, and the extinction of remaining agricultural frontiers. Mounting evidence of increasingly restricted and insecure access to land for the poor majority and increasing inequity in the face of land shortage and competition displays that customary systems are often unable to evolve equitably (Abudulai 2002; Alden Wily 2003; Bruce 1988; Kasanga et al. 1996; Swindell and Mamman 1990).

A number of excellent studies reveal the social differentiation within African communities and emphasize the importance of power structures (Amanor 1999; Amanor 2001; Berry 2001; Carney and Watts 1990; Daley and Hobley 2005; Juul and Lund 2002a; Oomen 2002; Peters 2002; Ribot 2001; Whitehead and Tsikata 2003; Woodhouse 2003). They describe internal processes of contestation, assertion and transformation and portray political struggles to define and redefine social relations in the customary sphere. A number of these studies demonstrate that local elites have been able to use their position and the ambiguities of customary law to appropriate land to further their own economic and political interests. This includes traditional leaders who have ruled arbitrarily with few checks and balances on their administration, giving power considerations precedence over the objectives of development. Some authors expect that chiefs’ dealings with land affect people’s views on the tasks and activities of chiefs and their attitude towards chiefs and chieftaincy in general (Claassens 2006: 26; Fisiy 1992).

Tenure Security

The main benchmark for evaluating land tenure systems is the concept of tenure security. It is broadly defined as the perceived right by the possessor of a land parcel to manage and use the parcel, dispose of its produce and engage in transactions, including temporary or permanent transfers, without hindrance or interference from any person or corporate entity, on a continuous basis (Migot-Adholla and Bruce 1994: 3). This definition thus not only encompasses certainty, but also the elements of extent and duration. Certainty again is a function of two elements: (1) assurance in exerting rights, and (2) the costs of enforcing these rights, which should not be inhibiting (Place, Roth, and Hazell 1994: 19-21). Lund cautions that when the extent and duration of rights determine the measure of tenure security, this seems to imply that private property has the highest tenure security possible. However, while increasing exclusivity may produce more tenure security for the excluding party, the opposite will be the case for the one who is being
excluded. Thus increasing tenure security for one usually correlates with decreasing tenure security for another (Lund 2000: 16).

Most land reforms aim to enhance tenure security, and policy documents abound with descriptions of the positive effects expected from enhancing tenure security (EU 2004; USAID 1986; World Bank 2003b). These include (1) more willingness to invest through an increasing likelihood that the operator will capture the investment returns; (2) enhancing the land’s collateral value and improving the creditworthiness of the landowner, thereby increasing not only the willingness but also the ability to invest; (3) increasing production and enhancing sustainability of production through more investment; (4) diminishing the amount of disputes over land, thereby freeing resources that otherwise would have been used for litigation; (5) by putting an end to ambiguity in property rights, reducing transaction costs and thus having a positive effect on the land market; (6) these five factors all lead to an increase in the value of land (Place, Roth, and Hazell 1994: 16-8). Caution is needed, however, with regard to the causal relationship between tenure security, investments, and yields. First, enhanced tenure security will only lead to higher investment demands when the farmer has knowledge of and access to inputs, viable technologies, and advice, and when investments are profitable and investment returns are not too risky. Second, even when demand for investment is enhanced, the absence of household labor and financial resources may prevent farmers from exercising this demand. Small farmers, even when they have a clear and secure title to their land, can still have extreme difficulties in acquiring a loan. Third, land improvements do not necessarily increase yields, as households may target their investments towards reducing yield variance rather than increasing mean yield, or they may prefer leisure or pursue off-farm opportunities (Atwood 1990; DFID 1999: 9; Shipton and Goheen 1992: 317-8).³

Evidence thus shows that tenure security does not necessarily lead to increased production. Nonetheless, even if tenure security does not have an effect on production, it is still crucial for the people concerned. It is first and foremost needed to guarantee continuation of current use rights, i.e. for ‘maintaining the status quo.’ Many people depend on land for food and some additional income through market sale of surplus production. Tenure security of this land is thus of vital importance for their well-being and survival. Or, as Migot-Adholla and Bruce (1994: 7-8) put it, the right of continuous, unchallenged use of agricultural land is perhaps the most critical measure of security of tenure.
Contestations over rights to land in peri-urban Ghana

Areas with land commodification make interesting cases for the study of the functioning of customary law and traditional rule and the regulation of customary tenure systems. They provide a dynamic environment in which to analyze the following questions: How do traditional authorities regulate customary land in the changing setting? How does this affect the tenure security and livelihoods of local farmers, and to what extent can these farmers influence local land management and traditional rule? How do the various actors attempt to use, transform, or create customary law in this process? To what extent and in what ways do governmental actions and discourse influence local land management and the development of customary law? Are state courts important actors in the ensuing struggles?

Ghana

Like most African countries, Ghana has in the last decades witnessed an increasing commodification of land, which has resulted in attempts to redefine land ownership and tenure and in contestation of rights to land. At the heart of these contestations lie the issues of the authority to allocate rights to customary land and the entitlements to the proceeds from such allocations. For instance, peri-urban areas witness severe struggles between farmers and families on the one hand, and chiefs on the other, over the right to convert farmland into residential land.6 In agricultural areas similar struggles over land and its proceeds can be witnessed. Amanor (1999; 2001) describes in detail how new land pressures and commodification have led to contestations and redefinitions of rights to land and labor in the cocoa, oil palm, and forestry sectors of Ghana. Others describe how chiefs have tried to tap a ‘gateway to prosperity’ by allocating land to migrant pastoralists for substantial payments to the detriment of indigenous farmers (Tonah 2002: 53-57), and point to struggles over the right to lease out land to tomato growers (Berry 1997: 1235). These and other struggles for land in the local and national arena have resulted in deteriorating access to land and security of tenure for immigrants, pastoralists, youth, women and the poor (Alden Wily and Hammond 2001).

Ghana is especially interesting for studying customary tenure systems, since it is a state characterized by strong legal and institutional pluralism. The position of traditional authorities7 in Ghana is, if not unique, at least exceptionally strong in comparison to other African countries. In the colonial period the British ruled the Gold Coast through traditional leaders. Their naive assumption that the traditional government arrangements in the various communities must all be like
those found among the Akan communities, combined with their preference for clear hierarchical structures, led in some areas to the invention of traditional leaders that had no root in tradition, and in other areas to invented or strengthened hierarchies among traditional leaders (Kumado 1990-1992: 196-7). The British made several inroads into the authority of the chiefs, for instance, by making the position of the chiefs dependent upon governmental recognition, by weakening and circumscribing their ‘judicial’ powers, and by restricting some of their powers over land (Kumado 1990-1992: 197-200; Ray 1998). While under indirect rule the chief lost his independence, he at the same time increased his powers over his subjects because the traditional checks and balances to his authority were watered down by the colonial authorities. The result was the weakening of the ties between the chief and his subjects, and this led to many destoolments and attempted destoolments (Kumado 1990-1992: 203).

The first government after independence seriously tried to curtail the powers of the chiefs, but subsequent governments have been more or less supportive of the chiefs. Besides the creation of a system of elected local government which gradually diminished the role of chiefs in local government issues, they have mainly implemented a laissez-faire policy. The 1979 Constitution eliminated the requirement that chiefs selected by customary practice must be ratified in their positions by the central government (Kofi-Sackey 1983: 72; Van Rouveroy van Nieuwaal 1987: 19). This requirement was briefly reinstated in 1985, but the position of chiefs is again guaranteed in the 1992 Constitution which withholds any power from Parliament to “confer on any person or authority the right to accord or withdraw recognition to or from a chief” (article 270 (2) (a)8). This power was given solely to the Traditional Councils and the Houses of Chiefs who are charged with chiefly succession and status disputes (Ray 1998: 61). Traditional leaders in Ghana are thus recognized by the state, but are not transformed into mere state agents; they possess political power in many localities, without being politically co-opted by the regime in order; and they are not reduced to a mere ‘folklorized’ version of themselves, as described for some other African countries (Van Binsbergen 1999; Van Rouveroy van Nieuwaal 1996: 43; Von Trotha 1996: 87).

The Constitution recognizes customary law as a source of law in Ghana (article 11) and explicitly states that both the selection of chiefs and the management of stool land are to be “in accordance with the relevant customary law and usage” (articles 267 (1) and 270 (2) (a)). It vests all customary or stool9 lands – which constitute approximately 80% of the land in Ghana – in the appropriate stool on behalf of and in trust for their people, and confirms that such lands be managed according to the fiduciary duty of the traditional authorities towards their
people (articles 267 (1) and 36 (8)). The origins of the formulation of customary tenure date back to the struggles of the British administration in the early colonial period to control land and vest it in the colonial state, and to the creation of a system of indirect rule. In the 1890s the rapid pace of land sales and mining concessions were of concern to the colonial government that had little control over the process (Amanor 1999: 46). The British attempted to enact legislation which would place all “unused land” under the Crown and enable the colonial government to control the granting of concessions (Berry 2001: 1-27; Lentz 2006: 7-8). These attempts met with considerable opposition from the traditional and modern Gold Coast elite. The Gold Coast intelligentsia developed a literature on customary land relations (Hayford 1970; Sarbah 1968) in which they couched their propertied interests in terms of the customary rights of Africans to land and the violation of customary law by colonial interventions (Amanor 1999: 47-9). Colonial policy circles in this period were polarized by debates between those who supported constructivist imperialism and a more *laissez-faire* policy based on liberalism. The liberal policy gained ascendancy, and a policy of indirect rule was established in which colonial rule was affected through an alliance with traditional rulers organized into Native Authorities, overseen by District Commissioners. From this period, the management of land came under the authority of chiefs and the British colonial administration supported the privileges of chiefs and their control over land and natural resources. A theory of African communal tenure was developed, in which land was vested in chiefs to manage on behalf of their communities and in which chiefs were recognized as the only social group that could transact land (Amanor 1999: 52-3). By controlling chiefs, the colonial government was thus able to control land. This construct of customary communal tenure did not reflect the social relations and permanent alienations in land that had existed in the nineteenth century (Amanor 1994; Hill 1963: chapter V; Rathbone 1996; Wilks 1975).

Commoner perceptions of wide-scale abuses of privileges by chiefs under indirect rule led to many destoolment actions against unpopular chiefs, as in for instance Akyem Abuakwa (Firmin-Sellers 1995: 868). By the late 1940s the Native Administration system had alienated much of the population, who called for the establishment of a system of local democracy and the reduction of the role of the chief. Although this led to the creation of a system of democratically elected government in the 1950s, and a gradual demise of the importance of chiefs in local governance issues, traditional authorities continued to enjoy rights of control over land. Since independence, successive governments have continued to maintain the claims of chiefs on privileged rights in land. Under the current NPP government, the pivotal position
of traditional leaders in land management might even be enhanced by the Land Administration Project Ghana, a long-term program with multi-donor support, started in 2003, under which the government is piloting the management of stool lands by Customary Land Secretariats under the aegis of traditional authorities (DFID 2004; Ministry of Lands and Forestry 2003: 12).10

Peri-urban Kumasi

In this book, we study the area of peri-urban Kumasi to examine the regulation of customary tenure systems and the functioning of customary law. Peri-urban areas form tenure hotspots where property relations are subject to intense contestation and where access to wealth and authority undergo rapid change. The peri-urban area is most appropriately thought of as an interface zone, approximating a continuum from rural to urban. It is characterized as having a rural basis with strong urban influences, easy access to markets, services and other inputs, ready supplies of labor but relative shortages of land and risks from pollution and urban growth (Edusah and Simon 2001; Simon et al. 2001). Due to expansion of urban centers and population growth, peri-urban areas witness a high demand for residential and sometimes commercial land, which triggers struggles over the rights to convert farmland, cultivated by community members, and to sell it for other purposes. Since traditional authorities maintain a strong position with regard to land, they play a prominent role in these conversions.

Peri-urban Kumasi, the zone around the capital of the Ashanti Region, is a case in point. Kumasi, a bustling city and an important transportation hub, houses the still vibrant royal court of the Asantehene, the powerful king of all Asante. Its population has grown by 4.2% annually since 1960, to 1,400,000 at present. This has led to the above-mentioned pressure on land in the peri-urban area. Increasingly farmland is being converted into mainly residential, but also commercial and industrial, land, especially alongside the major roads to Kumasi, where access to the city is easy and where electricity is available. Many peripheral villages have now become fully encapsulated by Kumasi.

Customary law

For customary land tenure systems the terms and conditions on which land is held, used, and transacted are regulated by customary law. This, however, is a much debated and not unproblematic phenomenon that has troubled researchers, administrators, lawyers, and judges alike, from the colonial period until the present. What is customary law?
Where can we find it? How do we study it? Even the term itself is ambiguous, as it evokes an image of an unchanging, antiquarian, and immutable normative system, whereas historical and anthropological research has revealed that customary law is dynamic and the historical result of interaction between local actors and state intervention (Benjamin and Lund 2003a: 2; Juul and Lund 2002b: 3; Lavigne Delville, Ouedraogo, and Toulmin 2002: 9; Migot-Adholla and Bruce 1994: 3-4; Sklar 1999: 120). As these questions underlie all other aspects of customary land management, the efforts of various local and supra-local actors to use, ascertain, transform, create, and recreate customary law will form a recurrent theme in this book. To offer background on this aspect of the research, I will now provide a broad sketch of the literature relevant to a number of these issues.

In the same way it had been discussed with regard to Asia, from the beginning of European contact with Africa, researchers and administrators hotly debated whether ‘primitive’ societies in Africa could be considered to have law. In the early twentieth century, two distinguished anthropologists dominated this debate about the definition and essence of law. Radcliffe-Brown, who defined law in terms of politically organized sanctions, concluded that preliterate societies had no law (Radcliffe-Brown 1933). His contemporary, Malinowski, instead defined law as the processes of social control by which any society maintains order and discourages disorder, which led to the conclusion that every society could be said to have law (Malinowski 1926: 50-68). This last view became dominant among future generations of researchers studying primitive societies (Nader 2002: 85-6).

A new controversy arose around the question of methodology. How to study the unwritten – tribal, customary – law of a society? Early legal anthropologists and colonial administrators tried to ascertain rules of customary law through conversations with traditional leaders and other ‘experts’, to be conserved in textbooks and codifications. Danquah’s 1928 Gold Coast: Akan Laws and Customs and the Akim Abuakwa Constitution and Shapera’s 1938 A Handbook of Tswana Law and Custom are well-known African examples. In 1941, legal realist Llewellyn and anthropologist Hoebel published their joint work The Cheyenne Way. The authors were of the opinion that “the safest main road into the discovery of law” was through the study of disputes or ‘trouble-cases’, since “not only the making of new law and the effect of old, but the hold and the thrust of all other vital aspects of the culture, shine clear in the crucible of conflict” (Llewellyn and Hoebel 1941: 29). This book was a response to the case law method for teaching law at American law schools – introduced by Langdell, who became the Dean of Harvard Law School in 1870 – which stressed the order and logic in the law. Legal realists criticized this view for severing the ties between the
study of law and everyday life (Nader 2002: 89). By studying the law of the Cheyenne Indians mainly through an investigation of disputes, Llewellyn and Hoebel tried to show that “law is not an autonomous phenomenon separated from its cultural matrix” (Pospisil 1973: 539), and that the study of trouble-cases “offers a possibility of study of a culture at work on and through its people, for which no schematization of ‘norms’ can substitute” (Llewellyn and Hoebel 1941: 28). They acknowledged that the study of disputes could not be fully understood without a reference to abstract norms or rules and to the actual behavior of members of a society (Llewellyn and Hoebel 1941: 21). Still, their arguments were largely based on fifty-three trouble-cases, and their work induced a generation of legal anthropologists to concentrate almost exclusively on conflict and its resolution.

In the 1950s and 60s several major works were produced in this field that advocated the study of customary law through an analysis of actual processes of adjudication, mostly restricted to public forums (Bohannan 1957; Gluckman 1955; Gulliver 1963; Nader 1969; Pospisil 1958). Pospisil, for instance, restricted the field of law to the rock-bed of legal decisions and such principles as could be abstracted from them, thus excluding stated rules not confirmed by such decisions (Pospisil 1958: 256-7, cf. Ter Haar and Supomo 1950: 475). These studies challenged the older approaches of ascertaining customary law through conversation with experts. Although it lost considerable ground, this approach did not fully disappear. It was for instance still followed by Allott (London School of Oriental and African Studies), who started an ambitious project of Restatement of African Law, that aimed to abstract and systematize the unwritten rules of African customary substantive law (Cotran 1968-9; Ibik 1970-1; Kludze 1973; Roberts 1972; Rubin 1965).15

Some scholars have criticized the case method approach as unduly restrictive, complicating the necessary analysis of the full range of socio-legal occurrences. (Malinowski 1941-2: 1252; Moore 1970: 270; Nader 2002: 97). A well-known proponent of this view, Holleman, propagates a move away from an exclusive focus on situations of dispute to an analysis of ordering in non-dispute situations (Merry 1988: 890). He observes that: “in the study of the substantive law and its practice, and in a field of law in which litigation is rare, a fieldworker relying mainly on a case-method focused upon actual trouble-cases may get a skewed idea of the accepted principles and regularities in this particular field. (...) The trouble-less case then becomes a necessary check on the trouble-case, rather than the other way around” (Holleman 1973: 599).16 He therefore pleads for a much closer integration of, and equal emphasis on, all components of the “methodological triad of legal anthropological approach”: normative statements (rules/norms), pract-
tice (troubleless cases) and disputes (trouble cases) (id.: 606-7). It should be noted here that Holleman's point of departure was that through a combination of these methodologies, the customary rules, valid in a certain locality at a certain period of time, could be ascertained. Criticism was also heard from within the group of scholars focusing on disputes. By the 1970s a crucial move was underway to shift the focus from the description and analysis of dispute settlement institutions to the description and analysis of behavior connected with disputing (Just 1992: 373-4). The processualists, represented by legal anthropologists such as Nader, Starr and Gulliver (Gulliver 1979; Nader and Todd Jr. 1978; Starr 1978), analyzed the entire process of conflicts in their total social context, thereby effecting a shift away from judge- and judgment-oriented accounts of dispute settlement that see customary rules as having the capacity to determine the outcome of disputes in a straightforward fashion, towards analyses that see customary rules as objects of negotiation and a resource to be managed advantageously (Comaroff and Roberts 1981: 14; cf. Just 1992: 374).

In the next decade scholars studying disputing made an effort to synthesize the rule-centered approach and the processual approach (Moore 1978; Moore 1986; Comaroff and Roberts 1981). Comaroff and Roberts, in their study on Tswana disputing, show that rules governing conflict behavior were not internally consistent codes of action analogous to western written law but were instead negotiable and internally contradictory repertoires that were applied with discretion (Merry 1992: 360). Arriving at this conclusion, the authors challenged the existence of one set of ascertainable, valid rules, just as the processualists had done before them. Another scholar who has questioned the possibility of finding the valid customary rules of a certain group of people is Martin Chanock, who observes in his work Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform that within each group there will be variations within and conflicts about customary rules, which finds expression both in normative statements of group members and in their actions (Chanock 1989). Analyzing the application of customary law by colonial officials, he concludes that what is represented as the ascertainment of valid rules of customary law by officials often entails a political choice from various locally existent versions (cf. Chanock 1998: xi).

Research in the 1980s and 1990s shows an increasing attention to how legal institutions and actors create and transform meanings, and a greater concern with the ways law both reflects, constructs, and deconstructs power relations (Collier 1988; Merry 1992: 360). This research reinforced the insight that there was no such thing – and never had been such a thing – as a fixed body of customary law ready to be ascertained, but that customary law was fluid, relational, and negotiable,
and was intimately tied to fluctuating social and political relations (Oomen 2002: 21). With regard to official versions of customary law, this insight led to the conclusion that what had been portrayed as the ascertainment of customary rules by colonial administrators and judges was actually, at least partly, an invention of tradition. Revisionist scholars displayed how official interventions, such as codification and judicial applications, created a customary law changed in form, content, and effect (Fitzpatrick 1984: 21-2). This was done in a dialogue – albeit within highly skewed power relations – between colonial administrators and African people (Chanock 1998; Mamdani 1996; Mann and Roberts 1991; Merry 1992: 364; Moore 1986; Ranger 1983; Snyder 1981a).17 Whereas in the past legal anthropologists mainly restricted the context of analysis to the local situation, there now came ample attention for the interaction between local and supra-local levels and the mutually constitutive nature between local customary law on the one hand and state law and official customary law on the other (Allott and Woodman 1985; De Sousa Santos 1987; Griffiths 1986; Moore 1986; Oomen 2002; Vanderlinden 1989; Von Benda-Beckmann 1984b; Von Benda-Beckmann and Strijbosch 1985; Woodman 1988).18 This led to an increasing awareness and often condemnation of the gap between local customary law – sometimes termed ‘living law’ (Ehrlich 1936; Moore 1973) or ‘sociologists customary law’ (Woodman 1977) – and official customary law as pronounced in court judgments, textbooks, and codifications (Tamanaha 1997: 102).

Although the problem of official representation and application of customary law by judges, legislators, and policy makers has been discussed by many eminent scholars, it still remains unresolved. The field seems to suffer from a limited cross-fertilization between, on one hand, the legal knowledge of processes of adjudication, law making and codification and the legal reasoning of officials, and on the other, the legal-anthropological knowledge of how local customary law functions. While many legal scholars and practitioners writing on the issues of ascertainment and codification of customary law (such as Allott 1960; Allott 1970; Asante 1969; Bennett 1985; Elias 1958; Kludze 1988; Osinbajo and Kalu 1991; and Zorn and Care 2002) have taken the state legal system and the role of state officials as their main reference point, paying limited attention to complex local realities, the value of many anthropological descriptions lies in their contribution to the study of comparative jurisprudence; however, these descriptions “can hardly have much impact on the more mundane level of the day-to-day administration of justice” (Allott 1969 in Moore 1992: 23) or be used in “the search for a local law” (Chanock 1998: vii) of the communities investigated (Elias 1958; Poulter 1975: 182). Systematic studies, building a bridge between these two kinds of knowledge to understand not
only the local functioning of customary legal systems, but also the ways in which officials confronted with the complex reality of negotiable and fluid norms interpret, apply, and transform customary law, are rare.\textsuperscript{19} The present book aims to contribute to this field by constructing some of the pillars required to support this bridge.

Research questions and methodology

Main Research Questions

In this book the study of the local functioning of customary legal systems and traditional rule and the way officials apply and interpret customary law is based on an analysis of customary land management in peri-urban Kumasi. As said previously, in this geographical area customary tenure is under high pressure and customary norms and rules are being contested in numerous struggles and negotiations in which traditional authorities often play a central role. These contestations bring to the fore questions regarding how customary law evolves in the localities and the way officials respond to those changes. Thus, the main research questions are: 1) How is stool land managed by traditional authorities, what effects does this have on the tenure security and livelihoods of the various local actors, and what factors can explain these outcomes and their winners and losers? 2) What role does customary law play in stool land management; how and to what extent do the various actors try to defend, reshape, expand and capitalize on their customary rights to land; and which factors can explain their degree of success? 3) How, to what extent, and with what objectives has government policy sought to regulate customary land management over time, and what have been the effects? 4) To what extent do state courts serve as an alternative channel for restraining chiefs in individual cases, and which factors can explain the limited effect of court decisions on local practices in general? 5) What effect does the role of chiefs in stool land management have on their positions and tasks and on the institution of chieftaincy? 6) How and to what extent do international policy pressures translate into national policy; how do lawmakers, national and international policy makers, and judges interpret, apply and build on customary law; which factors explain their method of working; and what normative bench-marks should guide their search for customary law?

The scope of this research goes beyond peri-urban Kumasi. Many countries, especially within sub-Saharan Africa, but also outside, are faced with issues of commodification of land, increasing inequity in customary land management, and the roles of traditional authorities and (weak) governments therein. The present study hopes to contribute to existing knowledge and understanding of customary land man-
agement, traditional rule, and customary law and the way officials discover, interpret and apply it in Ghana as well as in other countries in Africa and beyond. For this purpose, a further research question is needed: 7) What new insights (for Ghana and in theory) do the answers to the questions posed above provide about customary land management, the application of customary law and the functioning of traditional rule?

An Interdisciplinary and Multi-level Analysis

It is commonly acknowledged that struggles for land are never merely a question of land, but also a question of property, and that property is not about things, but about social and political relationships between and among persons with regard to things (Lund 2002: 11; Moore 1998: 33). Contestations over land and its revenues can thus not be disentangled from struggles over rules, political authority, and social and cultural capital, and are heavily influenced by the specific social, political and historical-geographic contexts (Bassett 1993: 21; Berry 1997: 1228; Juul and Lund 2002b: 4). Research into customary tenure thus requires an interdisciplinary, processual and institution-focused approach, encompassing aspects of the studies of law, anthropology, political sciences and public administration. These varying disciplines are necessary to study not only actual dealings with land, but also the underlying struggles to define rules of ‘customary’ tenure and – since claims of an institution to define property are also claims to the institution’s legitimacy itself (Berry 2002b; Lund 2002) – to affect, enhance, or change authority.

Questions with regard to customary land tenure obviously need a thorough analysis of village affairs, as property regimes are only as robust, solid, and enduring as the ongoing reproduction or re-enactment which enables them to persist (Juul and Lund 2002b: 4). Analyzing customary land tenure firstly requires the mapping of the various local actors involved. Families, farmers, chiefs, elders, heads of families, local government representatives, women, youngsters, and immigrants all have different interests in land. How and to what extent do these actors try to defend, reshape, expand, and capitalize their rights to land? What pallet of, negotiations, power plays, and struggles is encountered in the villages? To what extent and how is customary law used as a resource in local struggles? How do current developments influence the actors’ positions and livelihoods? However, as the local arena does not function as an autonomous social field (Moore 1973), local contestations for land cannot be studied by focusing exclusively on the village level. They require a multi-level analysis taking supra-local actors into
account. In this study, a number of supra-local institutional actors are of special importance.

Firstly, as chiefs play a pivotal role in land conversions, village affairs are heavily influenced by traditional authorities surpassing the village level, i.e., paramount chiefs and the Asantehene. Are they combating sales by their village chiefs or, on the contrary, condoning or even encouraging them? What position do they take when village chiefs are brought to their courts with charges of land mismanagement? What is the nature of the relationships between village chiefs and their superiors? To what extent do the superior chiefs try to influence the enstoolments and destoolments\(^{21}\) of village chiefs? Do they claim part of the revenue from village land conversions for themselves? What example do they set in their own land administration? Do they use their power and esteem to set certain rules of proper behavior and guidelines for the division of revenue? Do they attempt to use, create or transform customary law as legitimation for chiefs’ actions?

A second institution influencing village land tenure is the government. The Ghanaian government is not all-powerful, and local arenas are relatively autonomous. The interventions of the government may not be hegemonic, “the degree to which their ‘intrusive’ acts (Berry 1993: 101) influence the patterns of access to and use of land needs to be a question rather than a conclusion that they have limited effect” (Peters 2004: 294). Through legislation, policy, and public administration, the government is a partner in stool land management. The Constitution recognizes that stool land is vested in the stools, and the Land Act prohibits the vesting of freeholds on customary land; but how should these provisions be interpreted? Land sector agencies are mandated to be involved in the collection and distribution of stool land revenue, the provisioning of consent and concurrence for allocations of stool land, and in land use planning. How do these agencies function in practice? How are their tasks interpreted by street-level bureaucrats (Lipsky 1980)? What is the local effect of their activities, and what are the constraints on their functioning? What role do local government representatives, active at the village level, play with regard to customary land tenure, and what are their relationships with traditional leadership? What attitude do higher levels of government display with regard to chieftaincy and land affairs? What can be deduced from governmental and political discourse? How do policy makers interpret and work with customary norms and processes? Can the government control chiefly land management, or is this inhibited by the close ties between the current governmental and traditional elite (Amanor 1999)? What effect will Ghana’s Land Administration Project have on local power configurations?
State courts and judges could also have an influence on local land tenure. But are state courts accessible to the average peri-urban villager, or to the poor sectors of these communities, and do these people want to take their cases to this forum? Do state courts often try stool land cases, and if so, what kind of issues are tried? How do these courts gain knowledge from and interpret and apply customary law? Do court decisions protect smallholders or find favor with the chiefs’ actions? And what kind of effects do court decisions have on village affairs? How wide is the often mentioned gap between court decisions and local practices, and how can it be explained?

Finally, as “(g)lobalization would appear to be a permanent characteristic of Asante” (Woodman, Wanitzek, and Sippel 2004: 177), the developments in peri-urban Kumasi cannot be understood without looking at global developments and actors at the supra-national level (cf. Von Benda-Beckmann and Von Benda-Beckmann 1999). Globalization leads to a decline in the unique and overwhelming power of the nation-state through an increasing influence of the international arena (Woodman, Wanitzek, and Sippel 2004: 3-4). For instance, international policy pressures towards structural adjustment and decentralization open up public space for traditional authorities. The World Bank has in 2003 provided a US$ 5 million grant directly to traditional authorities in Ghana, bypassing the government. At present, international donors and policy makers furthermore largely favor privatization of land and the establishment or enhancement of a free market in land (EU 2004; USAID 1986; World Bank 2003b). How do these pressures translate into national policy, such as in Ghana’s Land Administration Project?

Historical and Other Bench-marks for Customary Land Management

This research intentionally limits itself to a description and analysis of current developments and does not attempt to sketch a comprehensive picture of allocation of customary rights and duties in earlier phases of Ghanaian history. Even if such an endeavor were desirable, it would be extremely complicated, as a number of excellent historical studies presenting struggles, contestations, and negotiations for the rights to land in former eras of Ghana and the Gold Coast reveal large differences in normative statements and actual practices between and within areas and periods of Ghana (Amanor 2008, forthcoming; Berry 1993; Firmin-Sellers 1995; McCaskie 1984; McCaskie 1995; Rathbone 1996). To quote Martin Chanock, “we do not have a ‘traditional’ world as an identifiable baseline” (Chanock 1998: 10). Historical sources should thus be seen as providing particular representations rather than universally accepted descriptions of certain historical processes and occurrences.
Reference will be made to these sources to demonstrate how certain groups or individuals have represented norms and practices over time. As said previously, the extensive variation in and struggles about norms and practices have characterized customary land management throughout history. This variety has always complicated the already difficult task for judges, administrators and even anthropologists to determine the ‘valid customary norms of the moment.’ Written representations of customary law in case law and certain textbooks can thus reasonably be expected to diverge to a certain extent from customary law practices in the localities, or to represent only one of the various practices found locally. Nevertheless, I describe and use them in this book, to provide at least some sort of bench-mark for the complexity of struggles and contestations. As with historical sources, they should not be seen as attempts to sketch the reality of customary law in the localities, but rather as representations by certain actors, or indicators of how these actors interpreted customary law at a certain time.

Methods

My first acquaintance with Ghana was in 1999, when I was still a student, and the idea of PhD research had not even crossed my mind. I visited an SNV-sponsored Legal Awareness Program, run by the formidable lawyer Hilary Gbedema. Hilary and her team of ‘legal literacy volunteers’ went into the remote villages of the Volta Region to educate communities on the rights of women and fought legal battles in court to defend these rights. Reading through the files of these cases and following the volunteers on their tour to the villages, it became clear that rights to land were at the heart of many of the battles fought within the program. The paramount importance of land for rural people was a lesson that would influence my later research.

In 2001, while drafting a PhD-proposal, I returned to Ghana for two months to put my initial research questions to the test. My main research question at that time focused on how judges ‘deal with’ customary law. I was intrigued by how judges, accustomed to the British legal system, gain knowledge of customary law, especially in the fields of land and family matters. These judges are academics, educated in the capital Accra or sometimes even in the UK, having had one or two courses on customary law in their whole curriculum. What knowledge do they have of the customary law, in their geographical jurisdiction, that varies from one ethnic group to the other and that changes over time and adapts to new circumstances? Although most judges interviewed agreed this was a most interesting theoretical question, they also candidly admitted that in almost all cases they ‘found’ customary law by turning to precedent, without so much as a thought to collect-
ing any sociological evidence. It would thus be hard to find cases to study this issue and collect enough material to write a PhD thesis. Although this was a bit of a disappointment at the time, it was soon compensated by the fact that the fields of law that I had in mind for analyzing judicial customary law – land and family law – did turn out to be very interesting. Land, especially, was an extremely hot topic in Ghana, and was not only debated in state courts, but also in local arenas, at traditional councils, by local government representatives, street level bureaucrats, high-level policy makers, and by international donors and financial institutions.

As a result of this trip, I broadened the focus of the research from the courts to all levels and institutions involved in land tenure. After a year of reading up on legal, anthropological, political, administrative, and historical material on the topic, I revisited Ghana in 2002 to select the geographical region for the field research, or rather the peri-urban area that I wanted to settle in, for I had decided to focus on an area with high demand for land. Kumasi, a bustling city with a pleasant atmosphere, rapidly swallowing the neighboring villages, came out top of the list, not in the least because it also houses the royal court of the Asantehene and thus forms the centre of gravity of a strongly hierarchical and vibrant chieftaincy. Furthermore, I was so lucky as to come into contact with an interesting research project on ‘land law and its legal institutions’, carried out by the University of Science and Technology in Kumasi in collaboration with the Institute for Development Studies at the University of Sussex, UK. One of the participating researchers, Dr Daniel Hammond, enthusiastically invited me to collaborate and promised practical assistance with initial logistics, which later proved to be a great asset.

The next eight months were spent on learning the local language, Ashanti-Twi, taking courses in field work methodology, reading additional literature and anything else geared towards the real fieldwork. In March 2003, my partner and I left for almost a year of fieldwork in peri-urban Kumasi. My first task was to find a village to settle in. I toured the major roads leading to Kumasi, watching for construction work to determine the borders of the peri-urban interface of interest for the research, and visited the various District Assemblies of the area and a number of villages in each interesting district. To avoid entering the villages through the chief, I first approached either the local representative of the District Assembly or a member of the Unit Committee, the lowest level of local government in Ghana. It soon became clear that most villages within a certain zone witnessed their own struggles and negotiations over land, which would provide insights into customary land tenure. But how to decide in which village to settle?
Before leaving for Ghana, I had asked many people who had preceded me in local field research how they had selected their residence. Among them my supervisor, originally trained as a lawyer, who, half bashful, half proud, answered that his wife, a social anthropologist, had made this decision. When I repeated my question to her, she gave the somewhat disconcerting answer that besides all kind of practical considerations and reflections concerning the content, a place also had to ‘feel right.’ I remember wondering whether a village has a feel, at least one that becomes visible upon a first or second visit, and I strongly doubted whether I would possess the antennae to pick up such ‘obscure vibrations.’ However, history would prove her right. I had already visited a number of villages where people had told interesting stories with friendly candor and sometimes even warm pleas to select their village, but no particular ‘feeling’ from my side. Then I visited Tikrom, and before I was well out of the taxi, a strong tension seemed to cover me like a blanket. This village later turned out to be a place with serious struggles over land and authority, where accusations of threats, bribery, and even talk of suspect deaths were heard. It was an ideal case-study, which I therefore included in my research, but not the preferred village in which to spend almost one year. A similar, but reverse, feeling came over me in the last village I visited, Besease. Despite numerous struggles regarding land, the atmosphere was pleasant and relaxed, and I soon made the decision to settle there.

Besease became the initial fieldwork site and operating base from which to visit eight other peri-urban villages, four of which were, like Besease, situated on or near the road from Kumasi to Accra – Jachie, Tikrom, Adadeentem, and Boankra – and four on the road from Kumasi to Obuasi – Ahenema Kokoben, Kotwi, Brofoyeduru, and Nkoransa. All villages lie within a range of ten to forty kilometers from Kumasi, and could therefore easily be reached by local minibus (trotro). In these localities I combined participant observation with semi-structured interviews with farmers, chiefs, elders, youth leaders, local government representatives, and religious leaders. At the end of the fieldwork period I supplemented my qualitative research with quantitative data, obtained by conducting a survey among 240 households.

I combined this local fieldwork with regular visits to the district capital Ejisu, the regional capital Kumasi, and the national capital Accra, to interview judges, lawyers, politicians, civil servants, policy makers, academics and donors on the one hand, and to study literature, policy documents, court records, and archival records on the other. Access to documents was mostly easy and merely required some patience and friendliness, although that did not guarantee the documents’ quality or continued existence. One place where I spent a considerable amount of time was at the premises of the Council for Law Reporting, the institu-
tion in charge of the publication of annotated case-law in the Ghana Law Reports (GLR). As the council was understaffed and underfunded there was a severe backlog and the most recent GLR at the time of my fieldwork covered the years 1993-1996. To realize my goal of comparing court decisions of customary land cases with peri-urban practice, I thus had to sift through all decisions collected from the superior courts of judicature, which were to be found in large numbers of huge heaps of paper in the library.

The combination of studying local, district, regional, and national actors and institutions, which I perceived as highly stimulating, produced a rich set of data, allowing for a thorough multi-level analysis of customary land management in peri-urban Kumasi.

**Outline**

As it seeks to gain insights in the functioning of customary law and traditional rule through a multi-level analysis of customary land management in peri-urban Kumasi, this book is divided into chapters dealing with a variety of actors at various levels. Chapters 3, 4 and 5 deal with local actors in Besease and peri-urban Kumasi, centering on farmers, chiefs and elders, local government representatives, and other opinion leaders. The other chapters analyze the activities and attitudes, respectively, of the government of Ghana (Chapter 2), national and international policy makers (Chapter 2 and 3), and courts and judges (Chapter 6). Chapter 7, the concluding chapter, will draw together the various actors and levels to form a comprehensive picture of the operation of traditional rule and customary law in the field of land management in peri-urban Kumasi.

Chapter 2 describes governmental influence on stool land management. To what extent, how, and with what objectives has government policy sought to regulate land management by chiefs over time? And what are the consequences of this regulation? The functioning of a number of governmental institutions, the discourse of the government on issues of customary land management, and the current activities undertaken in the Land Administration Project Ghana, are assessed for their risks, challenges, and impact on local struggles for land.

Chapter 3 first investigates how policy makers have perceived customary tenure systems over time. It describes policy changes with regard to tenure security and the role of customary norms and authorities therein. It shows that international and Ghanaian land policy is currently witnessing a renewed interest in customary tenure systems, and argues that this shift is mainly inspired by the practical necessity to start from existing systems and is based on ‘default reasoning’
brought about by disappointment with state programs of titling and registration. This chapter then turns its attention to land management practices in peri-urban Kumasi and argues that a specific set of factors enables chiefs to profit disproportionately from peri-urban land conversions and complicates the possibilities of local farmers to resist conversions. These factors lie respectively within the traditional system itself and in its interaction with the government. The combination of erosion of customary checks and balances on chiefly functioning and the government’s ‘policy of non-interference’ in chieftaincy affairs has seriously disrupted the fragile balance between chiefs and people. This has given chiefs the power to abuse their prominent positions as guardians of stool land and experts of the customary realm to manipulate customary law to legitimize their claims.

Chapter 4 zooms in on Besease to provide a detailed analysis of struggles for rights in stool land in one peri-urban village. With its microscopic view of processes of contestation it displays several actors, actions, and arenas that resurface throughout the book. It questions the current trend to place all local dealings with land under the term ‘negotiations’, even when one party outright negates or redefines the other party’s rights, and emphasizes the necessity of taking local stratification and power inequalities into account when assessing customary tenure systems.

Chapter 5 deals with the question of how peri-urban land management by traditional authorities, often leading to a loss of land for indigenous farmers, has influenced popular perceptions of chiefs and chieftaincy. Statistical data reveal the seeming contradiction between the highly critical attitude of many farmers towards land management by their chiefs and the people’s continued support for the institution of chieftaincy. As the way people feel about their chief seems not to influence their opinion of the institution of chieftaincy, reasons for the popular support for chieftaincy result not from a high level of satisfaction with the way chiefs perform their tasks, but are rather found in the realms of custom and identity. This squares with the fact that in peri-urban Kumasi dissatisfaction with local land administration and anger towards a particular chief hardly seem to lead to discussions of the desirability of the institution of chieftaincy. For the majority of the people, chieftaincy seems to be a fact.

Chapter 6 specifically deals with the courts and the question of whether they could serve as an alternative channel of resistance. Both their decisions and aspects related to their functioning – such as access, delays and backlogs, and comprehensibility – are analyzed. The ‘judicial customary law’ is compared with peri-urban practices, and the gap between the two is analyzed and explained by a number of legal and political factors, including the nature of the state legal system, the
difficulty for a judge to ‘know’ the applicable rule of local customary law, and the political configuration at local and national levels.

Chapter 7, the concluding chapter, first summarizes the conclusions from the earlier chapters to compose a comprehensive picture of customary land management in peri-urban Kumasi. As many other countries are also faced with issues of commodification of land, leading to increasing inequity in customary management, the conclusions hold relevance beyond Kumasi or Ghana. This chapter then focuses on a more abstract level, and turns to a discussion of general lessons regarding the study, application, and interpretation of customary law, through which I hope to contribute to theory formulation in this highly relevant field of study. The chapter concludes by answering the dual question of whether problems of access to and security of land in Ghana can be solved within the sphere of customary law and chiefly rule, and to what extent the national legal system can play a role in this process.

Notes

1 Contrasting with this highly positive view on traditional leadership, some literature describes traditional authorities as outdated institutions with no role to play in the modern era of democratic decentralization. For instance in the debate over the role of traditional authorities in post-apartheid South Africa, opponents claimed that “traditional leaders in South Africa have lost all legitimacy because of their involvement in the apartheid government” (Oomen 2002: 182).

2 Land tenure may be defined as the terms and conditions on which land is held, used and transacted (Adams, Sibanda, and Turner 1999).

3 When read literally, the definition does not include the realization or certainty of this perceived right. As the words “without hindrance or interference” refer to the perceived right, in this definition a person feels secure of his tenure when he has the perception to have a right to do certain things without hindrance, no matter his perception of hindrances in reality.

4 This should encourage land acquisition by those able to make best use of it. Research, however, shows that the operation of the land market does not appear to work in favor of allocative efficiency (cf. Platteau 2000: 71).

5 According to Atwood (1990: 664-5) four limiting conditions are likely to substantially reduce the impact of land titling on credit-related increases in agricultural production: (1) major financial market distortions can prevent increased agricultural lending; (2) transaction costs and risks to formal lenders of dealing with small farmer borrowers, even with titled land, may be prohibitive; (3) there may not be an active land market which permits easy transfer of land under collateral; (4) where informal lending predominates, collateral will be of little value.

6 This is elaborately explained in chapter 3.

7 In the course of this book, I will use ‘traditional authorities’ and ‘traditional leaders’ as synonyms. In Ghana, these terms can denote chiefs, heads of families, or tendamba – descendants of the pioneer settlers of their respective villages and representatives of the ‘earth God’ (Kasanga and Kotey 2001: 14). In the Ashanti Region of Ghana, the terms are only used to refer to chiefs.
This is an entrenched provision that can only be amended by parliament after a number of time-consuming and difficult measures have been completed (Ray 1998: 61).

The customary community is called ‘stool’ in reference to the carved wooden stool which is believed to contain the souls of the ancestors and is a traditional symbol of chieftainship.

See chapter 2.

Ohene is the word for king or chief in (Ashanti-)Twi, the indigenous language of the Asante. Within the Ashanti Region each village chief (ohene or odikro) is subordinate to a paramount chief (omanhenen), who again is subordinate to the Asantehene.

Whereas some researchers therefore prefer to talk about local land-holding systems and ‘socially determined land-use rules’ (logiques sociales du territoire) (Toulmin and Quan 2000c: 99), this book maintains the term ‘customary law’ following common terminology in Ghana.

For a discussion of the debate over a social scientific concept of law from the 1950s through the 1970s, see Tamanaha 1997: 91-128.

In The Netherlands Indies, a huge project was undertaken to ascertain the various customary laws (Dutch: adatrecht), under the direction of the Dutch scholar Van Vollenhoven, who, however, explicitly included the average citizen in his queries, see Van Vollenhoven 1918.

According to Allott, the restatements were conceived of as a contribution to nation-building and modernization. He explains that there was a large demand for a source of reference on the customary laws, cast into a legal language, and that earlier work by anthropologists failed to meet the criteria for a work usable by the courts (Allott 1969 in Moore 1992: 23). See for a discussion of this project Twining 1963. Even today, the idea of restatements has not disappeared, see for instance Hinz 2006; Osinbayo and Kalu 1991.

Holleman discusses the difficulty of abstracting rules focused upon single interests or actions from decisions in conflict situations involving a plurality of these. Real-life disputes, he observes, often present a much more complex set of issues than can be covered by a single rule, and circumstantial factors can play a role and lead to an outcome which is not strictly in accordance with the rules. Furthermore, the rule-finding exercise is complicated by the fact that conflict resolution often seeks a feasible compromise rather than the enforcement of a rule of conduct (Holleman 1973: 590).

It is a different question whether such created customary law also existed out of the contexts in which it was produced (Von Benda-Beckmann 1984b: 29), i.e., to what extent this official customary law influenced local customary law.

See Merry 1992: 363 for an overview of the literature. Some work in this field was already published in the 1970s; see for instance Moore 1973 and Woodman 1977.


Property can be seen as sets of rules governing people’s rights to access, use and control resources.

As the chief’s throne is called the stool, the installation and deposition of a chief are called enstoolment and destoolment.

SNV is a Netherlands based international development organization.