Courts and Peri-Urban Practice: Customary Land Law in Ghana

Based on University of Ghana Law Journal (2002-4) 22: 25-77

Janine M. Ubink
6. Courts and peri-urban practice: customary land law in Ghana

Introduction

Like most urban centers in Ghana, Kumasi has flourished in the last decades. Kumasi is the capital of the Ashanti Region, and houses the still vibrant royal court of the Asantehene, the king of all Asantes. It is a bustling city and an important transportation hub. Its number of inhabitants has grown by 4.2% annually since 1960, to 1,400,000 at present, due to both population growth and extensive urbanization. This has led to an increased pressure on land in the peri-urban area. Increasingly farmland is being converted into mainly residential land, but also commercial and industrial land, especially alongside the major roads to Kumasi, where access to the city is easy and electricity available. Many peripheral villages have now become fully encapsulated by Kumasi.

Most of the peri-urban land is ‘stool land’ – the word ‘stool’ denotes the customary community, in reference to the carved wooden stool which is believed to contain the souls of the ancestors and is a traditional symbol of chieftaincy. This land is regulated by customary law. According to representations of customary law in textbooks and case law, the ultimate or allodial title to every portion of stool land is held in common by the members of a community (Asante 1969: 105-6; Danquah 1928: 197-200, 206, 221; Ollenu 1962: 29, 55-6; Ollenu 1967: 252-5; Pogucki 1962: 180; Sarbah 1968: 64-7; Woodman 1996: 53, 66, 107). The chief of that community is the custodian of the land and he is customarily and constitutionally obliged to administer the land in the interest and development of the whole community (articles 36 (8) and 267 (1) of the 1992 Constitution). The lands thus are communal properties. As long as there is vacant land each community member has an inherent right to use part of it for farming or building. This will give the member a usufructuary title to the land, which is heritable and is extinguished only through forfeiture, abandonment, or with consent and concurrence of the farmer. The usufructuary cannot be deprived of any of the rights constituting the interest. Not even the chief can lay adverse claim. After the death of a community member, the
usufructuary interest usually devolves to the member’s family and becomes family property.

In short, the alodial title of stool land lies with the community, the usufructuary interest with an individual or family, and the role of custodian is allocated to the chief. This multi-layered customary set-up allows considerable space for struggles and negotiations over who has the right to convert stool land from farmland to residential land and lease it out to a stranger, and also what should be done with the revenue generated in this process. Taking into account the fact that this conversion has severe effects on the livelihoods of peri-urban farmers, and that plots of residential land in peri-urban Kumasi easily fetch a price of €2000, it is hardly surprising that these struggles encompass a whole range of actors and are often severe and protracted.

In many villages, the first and major actor in the conversion process is the chief. In peri-urban practice the chiefs are often also the main beneficiaries. Although local farmers and families attempt to influence these processes in various ways in the local arena, they often achieve limited effect. Realizing the low effectiveness of many local acts of resistance, it is worth examining to what extent state courts serve as an alternative channel for restraining chiefs. This depends on the one hand on people’s access to and the functioning of state courts, and on the other hand on the decisions reached by these courts and their execution at the local level.

This chapter will demonstrate that the Ghanaian courts in individual land cases protect the usufructuary interests of community members in stool land. Land practices in peri-urban Kumasi are, however, not in conformity with the rules of customary law as laid out in the courts. This difference can be explained by two factors, a legal and a political one. The legal factor consists firstly of the difficulty for a judge to define the applicable customary norm while there are in each locality variations within and conflicts about the contents of customary law. Secondly, a judge needs to translate these norms of ‘local customary law’ for use in state courts, creating a ‘judicial customary law’ (Cf. Allott 1975: 89 and Allott 1977: 11; Asante 1969: 100; Chanock 1989; Koene 1985: 105-7; Von Benda-Beckmann 1985b: 77-95; Woodman 1977: 115; Woodman 1996: 46). The political factor refers to the limited effect of judicial decisions on peri-urban practice due to the political configuration at local and national levels, which is characterized by four features: the prominence of chiefs and customary law in stool land administration; the erosion of customary checks and balances; the very limited shadow of state law in the localities; and the government’s attitude and actions with regard to chiefs and chieftaincy affairs.

This chapter starts in section two with a description of struggles for land in peri-urban Kumasi, the discourse and actions by chiefs and
farmers, and the erosion of traditional controls on chiefly administration. Section three contains a brief introduction to the courts system of Ghana, its bottlenecks, problems of access, and litigants’ reasons for turning to a state court. Section four then analyzes judicial customary law in court cases dealing with stool land. Special emphasis is put on security of tenure, power of alienation, and the role of the chief as custodian. This chapter in section five concludes with the non-conformity of local practices with customary land law as pronounced in state courts, and tries to explain this gap by demonstrating the legal and political causes.

**Struggles for land in peri-urban Kumasi**

*Chiefs*

Most Ashanti chiefs claim to have the authority to take farmland in which community members have a usufructuary interest, convert it into residential land, and lease it to strangers. These claims are supported by two dominant legitimizing discourses. A first discourse by chiefs holds that the abovementioned customary rules – protecting the usufructuary interest in land against anyone including the chief – date from the days when communities were involved in subsistence farming in land abundant areas; however, these rules have become outdated now that urbanization and population growth have enhanced the value of land. Therefore these rules need to be adjusted to modern circumstances, in the sense that when communal land can be used in a more productive way, it should be brought back into chiefly administration; the chief will then centrally organize the conversion. In the words of the Besresehene: “It’s a law that when the town is growing and it comes to your place, you don’t have any land, because the land is for the chief. Therefore the community can use this land.” These claims seriously weaken the tenure security of the usufructuary: any time there is a demand to change the use of land from agricultural to residential, the chief can claim the right to reallocate their farmlands.

Among some of the chiefs, an even more far-reaching discourse is found. These chiefs claim that stool land does not belong to the community as a whole, but to the royal family only, “since they were the ones fighting for the land.” “The land belongs to certain families. They fought for it or got it from the Asantehene or Ejisuhen because of for instance marriage. If your forefathers did not have land, you can’t claim it now.” This feudal claim is facilitated by the fact that the word ‘stool’ is used in different contexts, sometimes denoting the whole indigenous community, other times only the office of the chief or the royal family. In this discourse, the royal family had only given the land out
for farming purposes, to temporary caretakers, and can at any time re-
claim it when its use is changed to residential. Obviously this line of
reasoning leaves no obligation on the royal family to compensate the
farmer or use the revenues in the general interest. “The farmer does
not lose any land, since he never owned any land. The farmer is only
the caretaker for the chief. The land was given to him free of charge,
so how can he claim part of the money when it is being sold?”12 “The
division (of land revenue) depends upon the leniency of the chief. He
can decide to take everything himself.”13 This narrowing down of the
land-owning community degrades the nature of the customary rights
of usufruct. The freehold is transformed into a permissive right of te-
nant-like character, based on the leniency of the chief instead of on the
communal ownership of the land. Obviously, this severely diminishes
the security of the usufructuary rights. The allodial title proportionally
gains in weight and it shifts from the community as a whole to the roy-
al family, on whose behalf the chief now claims outright ownership.14

Farmers

Besides the chiefs, indigenous farmers and families are the main ac-
tors in local struggles and negotiations for land. Some farmers, fa-
milies or communities accept the fact that the chief is converting and
leasing out their farmland, although they often do try to influence the
division of the revenue accruing from the lease. Many others, however,
do not agree to and try to resist the chief leasing out their land at all.
Resistance takes many forms: public consultations with the chief at vil-
lage meetings; private consultations between farmer or family and
chief or with the involvement of members of the local Unit Committee
or the assembly member of the village;15 farmers or families selling
their own land before the chief can do it; making threats of destool-
ment against the chief or actually destooling him;16 violence against
the chief; chasing off the buyer when he comes to develop the land.
These acts of resistance are sometimes successful, sometimes not. The
varied outcomes depend on factors such as the approach taken by and
the power, position, and personality of the resisting actor; the personal-
ity and power of the chief; and the ability of both parties to build coaliti-
ons within the community and to mobilize support outside the com-
munity, notably at higher levels of chieftaincy and from the govern-
ment. A number of short case studies are described to make this point
clear.

In the village of Brofoyeduru, on the road to Obuasi, strangers
started to ask for residential land approximately 15 years ago. At first it
was the chief demarcating the land and leasing the plots out to stran-
gers, without paying any compensation to the farmer who lost his land.
But after a while, his sisters went to talk to him, and he allowed first one and then all of his siblings to convert and lease out their own land. When word got out, other people in the village also started to do that. The chief is not protesting. He signs the allocation papers of the farmers, for which he receives a signing fee. In the village of Tikrom, a few kilometers off the road to from Kumasi Accra, the chief has been steadily converting and leasing out village farmland. The community, led by the Unit Committee chairman and the assemblyman, has tried to talk to him to get him to agree to give a certain fixed percentage of stool land revenue to the village for development projects, but unsuccessfully. The community has sought publicity on a local radio station; has written a letter to the Asantehene; has appealed to the Asomenyahene, the chief of their hometown, to intervene; and has brought in the Environmental Protection Agency to stop the chief from sand winning close to the streams. All to no avail. A large part of the farmlands in the village are now sold, and the villagers have not seen any community development, but for the construction of a primary school, which was funded by the EU.

The village of Besease is situated on the main road from Kumasi to Accra, approximately 23 kilometers from Kumasi. The Beseasehene has already converted and allocated most of the farmland of his own family. Looking for new sources of revenue, he is now trying to allocate land of other families in the village. He has for instance allocated two plots of land belonging to the lineage of his Kontihene subchief. The Kontihene and his elder made the following remark about these allocations: “The Beseasehene has no say in our land. I also have a black stool, so I am next to him, not subject. We have challenged him. But we, as the rulers of Besease, do not want to take him to court. But the buyer cannot come and work on the land. If he comes to work, he will meet the Konti. He will either get part of his money back from the Beseasehene, or maybe get only one of the two plots. Or he will pay some extra 5 million Cedis to the Konti to be allowed access to the plots (that were sold for Cedis 15 million). We want that person to summon the chief in court.”17 Beseasehene has also allocated one plot of land of a different family to a stranger. When the stranger came to develop his plot, he was chased off by the farming family. When the stranger complained about this to the Beseasehene, the chief went to the family “to plead with them to settle the case”, but the family nearly beat him up. The chief then refunded money to the buyer.18

Besease does not only house the Beseasehene and his subchief the Kontihene, but also three of the subchiefs of the Ejisumanhene, the paramount chief of the area. One of these subchiefs is the Kyidomhene. An elder of this lineage, and the next in line to become Kyidomhene, has recently allocated seven plots of family land to pay for the re-
novation of the family house. When asked whether permission of the chief is needed to lease your land to a stranger, Mr. D, the elder, answered: “Things are changing. It depends upon the animosity. The chief has to sign the land allocation paper and the site plan. But we first sell and then we go to the chief.”19 He later explains that his family consists of three houses or gates, from which the chief is selected. The people from these three gates can sell their own land, whereas the others cannot.20 According to the Kyidomhene, however, “D was wrong when he said that members of the three gates can sell their own land. He says that because he has sold seven plots. It is the chief who will sell the land and divide the revenue.” Mr. D, however, is not on a bad footing with the Kyidomhene, since D did not connive with the paramount chief, when the latter wanted to get the Kyidomhene destooled and D enstooled as new Kyidomhene. No formal actions were therefore taken against Mr. D on account of the land sales. Another of the subchiefs of the paramount chief residing in Besease is the Gyaasehene. Recently the Gyaasehene has been selling land without the knowledge of his family members who were farming on that land and also without paying them any compensation. A family member explained that “If you are very difficult, the chief cannot take your land away. You can sell and give part of the money to the chief. But if you are unlucky the chief will take it, and if you don’t fight it, you don’t get anything.” Now that she knows the Gyaasehene is selling land without consent of the farmers, she will prepare a plan when the town starts to reach her land, because “that gives me the possibility to fight.”21

The short cases described above clearly show that the peri-urban area of Kumasi is an arena of severe and protracted negotiations and struggles over land. Practices regarding customary land are thus more negotiated than based on clear and unambiguous rules of customary law (cf. Berry 2001; Chanock 1998; Comaroff and Roberts 1981; Mann and Roberts 1991; Moore 1986; Oomen 2002; Otto 1998; Ranger 1983; Roberts 1979: 182; Von Benda-Beckmann 1979). Customary law, or rather interpretations or claims of customary law, should be seen as one of the resources actors in these struggles use. Actors try to use the somewhat flexible, unwritten nature of customary law to legitimize their actions and defend their interests. Chiefs and elders do so explicitly, farmers more implicitly. But the negotiations over land are and always have been power struggles, to a high extent influenced by other factors, such as historical narratives, personalities, and social and economic capital.
Traditional Controls on Chiefly Administration

Despite many acts of resistance, chiefs are often able to re-appropriate a considerable proportion of stool land and to lease those plots to outsiders. This is strongly connected with a shortage of checks and balances on chiefly administration on the one hand and a lack of accountability on the other. Authoritative writers have described a number of customary checks and balances on the performance of chiefs in Ghana, such as the fact that chiefs ought to take decisions in council with their elders or subchiefs, and the possibility to destool a seriously malfunctioning chief (Busia 1951; Danquah 1928; Hayford 1970: Ch. 2; Kasanga and Kotey 2001; Kofi-Sackey 1983; Obeng 1988: Ch 7-11; Ollenu 1962; Ollenu 1967; Pogucki 1962; Sarbah 1968).22 They seem, however, to depict an idealized version of customary law rather than effectively functioning checks and balances in present-day village practice in peri-urban Kumasi.

According to customary law, a chief can only bind the community if he acts with the consent and concurrence of the whole community represented by the principal councilors from all major families of the community (Busia 1951: 14; Hayford 1970: 73; Ollenu 1962: 130). Therefore, the chief is controlled in the enjoyment of the communal lands by his councilors, called elders or subchiefs (Pogucki 1962: 182; Sarbah 1968: 66, 87). A chief who repeatedly ignores the advice of his people, especially of his councilors, is liable to destoolment (Danquah 1928: 57, 116). Current practice in peri-urban Kumasi shows an entirely different picture. In a number of villages, the councilors are selected from the royal family only and not from all major families of the community. Furthermore, when elders criticize their chief, in many villages the chief does not listen to them. “Beseasehene is a new chief. He doesn’t mind the rules. I tried to talk to him, but he didn’t take my advice. If I wasn’t educated, he would try to cheat me as well.”23 In other villages, the chief co-opts his elders by sharing the benefits from land administration with them, removing their incentives to effectively check the use of power and if necessary stand up against the chief. “The subchiefs support the chief, because they get a share of the money. When they argue with him, they won’t get anything.”24 “The natives of the town have to try to stop the chief from malpractices. If you attack him constantly, he has to change. This is usually done by the elders, but in many villages the elders connive with the chief.”25

When the people of a community want to destool their chief, a case has to be brought to the Traditional Council, constituted of the paramount chief and his subchiefs.26 Removing a chief thus always requires the involvement of other chiefs. This can be complicated. Paramount chiefs often have a direct interest in the person who will be
elected to occupy the village stools, mainly because of their claims to a share of the villages' land revenues. But even if paramount chiefs do not have such an agenda, it is still chiefs judging their fellow chiefs. Many of the current destoolment charges have in one way or the other to do with land administration. And often the charges against the chief-on-trial, such as not using enough stool land revenue for community development, are also items of contestation in the villages of the judging chiefs. Often their personal interest in such cases therefore stands in the way of objective and impartial judgments. Besides the fact that other chiefs always have to be involved, an additional obstacle to destoolment is that, according to customary law, charges cannot be brought by commoners, but only by the 'kingmakers', i.e., those subchiefs and members of the royal family who can also make or enstool a chief (cf. Hayford 1970: 36). As discussed above, these subchiefs are often restrained by their proximity to the chief or co-opted and therefore not likely to take the lead in actions against the chief. And if they do dare take action against their chief, this is only "after many years of wrongdoing. The chief will first be given the benefit of the doubt." When you add to those waiting years the years the destoolment procedure itself may take, one can imagine that a chief can alienate a considerable amount of stool land in those years and spend the proceeds as well.

The main customary checks and balances on chiefs – ruling in council with subchiefs and the possibility of destoolment – are thus not very effective. One can add to this the fact that chiefly accountability is extremely low. Through a lack of registration most land administration is concealed. A good chief may account to the people for his administration on his own accord, but this is an exception rather than the rule. Some people claim that "nobody has the right to ask the chief to account" and "[I]f it goes wrong, there is nothing to do about it." This is often explained by the fact that the chief also has his professional income, and therefore one does not know whether he is spending personal or stool money. Or it is said that "the chief does not receive any remuneration, but he does have job-related expenses, to which the people do not want to contribute;" the chief continues to bear obligations for which the customary provisions, such as the chief's right to portions of skins of wild animals, tributes of fish, and communal work on his farm, have ceased (Amnor 1985: 157; Busia 1951: 44). Others claim that to ask a chief to account to the people is considered a vote of no confidence – "If a chief does his work well, no one will ask him to account" – and most people will not dare to do that unless there are more than clear indications of serious misrule by the chief. And even then, 'who is to bell the cat?' The chief is still a powerful fig-
ure in most villages and you are sure to bring his wrath upon you by agitating against him.

Besides by traditional controls, chiefs could also be constrained by governmental checks and balances. Although such state controls exist on paper, this chapter discusses in section five under the heading ‘the political factor’ why they are hardly effective in reality.

Considering the difficulty of resisting the chiefs from re-appropriating and leasing stool land and the weak accountability of chiefs over their administration and the revenues, it is worthwhile to examine to what extent state courts serve as an alternative channel for resistance to indigenous farmers, families, and communities. As said, this depends on the one hand on people’s access to and the functioning of state courts, and on the other hand on the decisions reached by these courts and their execution. These issues will therefore be discussed in the next two sections.

The court system and its bottlenecks

The Ghanaian court system currently consists of the superior Courts of Judicature – the Supreme Court, the Court of Appeal, the High Courts and the Regional Tribunals – and the lower courts – the Circuit Courts, Circuit Tribunals, and the Magistrates Courts. The Magistrate’s Court is the lowest level of civil court which hears land cases. In the peri-urban areas, however, most land cases start in the High Court. From the High Court an appeal lies at the Court of Appeal and from there at the Supreme Court (Brobbey 2000).

The state courts – especially the Magistrates Courts and the High Courts – have been in a state of crisis for some years. Although this is a generally acknowledged fact in Ghana, there is little research on the functioning of state courts, in particular from a people’s perspective. A positive exception to this rule is the research done by Crook, who has undertaken an in-depth study into court use in Ghana, with a survey among 186 litigants in land cases in Kumasi High Court, 10 in Wa High Court, and 47 in Goaso Magistrates Court (Crook 2003). The courts are overwhelmed with the large volume of cases, of which land cases form a significant proportion. Few of these land cases can be heard or settled within a reasonable time, causing a huge backlog of unheard cases and long delays for litigants. According to Justice Georgina Wood “land litigation in Ghana has been found to be a complete nightmare” (Wood 2002: 1). It is a nationwide problem that the rate of disposal of land cases is far lower than the rate at which these cases are filed in the courts (Kotey, Dowuona-Hammond, and Atuguba 2004: 78; Wood 2002). According to Wood, for a case to travel
through the entire hierarchical court structure takes an average minimum of 3-5 years and a maximum of 8-15 years (Wood 2002: 2). A farmer narrates his experience with the court: “I went to court and it took more than five or six years. Then the lawyers advised me to settle the case at home. I was sure that I would win, but there was an injunction on the cocoa farm and that cost so much that settling would be cheaper.” The number of times litigants have to come to court is also problematic. In Crook’s research 40.6% of the respondents said they had attended court more than 21 times since the case began – often only for the case to be adjourned without a hearing – 6.1% even claiming they had attended more than 100 times (Crook 2003: 9).

These adjournments are largely caused by lawyers, witnesses or even parties simply not turning up when their cases are scheduled, or in the case of lawyers turning up insufficiently prepared. But there are also a number of administrative and procedural problems causing adjournments and backlogs: insufficient number of judges, caused by unattractive salary and working conditions; the very small percentage of out-of-court settlement; too much reluctance to bring summonses for attendance and to move cases to be struck out for lack of suit; over-optimistic scheduling of hearings – up to 20 or 30 cases a morning; ‘missing’ dockets, either because of inefficiency or because of corruption by court staff on behalf of one of the parties; not enough working months due to long holidays; and parties who do not know when the date and time of the next hearing is (Crook 2003: 9-10; Wood 2002: 4-9).

An additional obstacle for many people is to gain access to the system. Abovementioned bottlenecks of duration of cases and number of times a litigant has to come to court – usually accompanied by a lawyer – have obvious implications not only for time but also for the costs. In Crook’s research, 70% of the litigants had spent between Cedis 500,000 and Cedis 5 million. Although he concludes that these costs are not as out of reach for a family or somebody with a farm or business as might have been expected, for subsistence farmers this amount could severely hamper their access to courts. Kotey et al. show that while the costs of initiating land cases is quite low they can seriously mount up during the case. Some of the litigants are therefore later unable to continue with the case for financial reasons, again causing delays, adjournments and backlogs (Kotey, Dowuona-Hammond, and Atuguba 2004: 104).

In addition to the financial aspect, there is also an emotional side to access. State courts are often said to be remote from the villages, both in physical and emotional distance. The culture of the court can be alien, unintelligible, and intimidating for many Ghanaians. Crook qualifies this criticism by stating that, although the core of the legal system indeed remains the English common law, the courts have been operat-
ing in Ghana for over a hundred years and their procedures have in many respects been ‘Ghanaianized.’ The language has also been adjusted: whereas the recording is done in English, most hearings are held in a combination of English and the local language.45 In Crook’s survey, 82% of the respondents said they had understood the proceedings, and over half of all respondents described the judge in positive terms.46

With regard to disputes involving a chief, there is another possible obstacle for bringing such a case to court: state courts have no jurisdiction in a “cause or matter affecting chieftaincy.”47 This is interpreted as any cause, matter, question or dispute relating to the nomination, election, selection, installation, deposition, or abdication of a chief.48 As a consequence disputes over stool land that are related to charges for destoolment cannot be dealt with by state courts. In peri-urban Kumasi the access to state courts when chiefs are involved is even more impeded by the appeal of the Asantehene to withdraw all land cases pending at the state courts, to bring them to his ‘court’ for dispute settlement.49

Nevertheless, in spite of difficulties of access, expense, and delays, state courts are resorted to by very large numbers of litigants in land cases (Crook 2003: 5).50 ‘Going to court’ is not only for the rich, powerful, or highly educated; a wide range of ordinary citizens use the courts.51 According to Crook, the main reasons for choosing the state court are the perceived need for authority and certainty and a suspicion about the impartiality of arbitration.52 Many people also stated that arbitration cannot be enforced.53 Because of the high number of land cases, courts are in a position to play a significant role in enhancing the tenure security of subject-farmers.54 This depends both on the kind of decisions and the rules of customary law the courts pronounce, and on the execution of the judgments in the localities. Unfortunately there seems to be no literature available on the execution of judgments in Ghana. The fact that execution is not discussed, both in Crook’s research and in some other critical analyses of the functioning of Ghanaian courts55 seems, however, to imply that execution of judgments is not a major problem area in Ghana. This chapter will therefore acknowledge the need for further research in that area and leave execution out of consideration. The next section focuses on the pronouncement of rules of customary law in land cases in the Ghanaian courts, i.e., on judicial customary law.
Customary land law in the courts

The state courts are constitutionally endowed with the power to apply all the rules of law recognized in Ghana, including customary law (article 11 of the 1992 Constitution). In this section, the application of judicial customary land law is analyzed. This will show how Ghanaian courts answer questions regarding competing claims for land by chiefs and community members; tenure security of usufructuary rights in land; the power of alienation of these rights; the role of chiefs in land administration; and their accountability in this process. It draws on reported cases – available up to 1996 and for the Supreme Court up to 2002 – and unreported cases from 1995 until 2004, studied at the Council for Law Reporting in Accra and collected at law firms in Accra and Kumasi.

General Rules

According to state courts, the allodial title to every portion of stool land in Ghana is vested in one of the customary communities. It is also described by such terms as the absolute, final, radical, paramount, or ultimate title. Any community member has the right to occupy a vacant portion of the stool land to develop a plot “by cultivating it in one form or another, by building on it, or using it in any other way in which an owner would use his land.” The member then acquires an interest, called the usufructuary, determinable, or possessory interest, or the customary freehold. The term customary freehold is enshrined in various statutes, such as the Land Title Registration Law, 1986 (PNDCL 152). However, in line with the terminology in most dicta, this chapter uses the term usufructuary interest.

Several cases have held that when it comes to rural and farming lands, no express grant is required from the community holding the allodial title. The members occupy and use the land by implied grant. With the reduction in the area of vacant land, however, the members have been subjected to more control (Woodman 1996: 90). In the case of urban or peri-urban lands where the demand for land is higher and there is a need for orderly development, it has become relatively common for members to seek an express grant from the allodial title holder. For instance, in Oblee v. Armah (1958) it was held that:

“the general rule that a stool-subject does not require the consent of his stool, when seeking to occupy vacant stool land, gives way where the land is outskirt land of an urban area and is ripe for development. (...) In the case of such lands, express permission is always required, and limits are set to the extent of land
which one subject may occupy, in order to maintain proper administration of the land and ensure that each subject who requires land to build gets his fair share.”\footnote{64}

Under certain circumstances, express grants may even be necessary in respect of some farmlands. In Frimpong v. Poku (1963) the Supreme Court held that:

“\emph{The principle of customary law which says that a subject is free to cultivate any extent of stool land does not confer on a subject an unlimited license for indiscriminate cultivation, and a subject usually obtains the formal permission of the stool for the purpose. Permission is never refused but it is necessary in order to enable the stool to keep a check on cultivated areas. In days gone by when land was plentiful and persons seeking to cultivate it were few, a subject would be shown a site or would choose his own site with the approval of the stool, and he could then extend his cultivation to wherever \textquote{his cutlass could carry him} as the saying goes. In modern times, however, it has become necessary to ensure a more equitable distribution of available land for cultivation and the practice has been for limited areas to be demarcated for subjects of the stool.”\footnote{65}

And in Amatei v. Hammond (1981) it was held that:

\emph{“where a subject of a stool requires land (…) and engages himself in commercial mechanized farming he should be required to obtain an actual grant in the form of a lease. If such a person with the necessary resources and equipment is permitted to rely on this inherent right to clear miles and miles of stool land, it would not be long when other subjects of the same stool would be deprived of any share of the land.”}\footnote{66}

Although it has become relatively common for members to seek an express grant from the allodial title holder, this does not mean that the creation of the interest is dependent on the obtaining of such a grant (Woodman 1996: 90-1). There may even be a right to receive that grant on request.\footnote{67}

Other issues include whether interests created through express grants differ from interests created through implied grants, and whether allodial title holders can attach certain conditions to express grants. In 1951, Jackson J. held in the Kokomlemle Consolidated Cases\footnote{68} that the usufructuary title which a subject of the Gbese stool acquires in Gbese Stool land upon express grant confers upon him only farming
rights and nothing more. According to Ollennu this case was upheld by the West African Court of Appeal in two cases (Ollennu 1962: 56). In Woodman’s opinion, however, these cases did not discuss the correctness of this part of Jackson J.’s judgment (Woodman 1996: 100-1). In any case, Jackson J. seems to have erred in his earlier opinion and went back on his statement in a later case. In this judgment of 1952 he interpreted the subject’s title – which he called farming right – as follows:

“(...) which right includes all the incidents of living, whether by residence on the land by members of the family or by leases of the land to strangers, i.e. so long as they do not alienate the land from the stool of which they are subjects.”

This judgment seems to represent the current legal opinion. For instance in Thompson v. Mensah counsel for plaintiffs argued that when a subject obtains an express consent of the stool to occupy stool land, the stool can prohibit the alienation of the usufructuary title without the previous consent and concurrence of the stool. But this was not accepted by Ollennu J., who held that such a condition would be void and unenforceable, since it is a violation of the subject’s inherent right to occupy stool land without any burden except the recognition of the title of the stool which carries with it certain customary services. In Oblee v. Armah Ollennu J. also argued against conditional grants, stating that “the rights exercised by a stool-subject over land in his occupation are not limited by the purpose for which he has acquired the land or for which it was demarcated in his favor. Thus where a stool-subject occupies or is granted land for farming purposes he is not thereafter restricted to farming in his use of the land.” Presumably based on increasing awareness of the need for planning, High Court Kumasi decided in 1997 that when a subject wanted to change the nature of the land from agricultural to commercial, he did need an express grant from the stool.

In conclusion, areas with pressure on land show a trend from implied to express grants. It seems, however, that according to judicial customary law allodial title holders do not have the ability to use express grants to alter the usufructuary interests of community members.

Security of Tenure

In many cases it has been asserted that the usufructuary interest is a potentially perpetual interest: when a usufruct has come into existence, the stool has no power to grant conflicting rights to anyone else unless
the interest-holder consents, and the interest is lost only by abandon-
ment, forfeiture, extinction by operation of legislation (compulsory ac-
quision by the state), because of failure of successors, or with consent
and concurrence of the interest holder.77 For instance in Total Oil Pro-
ducts v. Obeng (1962), a case concerning a lease by a stool to a stranger
of land in the possession of a subject of the stool or his grantee, High
Court Accra stated that this practice was “absolutely against customary
law.”78 And in Mansu v. Abboye (1982-3), Francois J.A. held that “(it is)
a hallowed canon of customary law, that stool subjects in possession
can only be dispossessed of their usufruct in land with their consent or
on proven and unrectified breaches of customary tenure, or upon aban-
donment.”79 The usufructuary can sue the stool for a declaration of ti-
tle, damages for trespass, or recovery of possession.80

In a few cases it has been suggested that the stool may have some
powers to deprive the usufructuary of his rights (Woodman 1996: 107).
Woodman cites a 1911 case that held that a person who buys land from
the community may dispossess a member on the land in return for
reasonable compensation.81 And a 1949 case held that “there was
some authority for the view that the cultivator could be compensated
for his trees, after a proper valuation, instead of continuing on the
land. The defense had not however proved that they had such a right
in this case.”82 Yet according to Woodman, these cases appear to be
contrary to the numerous dicta stressing the security of title.83

Another decision suggests that a community has the power to ex-
change land held by a member.84 In this 1950 case the chief of the Bra-
zilian community of Accra claimed the right to alienate, free of all in-
terests, land which had been cultivated by a member. The case was dis-
missed, because he failed to show a decision by the community to
convey the land. But Coussej J. held:

“If the plaintiff had shown that the elders of the (…) community
had concurred with him in selling land for the benefit of the
community and that they had resolved that in the interests of
the community the defendants’ occupation should be shifted to
three other plots of land, he might have been entitled in certain
circumstances, subject to the defendant’s interest being defined,
to a declaration.”

In a later similar case (1959) a chief claimed that he could exchange
land in the possession of a subject because the area was laid out for or-
derly development. This was rejected by the court:

“It is difficult to appreciate this argument. Once land has been
granted to a person, it cannot be taken away from him and other
piece given him in substitution without his consent. The grantor would be acting unlawfully if, without the consent of the grantee, he should grant the original land to another person, allocating another piece of land to the original grantee. And the party to whom a purported grant of such land is made would be guilty of trespass if he entered upon it without permission of the original grantee.”

In another case, in 1961, defendants claimed that the people, chief, and elders of two towns had agreed that no compensation would be paid for any farms which might be destroyed in the process of raising a new township. High Court Accra held that such an agreement which interfered with vested individual private rights is ultra vires. For an individual to be deprived of his rights in property it must be shown that he personally agreed to waive that right. In *Total Oil Products v. Obeng* counsel for the plaintiffs raised the point that subjects of a stool traditionally had an inherent right to the exclusive use of a portion of stool land in return for war services. Now that subjects are no longer called upon to lay down their life to acquire or preserve stool land, their rights to stool land are at the will of the stool. Therefore the stool could alienate land in the possession and occupation of a subject without reference to the subject-owner. The High Court rejected this argument and there has been no other attempt to establish that the member holds at the will of the community (Woodman 1996: 108).

*Security of Tenure in Peri-urban Areas*

Because of the peri-urban practices as described in earlier sections it is interesting to look specifically at court cases dealing with land that is being converted from farmland to residential land. In *Baddoo v. Botchway* (1949) it was held that this change in the category of the land causes the member’s title to lapse. But this decision was based on the view that a member who received a grant of vacant communal land from the community was a mere licensee without a power of alienation, and this would be regarded as bad law today (Woodman 1996: 109). In four cases decided in 1959 and 1961 the same argument was rejected. For instance in *Ashieoma v. Bani* (1959) it was held that “the Court of first instance was right in rejecting the alleged custom by which a landowner was divested of his title when his land became outskirt land (and) that such a custom would be contrary to natural justice, equity and good conscience.” However, in 1979 it was suggested by Edward Wiredu J. in *Amatei v. Hammond* that these holdings should be “looked at again”: **
“Where an outskirt land in possession of a subject is required for general development of the community such as for building a school, lavatory, etc. or where as in this case, the area already in the occupation of the plaintiff had been carved into building plots for the use of the general community and the complete lay-out of the area has changed, I am of the view that the subject’s prior occupation should give way subject, of course, to preference being given to him in the allocation of such plots if he requires one to build or in the alternative another suitable area given him in place of the one lost and his consent should not be a prerequisite to the stool taking over control of such an outskirt land.”

And in 1997 High Court Kumasi decided a case where subjects of Trede protested against the surveying and selling of the land by the regent of Trede. Although the court held that the regent could not alienate the land because of a dispute between two stools about the land, it also stated that the subjects could not “hold onto their farmland as farming land when development of Trede reaches that area, as that will not be in the interest of the community at large.” This case does not make any statements as to procedure, compensation, or division of revenue, but does seem to indicate that consent of the usufructuary is not necessary for a change of land use.

Despite these few exceptions, it seems fair to conclude with Woodman that “the courts have been unsympathetic to attempts to subordinate the interests of the individual customary freeholder (usufructuary) to those of the community” (Woodman 1996: 109). And even where the courts did make such exceptions, they posed conditions such as that the land is required for the general interest of the community and that the usufructuary would be properly compensated with other land.

**Power of Alienation**

Under judicial customary law, the holder of a usufructuary interest may grant a tenancy to be held from the usufructuary as a landlord (Woodman 1996: 100). The usufructuary may also seek to alienate his or her usufructuary interest outright (Id: 101). Until 1957, the general opinion was that alienation of a usufruct from a member to a stranger required prior consent of the community, and that consent could be given conditionally. From the 1950s onwards there was a change towards the view that “usufructuary title can be transferred without the consent of the real owner, provided that the transfer carries with it an obligation upon the transferee to recognize the title of the real owner, and all the incidents of the subject’s right of occupation, including per-
formance of customary services to the real owner.”\textsuperscript{94} The change was mainly effected in decisions of Ollenu J.\textsuperscript{95} whose view was also expressed in 1961 by the Supreme Court\textsuperscript{96} and the Privy Council.\textsuperscript{97} In this last case Lord Denning held:

“Their Lordships have been referred to a series of decisions in the Land Court in recent years, affirmed on occasions by the Court of Appeal, from which it appears that the usufructuary right of a subject of the stool is not a mere right of farming with no right to alienate. Native law or custom in Ghana has progressed so far as to transform the usufructuary right, once it has been reduced into possession, into an estate or interest in the land which the subject can use and deal with as his own, so long as he does not prejudice the right of the paramount stool to its customary services.”\textsuperscript{98}

Two decisions went the other way, including a decision of the Supreme Court in 1960.\textsuperscript{99} The idea that transfer of the usufructuary title does not need the consent of the allodial titleholder, however, came to represent the dominant view.\textsuperscript{100} For instance, in 1997 the Court of Appeal held that:

“(a)ll the text writers and decided authorities agree that it is the owner of the possessory or usufructuary or determinable title to land who has the right of alienation (…) without prior consent and concurrence of the paramount owner, so long as the alienation carries with it an obligation to recognize the title of the allodial owner and to perform customary services due to the allodial stool when called upon.”\textsuperscript{101}

Interestingly, this was decided not only in cases dealing with transfers of land for farming purposes, but also for residential purposes\textsuperscript{102} and for a cemetery.\textsuperscript{103}

\textit{The Chief as Custodian}

In most cases it is stated that the allodial title is vested in the ‘stool.’\textsuperscript{104} It seems incorrect to say that the title is vested in the chief (Danquah 1928: 200; Woodman 1996: 191). However, it has been held that the chief is a ‘trustee’ or ‘in the position of a trustee.’\textsuperscript{105} Woodman explains clearly why this word is “uninformative, and maybe even misleading”:

“The word ‘trustee’ is a common law term which signifies the existence of a trust, whereby one title to property, usually the le-
gal title, is vested in a trustee, and a different, equitable title to the same property in a beneficiary. Customary law does not distinguish between legal and equitable interests in land, so clearly the term cannot be used in that sense here. The meaning closest to it would be that the interest was vested in the chief, but that the chief could not validly deal with it without the consent of the stool council. However, it is not normally said that title is vested in the chief at all, and indeed some of the authorities comparing the chief with the trustee state that title is in the stool. Thus the term trustee appears not to refer to title, but merely to emphasize the restraints placed on the chief as representative of the community.” (Woodman 1996: 191-2)

It is more accurate to say that the chief, as the leader and principal representative of the community, is the custodian of stool land. He is required to act with the advice of the stool council, and failure to do so constitutes grounds for destoolment. It was long held that although the chief’s activities are controlled by the council, he cannot be held liable for accounts. He could, however, be destooled and then required to render an account. As late as 1981, the Court of Appeal upheld the rule that chiefs could not be held liable for accounts, even though Charles Crabbe, J.S.C. admitted that:

“The circumstances of this case require that the appellants, i.e. the second defendant and the co-defendant, the occupant of the Kumawu stool, be called upon to account. More so, the co-defendant. I freely admit that his conduct is reprehensible, if not sordid. Yet, I am of the view that perhaps the Supreme Court, but certainly not this court, is the proper forum for the explosion called for. And at best (…) “legislation not litigation, is the only satisfactory way of delimiting the bounds of so complex a subject.”

The facts of the case were that the chiefs and kingmakers of Kumawu in the Ashanti Region had fraudulently claimed and received for themselves compensation paid out by the government in respect of acquisition of Kumawu stool lands. Respondents, all of whom are subjects of the Kumawu stool, successfully instituted an action at High Court Kumasi for the recovery of the compensation. On appeal, the Court of Appeal accepted the trial judge’s findings that the Kumawuhene had perpetrated fraud on the stool or oman of Kumawu. But it reversed the High Court decision on the basis of the facts that (1) at customary law, only a chief could bring an action to recover stool property; the plaintiffs, not being chiefs, had no standing to initiate the action; and (2) at
customary law, a chief could not be taken to court by his subjects and asked to render accounts. The Court of Appeal did not accept the analogy of family property, in relation to which a previous Court of Appeal had decided that where the family elders for their own selfish reasons were not acting to save family property, other members would be allowed to litigate to protect such property. This was harshly criticized in an article by Fui Tsikata, who claimed that:

“Here was even a stronger case, as findings of fraud were made against the head and at least one elder. (...) The arguments invoked in support of the immunity rule are the need to (1) uphold the dignity of the head of family or chief, (2) protect them from frivolous actions, (3) preserve an area within which the community can take its own decisions, in its discretion, without being imposed upon by the courts. Surely, none of these takes us to the point that if the head of family or chief has fraudulently diverted communal funds into private hands, the courts will not protect those funds unless the head or chief is deposed. Anyone who has been involved in organizing against wrongdoers who are backed by established social connections and wealth will appreciate what tremendous difficulties the plaintiffs in this case must have surmounted even to have the action initiated. (...) Any attempt to depose the chief would have confronted infinitely greater obstacles.”

He therefore concludes that: “We submit that the pronouncements of the Court of Appeal on the customary law rules ought not to be followed, and that it should take advantage of the next available opportunity to distance itself from them.”

Whereas the Court of Appeal was unwilling to extend the exceptions adumbrated in *Kwan v. Nyieni* from family to stool property that was exactly what the Supreme Court did on appeal in 1991. The Supreme Court had to decide on two main issues: whether the appellants were competent to bring the action and whether a chief could be held accountable. With regard to the first question the SC held that the applicants were competent to bring the action because:

“The principle in *Kwan v. Nyieni* [1959] GLR 67, CA providing exceptions to the general rule that the head of family was the proper person to initiate suits for recovery of family land was not confined to land. Under customary law wherever those clothed with authority to protect family interests failed to do so but rather formed an unholy alliance or conspiracy to damage
the interests of the family an urgent situation had to be deemed to have arisen allowing for a relaxation of rules and permitting more responsible members of the family to protect the endangered family interests. Since the respondents who should have protected Kumawu stool revenue formed an unholy alliance to enrich themselves at the expense of the state, their conduct which amounted to fraud disabled them from performing their duty in preserving Kumawu stool revenue. And it could hardly be expected that they would take steps on their own volition to refund moneys they had illegally appropriated or rather misappropriated. In the circumstances, it was only the plaintiffs who were the remaining entity capable of championing the rights of the state. Accordingly, the exceptions to the general rule in *Kwan v. Nyieni* (supra) applied to clothe them with capacity.”

With regard to the second question, the Supreme Court held that:

“He (the chief) can receive no protection for his illegal conduct by relying on the traditional immunity from accountability. That principle cannot be urged as a cloak for fraud. Since it is a statutory imperative that moneys from stool land acquisitions should be lodged in a designated fund, it would be improper for this court to overlook a defalcation that illegally subverts this rule. The principle of non-accountability cannot be projected above statutory requirements to afford a viable protective umbrella.”

Thus, although there is no general statutory provision allowing the chief to be sued for an account, the principle of non-accountability is overruled when a specific statutory provision – currently found in article 267 (2) of the 1992 Constitution and section 2 of the Office of the Administrator of Stool Lands Act, 1994 (Act 481) – requires the revenue from stool lands to be paid into stool lands accounts.

**Courts and peri-urban practice**

In this section, we will compare practice in peri-urban Kumasi with judicial customary law and try to explain the gap between the two. Practice in peri-urban Kumasi displays the chief as the most powerful actor in local struggles for land. Chiefs are often able to re-appropriate stool lands – in which community members have a usufructuary interest – with the aim of converting this farmland to mainly residential land in order to lease it to outsiders. As said previously, they try to legitimize their actions mainly with two discourses. The first discourse says that
when land can be used in a more profitable way, the chief has the right
to reallocate land and alter its use. The second discourse holds that the
land belongs to the royal family instead of to the whole indigenous
community, and this family can therefore reclaim the land from the
farmers at any time. The second discourse explicitly dismisses any rea-
son for compensating the farmer or using revenues for the welfare of
the community. The first discourse, however, implies that the proceeds
of the conversion are used for community development such as infra-
structural or educational projects. Although most interviewed chiefs ac-
nowledged that they have at least a moral obligation to use part of the
revenue for compensation of the farmer and/or for community devel-
opment, the actual practices differ considerably and on average the
chiefs receive unsatisfactory marks from the villagers. Both dis-
courses bring about serious tenure insecurity for the farming commu-
nity members. Attempts to hold chiefs accountable for their adminis-
tration of land and the revenue accruing from the conversions have
proven extremely difficult in the research area.

Land practices in peri-urban Kumasi are not supported by judicial
customary law as described in the preceding section. Customary law in
the Ghanaian courts conveys an image of protection of the interests of
the individual usufructuary against the chiefs’ attempts to re-appropri-
ate stool lands for ‘development’ purposes. First, usufructuary rights
are quite secure. Second, the transfer of the usufructuary title does not
need the consent of the allodial title holder. This seems even to apply
when farmland is transferred for non-farm purposes, such as for hous-
ing or cemetery plots. And even if an express grant were needed to
change land use from agricultural to residential, as was stated in one
court case, it seems that the community member has a right to re-
ceive this grant unless overriding communal interests prohibit it.
Thirdly, chiefs can be held accountable for the way they use stool land
revenues, since there is a “statutory imperative that monies from stool
land acquisitions should be lodged in a designated fund.” What can
be discerned in judicial customary law is a trend towards more power
to the chief as administrator, ensuring sound town planning and more
equal distribution of land through the instrument of express grants.
This trend cannot be interpreted to mean that the chief has the power
to deal with land upon his own volition, without regard for community
interests or compensation for farmers.

This gap between the customary rules as laid out in the Ghanaian
courts and peri-urban practice can be explained by two factors. First,
the difficulties for judges to know what the rules of local customary
law are and to ‘translate’ these rules from the local level to state courts.
This will be called ‘the legal factor.’ Second, the limited effect of judi-
cial decisions on peri-urban practice due to the political configuration at local and national level: ‘the political factor.’

The Legal Factor

It is common knowledge that there is often a wide gap between customary law as pronounced in the courts – judicial customary law – and actual local practices (Cf. Allott 1975: 89; Allott 1977: 11; Asante 1969: 100; Chanock 1989; Koesnoe 1985: 105-7; Von Benda-Beckmann 1985b: 77-95; Woodman 1977: 115; Woodman 1996: 46). This gap can be explained firstly by the difficulty of knowing what the applicable rule of local customary law is, and secondly by the nature of the state legal system, which inevitably transforms local customary norms. Interestingly, High Court judge Baffoe Bonny turned the argument around, saying that: “what is in the courts is the customary law. Local practice differs from customary law because of ‘ignorance’ and opportunity.”119 Both aspects are dealt with below.

The first aspect is the difficulty for a judge to define the applicable rule of local customary law. Obviously this is difficult because each locality has its own customary laws, and judges rotate through the country. But more fundamentally the complication lies in the fact that within one locality there are always variations within and conflicts about what local customary law is. Customary norms should not be regarded as the expression of values of the whole group, but rather as representations of the interests of parts of groups, which are focused into normative statements to give legitimacy to these partial interests (cf. Chanock 1989: 174).120 This makes it hard for courts to enquire locally after the appropriate local rule of customary law. For who are to be regarded as authoritative experts of customary law? Allot points out that apart from reasons stemming from their personal or group agenda, experts may also give a misrepresentation of local customary law because of a tendency to idealize the law, to present what it ought to be instead of what it is, and because of the connected failure to appreciate that the ancient traditional law has been modified by subsequent practice (Allott 1975: 78). He furthermore shows the “contrast between the informality, the flexibility, the ‘political’ bargaining quality and the unpredictability of dispute settlement and the precision of the norms which will be quoted by members of the same society” (Allott 1977: 10). Under colonial rule, it was mainly the African ruling groups of male elders who were able to put their morality forward as ‘custom’ and whose claims were countenanced by courts and administrators (Chanock 1989: 179, 184; McClendon 1995). Although Ndulo claims that this ‘male elderly bias’ has not fully disappeared in the post-colo-
nial period, the protection of farmers’ usufructuary rights against chiefs qualifies this criticism (Ndulo 1981).

It is equally problematic for judges to deduce, by themselves, the rules of customary law from local practices. For not only dispute settlement – as Allott points out – but also out-of-dispute-negotiations show a flexibility and unpredictability, and consist of political bargaining embedded in power relations. Customary law, or rather claims as to what is local customary law, form only one of the resources used by local actors in such negotiations over land. So how should a judge deduce rules of customary law from the outcome of struggles over land, from local “customary” practices?

This is all connected to the opacity as to who is the lawmaker in customary law. Is it the people who by practicing a certain custom turn it into law, or is there a special role for chiefs in this respect? A Ghanaian researcher in an interview once said: “This Asantehene has said that all land belongs to him and that families and individuals cannot sell land. So this is now the customary law, which the courts should follow.” On the one hand, custom may confer on some person or body the authority to legislate. When that power is used, the result could be regarded as customary law because that is its source of legitimacy. On the other hand, the Ghanaian Constitution defines the corpus of customary law as comprising “rules of law which by custom are applicable to particular communities in Ghana.” This seems to indicate that practice is essential to the creation of customary law, and that its continued observance is required to keep the norm in being (cf. Allott 1975: 89; Allott 1977: 11). According to S.K.B. Asante:

“this definition postulates an empirical reference for the content of the law, reaffirming the truism that customary law is grounded on the customs actually prevailing in the community. There can be no retreat to a remote and unsullied haven of logically coherent juristic norms. The very nature of customary law makes reference to contemporary practice and usage in society an integral part of the legal process.” (Asante 1969: 99)

This brings us to the second legal factor located within the state legal system, which by its nature inevitably changes local customary law. For – despite the abovementioned reference to empiricism – in a common law system, once custom has been settled by judicial decision, its binding force depends on the doctrine of precedent. Today in the majority of land cases the courts do not look for local norms and usage, but to precedent for the rules and principles of customary law (cf. Woodman 1996: 43). A divergence is therefore likely between judicial and local customary law. High Court judge Baffoe Bonny acknowledges this gap
by saying that “even when I know better I am bound to follow case law.” According to S.K.B. Asante:

“(A) meaningful and scientific clarification, as well as a purposeful application, of contemporary customary law has been menaced by a tradition which restricts the orbit of the law to the narrow confines of authoritative decisions, and strictly commits decision-makers of today to the dubious wisdom of past experience. Nowhere is this cleavage between textbook law and social reality more glaring than in the customary land law of Ghana.” (Asante 1969: 100)

Although precedent does not establish a fixed rule in perpetuity, the system does not provide the same amount of flexibility that characterizes local customary law, with its ability to respond to changes in social reality. The system of precedent has the tendency to somewhat ‘freeze’ the law at one stage of its development and complicate further change (Allott 1975: 95). The notion of flexibility of customary law should, however, be used with caution. It can easily be – and often is – misused by actors in local power struggles. An instance occurs in this chapter’s description of how chiefs are trying to legitimate their claims to land with reference to “evolved” customary law.

The mere imposition of a state court, with the power to impose rules and to enforce decisions in disputes already transforms the fluid nature of customary law. Whereas in local dispute settlements customary rules set the ‘parameters of the dispute’ and the ‘guidelines for decisions’, in state courts these rules will be strictly applied and imposed (Allott 1975: 73; Chanock 1989: 180; Von Benda-Beckmann 1985a: 78, 87). Furthermore, state courts cannot capture the ‘processual aspect’ of customary law. For instance, African marriage should not be seen as an event or condition, but as a developing process, with many steps (Woodman 1977: 117). For a long time, parties are in interim conditions being neither totally married nor completely single. State courts, however, will have to decide in a certain case whether a couple was married or not at a certain point in time. State courts often also ignore local variation. Either due to ignorance, or as a purposeful policy, judges have gradually integrated customary law over the years, leading to the evolution of a body of principles which they have proclaimed to be of universal application in the country (Asante 1969: 101; cf. Koesnoe 1985: 98).

There are a number of additional reasons why courts have no alternative but to establish as judicial customary law rules which are not identical to local customary norms: 1) it is impossible for the courts to convert all customary norms into legal rules. They will need to select
from a large body of customary norms a relatively small number to be accorded judicial enforcement; 2) when social changes have left the relevant norm uncertain, the courts are compelled to act ahead of the customary norms and make law; 3) developments in other types of law binding on the courts prevent them from adopting some customary norms, although these norms may continue to operate in practice. For instance, the courts cannot recognize a customary marriage contracted by a person already married under the Marriage Ordinance;128 4) pressures to attempt to produce social change through judicial action are in practice irresistible;129 and 5) local dispute settlement institutions and state courts have different procedures, different rules of evidence, and a conflict at a state court must be formulated to fit the requirements of ‘civil disputes’, whereas in village institutions disputes tend to be formulated in terms of proper behavior and procedures behavior and procedures (Kludze 1985: 97; Von Benda-Beckmann 1985a: 80-82; Woodman 1977).

It is often said that the fact that judges inevitably ‘create’ judicial customary law which differs substantially from local customary norms and local practices can affect the local legitimacy of court decisions (Allott 1975: 89; Allott 1977: 11; Asante 1969: 100; Chanock 1989; Koesnoe 1985: 105-7; Von Benda-Beckmann 1985b; Woodman 1977: 115; Woodman 1996: 46). This does not, however, seem to be an important factor in explaining the gap between court decisions and local practice in peri-urban Kumasi. In fact, the protection of the usufructuaries by the courts is in close keeping with the perceptions of many local smallholders.

The Political Factor

Whether the rules of customary law as pronounced in the courts will be complied with in the local arena – outside of the direct scope of the decided case130 – depends to a large extent on the political configuration at both the local and the national level. With regard to the local level we have already seen that stool land administration is characterized by chiefs in leading positions and the prominence of customary law. Local negotiations over land are fluid and intimately tied to fluctuating social and political relations. Norms and rules are sources of power, manipulated and used selectively by parties in these negotiations (Chanock 1998; Comaroff and Roberts 1981; Mann and Roberts 1991; Moore 1986; Oomen 2002; Otto 1998; Ranger 1983; Roberts 1979: 182; Von Benda-Beckmann 1979). The critical question is, which actor or group of actors has the power to issue definitions or is able to mobilize support – from community members, the traditional system, the state – for its version of customary law. Since chiefs are generally re-
garded as authorities in the field of customary law and as guardians of stool land, they are in a strong position to point to ‘custom’ to acquire and legitimate power over land in the local arena.131

Furthermore we have seen that customary checks and balances on chiefly functioning have eroded. Theoretically, these checks and balances are supposed to constrain the chief in his administration of land and in his use of the pliability of customary law. But as we have seen, in many localities the customary notion of ruling in council with elders or subchiefs has been severely eroded, destoolment procedures are prone to difficulties, and accountability structures are lacking.

Finally, it deserves mentioning that in peri-urban Kumasi knowledge of state law and court decisions appears to be minimal. During my fieldwork, people hardly referred to legislation and case law to stake their claims. And when they did, they often quoted sections that did not exist: “It is a constitutional provision that the town receives thirty percent of stool land revenue”132; “Land revenues are supposed to be divided into thirds, one part to the farmer, one part to the chief who signs the allocation paper and one part to the town. That is even in the Constitution.”133 The ‘shadow of the law’ thus seems minimal in peri-urban Kumasi.134

With regard to the national level it is worth considering whether the government shows a clear commitment to curb mismanagement of stool land or whether they are reluctant to interfere in such matters. It is clear that the current government is providing hardly any checks and balances on local land administration. The ‘policy of non-interference in chieftaincy affairs’ shows itself in governmental land management. The government continually emphasizes the sovereignty of the chiefs and the fact that land administration rests exclusively in their hands. An instance is the wording, drafting process, and content of the National Land Policy – the first comprehensive land policy ever formulated by the Ghanaian government – and its implementing Land Administration Program (Ministry of Lands and Forestry 1999; World Bank 2003a). Public consultation about the formulation of the policy and the program has been minor and there seems not to have been a wide and open discussion on the role of chiefs in the administration of stool land – including the tendency of chiefs to adopt landlord-like positions – and the possible checks and balances the state can put in place with regard to stool land administration (Alden Wily and Hammond 2001: 25). The ‘policy of non-interference’ also becomes clear in general governmental discourse: government officials at all levels regularly proclaim in the media that they will not “meddle in chieftaincy affairs”, by which they not only mean chieftaincy disputes, but chiefly administration in general.135 Administrators, lawmakers, and policy makers also pay little heed to judicial customary law. They rather leave
the interpretation of customary law to the locality or follow the practice of the most powerful local actors, the chiefs. It is not hard to understand that this governmental ‘policy’ gives additional legitimacy to the chiefs, provides them with ample leeway to administer land the way they please, and places the power to define customary law squarely in their hands.

This ‘policy’ is not surprising when one takes into account the political power of chiefs, who are still regarded as strongly influential, and ‘who are still vote-brokers, especially in the rural areas.’ Furthermore, the current tendency to fill chieftaincy positions with highly educated professionals, blurs the traditional distinction between state elite and chiefs, and creates new alliances between these two groups. The elite of the party presently in power, the NPP, is especially closely connected to the chiefs. Not only does it have its stronghold in the Ashanti Region, with its resilient chiefs, but president Kufuor himself is through marriage connected to the royal family of the Asantehene. Many members of the current government, up to those at high levels, are or have been chiefs or royal family members in their hometowns.

A clear example of the pro-chieftaincy course of the NPP government is the current plan to ‘return to the chiefs’ land that the government has compulsorily acquired over the last decades, but which it has not yet put to its intended use. This returning to the chiefs is done without any conditions on the way the land should be used or that its revenue should be accounted for. In this way the government lacks any consideration for the community members who used to farm or live on this land.

This chapter does not allow enough space to elaborately discuss the functioning of state institutions involved in stool land management, such as the Lands Commission, the Office of the Administrator of Stool Lands, and the Town and Country Planning Department of the District Assembly. It suffices here to say that these institutions effectuate little control on chiefly functioning. They are severely hampered by a combination of factors. Internal factors include the lack of funds, qualified staff, equipment, and vehicles on the one hand, and mismanagement and corruption affecting their legitimacy in the eyes of the people on the other. Externally, the uncooperative behavior of the chiefs and lack of high-level government support to tackle that behavior also severely hamper the functioning of state institutions.

There are two additional ways in which the position of the chiefs is enhanced by the state. First, local government cannot bypass chiefs in local land use planning: planning schemes can usually only be drawn up with the cooperation of, or at least consultation with, the chief; and the District Assembly only issues a building permit when the applicant can present an allocation paper that has been signed by the
chief. Second, article 267 (5) of the 1992 Constitution could be interpreted as enhancing the position of the chief. This article provides that “no interest in or right over any stool land in Ghana shall be created which vests in any person or body of persons a freehold interest, howsoever described.” There is considerable controversy as to how this provision should be interpreted, and whether it means to include customary freeholds. According to Da Rocha and Lodoh, “the tenor of this provision is that not even members of a stool, as from 7 January 1993 (commencement date of the 1992 Constitution) acquire a (customary) freehold interest in any land in Ghana in which the stool holds the alodial title. The provision is however silent on the transfer of existing freehold interest in such lands. The deduction is that the transfer of freehold interests in existence prior to 7th January 1993 is not prohibited by the constitutional provision” (Da Rocha and Lodoh 1999: 1-2). Toulmin et al. quote an unpublished court case – The Republic v. Regional Lands Officer, Ho, ex parte Professor A.K.P. Kludze, 1994 – in which the judge as an obiter dictum seemed to confirm that the Constitution prevents any freehold interest being created over stool lands (DFID 2004: Annex 3). However, in Gyan’s opinion, which was accepted by the Attorney General’s Office, article 267 (5) does not prohibit the grant of a customary freehold in stool land, where the grantee or transferee is a subject of the land-owning stool (Gyan 2005). The significance of this discussion lies in the fact that if the Constitution is interpreted to prevent the creation of customary freeholds “chiefs could feel justified in issuing only leases even to their own subjects (...) thus further eroding the rights of customary landholders and their ability to resist re-appropriation of customary lands for ‘development’ purposes by Stools which wish to cash in on peri-urban land values” (DFID 2004). Furthermore, it could then be argued that it would be illogical and unjust if the customary land holder can pass on his/her customary freehold to a stranger, since that would give the stranger a stronger title than he/she could get if he/she applied directly to the stool.

Courts as Alternative Channel of Resistance?

In response to the question posed in the introduction, this chapter shows that courts could serve as an alternative channel of resistance in individual cases for farmers in peri-urban Ghana whose land is being re-appropriated by the chief. However, notwithstanding the high number of land cases in the courts, many more land conflicts never reach the courts, either because of the lack of access or interest of the aggrieved parties, or because they are embedded in ‘chieftaincy affairs’, for which state courts have no jurisdiction. In peri-urban Kumasi this is even aggravated by the appeal of the Asantehene to withdraw all land...
cases pending at the state courts, to bring them to his ‘court’ for dispute settlement. In particular, cases dealing with chiefs’ appropriation of peri-urban farmland for development purposes are only sporadically dealt with in state courts. Furthermore, court decisions in those cases that do reach the state courts do not seem to have much effect on local negotiations for land outside the scope of the decided cases. This is, firstly, because of the limited knowledge local people have of court decisions. And secondly, as we have seen, a combination of factors at local and national levels creates an arena for strong local chiefs, hardly constrained by local checks and balances, and barely controlled by the government. It is therefore not surprising that chiefs do not comply with the rules of customary law as set out by the courts that protect the interests of the usufructuary. As said before, customary law is only one of the resources in local power struggles over land, and a multi-interpretable one.

Notes

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

2 See for a description of relevant case law the section ‘customary land law in the courts’ in this chapter.

3 Forfeiture results from denial of the landlord’s title.

4 In the villages close to Kumasi, this causes the near total disappearance of farmland, creating increasing income insecurity for community members. They are no longer able to grow their own food and generate some income by selling the surplus at the market. Most of the mainly lowly educated farmers become jobless or resort to petty trading. The food prices in these communities rise, leading to increased costs of living. Furthermore, locals cannot compete with outsiders with a formal job for a plot of land, making it very hard for them to find land for residential purposes in their own village. In the villages further away from Kumasi or the main roads the conversion process is in full swing, but there some farmland still remains within walking distance. Cf. Berry 2002a: 124; Hammond 2005; Kenton 1999: 31; Similar stories are told for other urban centers in Ghana, see Abudulai 1996; Abudulai 2002; Alden Wily and Hammond 2001: 12, 36-40; Hammond 2005; Kasanga et al. 1996; Kasanga and Kotey 2001: 17-18; Maxwell et al. 1998; Wehrmann 2002: 26-32.

5 Struggles for peri-urban building land are not new. For instance McCaskie in his description of the expansion of Kumase between 1945 and 1950 already shows the unprecedented struggles over rights in land as people tried to assert title to potentially valuable building plots (McCaskie 2000a: Ch. V). These struggles were not conducted as exclusive affairs between chiefs. “Owners and occupiers, squatters and speculators, or indeed anyone who hoped to cash in on the building boom pitched into battle over rights in land. The lineages that made up the pre-colonial population fought each other over historical prerogatives and split internally over issues of family or personal control over prime building sites” (p. 214). “Rights in building land and the income to be gained from them was a key locus of conflict between chiefship and its opponents in this period. The objects of groups (...) were to attack chiefly authority by challenging its rights in
land; to accumulate money from such activities for political and personal use; and – perhaps above all – to expose to public gaze the corrupt self-interest of the Asantehene and his associates in profiting from the building boom through their insistence on historic prerogatives of access to and control over land” (p. 219).

6 The terminological question here is a tricky one. Authors use a wide variety of terms and phrases such as ‘local customs’, ‘living law’, ‘social rules’, ‘social norms which people customarily regard as binding upon them’, ‘sociologists customary law’, ‘practiced customary law’ or ‘contemporary practice in the social process’ (Asante 1969: 99; Ehrlich 1936; Oomen 2002; Woodman 1977: 115). Each terminology has its own drawbacks. This chapter uses the term ‘local customary law’, in contrast with ‘judicial customary law’, and sees norms of local customary law as one of the resources in the struggles and negotiations that determine local practices.

7 In my field research not only 11 of the 12 village chiefs were of this opinion, but so were the Ejisumanhene, a paramount chief in the area, and the Asantehene, according to his land secretariat. A number of quotes illustrate this: “The king of Besase has overall power of the land. (...) It is a law that when the town is growing and it comes to your farm, you don’t have any land” (interview Besasehene, 11 May 2003); “It is only the chief who can lease land for residential purposes” (interview Gyaasehene of Ejisumanhene, 1 June 2003); “The chief is the total owner of the whole place” (interview Kontihene of Ejisumanhene, 1 January 2004); “It is the chief of the town who allocates land” (Interview Asantehene’s secretariat, 10 September 2003); “When the lands turn profitable, they turn back to the stool (interview Asantehene’s land secretariat, 2 July 2003). At a stakeholder meeting about the construction of an inland port in Boankra, someone was talking about “our land”. This enraged the Ejisumanhene, who grabbed the microphone and said that no one owned land but him (personal communication at workshop on ‘land law and its legal institutions’, Accra, 5 September 2003). The literature mentioned above in note 7 shows that the same kind of claims are made by chiefs of other peri-urban villages, near Kumasi as well as other towns.

8 Chiefs have played a key role in giving out land to strangers since the rise of cocoa and cash crop cultivation. See for instance Polly Hill, who writes in 1963 that for at least a century chiefs in Akim Abuakwa have been selling land to strangers. This concerned unoccupied portions of land that chiefs could sell in order to pay debts incurred by their stool. This last condition, however, “as time went by, was more honored in the breach than the observance” (Hill 1963: 139). Berry shows that the chiefs’ rights to land and land revenues were already disputed in the early twentieth century: “Chiefs also had a penchant for treating cocoa rents as their personal income, rather than public revenue belonging to the stool, and for selling land or levying their subjects to raise money for litigation (...). Such practices occasioned widespread discontent and contributed directly to the increasing number of destoolments in the 1920s and 1930s” (Berry 1993: 112). See for literature on the chiefs’ role in giving out land to strangers and chiefs’ contested rights to land and land revenue also Berry 1997: 1233-1235; Berry 2001; Rathbone 1996.

9 Interview Besasehene, 11 May 2003.

10 For instance Nana Sir Ofori Atta, the king of Akim Abuakwa during the most important decades of colonial rule, argued that Akim Abuakwa’s monarchs had taken land by conquest; although the royal family had afterwards distributed the land to the divisions, they never relinquished their ultimate right to this land (Rathbone 1996: 511). The argument that it was the royal family that “fought for the land” is in contrast with a Ghanaian proverb which says: “In the fight, to secure the land and save the stool, no person’s ancestor carried two swords, each carried one” – meaning that the ancestors of all community members including those of the occupant of the stool made equal sacrifices or contributions to win the land. And therefore each one has an inherent right to occupy
any portion of it which is not already occupied by another community member (Ollennu
1962: 30).

11 Interview Kontihene of Beseasehene, 23 October 2003.
12 Interview former Akyeamehene subchief of Tikromhene, 7 January 2004.
13 Interview Asantehene’s land secretariat, 2 July 2003.
14 See also chapter 3, p. 59-60.
15 The Unit Committee and the District Assembly are the two lowest levels of local govern-
ment in Ghana.
16 A chief’s throne is called stool. The installation and deposition of a chief are therefore
called ‘enstoolment’ and ‘destoolment’.
17 Interview elder Besease Kontihene, 20 May 2003.
18 Interview elder Besease Kontihene, 20 May 2003.
19 Interview elder Kyidomhene, 7 May 2003.
20 Interview elder Kyidomhene, 22 May 2003.
21 Interview farmer Besease, 27 August 2003.
22 In an interview, prof Kasanga, the Minister of Lands and Forestry until mid 2003, in-
sisted that “there are enough local checks and balances in the customary systems” (in-
terview prof Kasanga, 3 December 2003).
23 Interview Kontihene subchief of Beseasehene, 1 July 2003.
24 Interview Unit Committee member Tikrom, 26 June 2003.
26 Due to section 15 of the Chieftaincy Act 1971 (Act 370), which confers exclusive jurisdic-
tion in any ‘cause or matter affecting chieftaincy’ to the Traditional Council, such cases
cannot be taken to the regular state courts, only to the Supreme Court in last instance.
27 Interview Kontihene subchief of Ejisumanhene, 27 May 2003.
29 Interview Gyaasehene subchief of Ejisumanhene, 1 June 2003.
31 A complicating factor in this discussion is that a distinction should be made between
the costs of administration of the stool and a personal emolument for the chief. That the
community should bear the cost for administration of the stool is hardly disputed, but to
what extent should the chief also receive a salary? In colonial times big chiefs received
salaries according to their ‘grade’, but they were simultaneously under an obligation to
account for their revenue through the Native Treasury (Crook 1986: 90-94). Since inde-
pendence, the chiefs have not received any salary from the government, but they do re-
ceive a percentage of stool land revenues from the Office of the Administrator of Stool
Lands. This office disburses stool land revenue in the following proportions: twenty-five
percent to the stool through the traditional authority “for the maintenance of the stool
in keeping with its status”; twenty percent to the traditional authority; and fifty-five per-
cent to the District Assembly (Office of the Administrator of Stool Lands Act 1994 (Act
481)). The wording of this section implies that the twenty percent to the traditional
authority can be regarded as personal emolument for the traditional authority.
32 Interview Okyeame subchief of Beseasehene, 12 June 2003.
33 Courts Act 1993 (Act 459), later amended by the Courts (Amendment) Act 2002 (Act
620). Magistrate Courts were set up only in 2002. Under the 1993 Courts Act the lowest
court was called Community Tribunal and incorporated a lay panel of assessors be-
sides a legally qualified magistrate – if such a person could be found in the area. For in-
stance, in the Upper East Region the tribunal consisted of lay persons only (interview
circuit court judge Wa, 20 July 2001; interview circuit court judge Accra, 7 August
2003). These tribunals were replaced by the amending Act of 2002 by Magistrate Courts
that operate under a single legally qualified judge. The term Magistrates Court is a rever-
sion to an older title, used for the District Courts created in 1938. Since 1993 the Fast
Track High Courts have been added to the system. These courts differ only in procedures.

34 Until 2002, the Magistrates Courts were limited to cases involving property not exceeding 5 million Cedis in value. In practice this meant that they did not hear any land cases in the urban and peri-urban areas which routinely started in the High Court. In 2002, the limit on Magistrates Courts was raised to 50 million, which is hoped to ease some of the pressure of the High Court. According to Crook, this is however unlikely, since the pattern of going straight to the High Court has become well entrenched, unless lawyers begin to advise their clients to use the Magistrates Courts for reasons of speed and cost (Crook 2003: 2).

35 According to Kotey et al., in the period 1990-2002, land cases made up approximately 30% of all pending cases (Kotey, Dowuona-Hammond, and Atuguba 2004). According to Wood, land cases in 1967 already accounted for approximately 50% of the total cases filed nationally (Wood 2002: 2). In Kumasi High Court, land cases have accounted for an average of 45% of all cases between 1998 and 2002 (Crook 2003: 2). At the beginning of 2002, the number of land cases pending in the High Courts alone – and only in first instance, not on appeal – was estimated at 14964 (Kotey, Dowuona-Hammond, and Atuguba 2004: 67). In a 2003 report it was claimed that there were then about 35000 land disputes before the courts (Ministry of Lands and Forestry 2003).

36 Crook describes that in the Kumasi High Court the rate at which land cases were being settled was constantly outstripped by the rate at which new cases were being added each year, in spite of efforts of the Asantehene since 2000 to withdraw stool land cases from the courts (Crook 2003: 2).

37 Of 149 land cases documented in Ghanaian law reports between 1961 and 2003, half of them took more than 4 years to be disposed of. However, 34% of the cases took less than two years (Kotey, Dowuona-Hammond, and Atuguba 2004: 90).

38 Interview farmer Besease, 22 May 2003.

39 In some instances, a court action seems a form of harassment calculated to cause the defendant expense and inconvenience (Crook 2003: 9). “If you have money you can ‘outlive’ the other” (Interview elder Kyidomhene, Besease, 7 May 2003).

40 According to Wood, this only happens in approximately 5% of the cases (Wood 2002: 1).

41 High Court Justice Baffoe Bonny explained this in the following way: “when I strike out a case, often the lawyer will come to me the next day and if he has good reasons I have to reinstate the case. So what is the use? And I can proceed with the case without the lawyer, but then he will want to read the proceedings the next day. The handwritten notes therefore have to be typed out, which takes a long time, leading to more delay than another adjournment” (personal communication 5 September 2005).

42 In 94% of the reported cases both plaintiff and defendant were represented by lawyers (Kotey, Dowuona-Hammond, and Atuguba 2004: 113-4). In Crook’s research 96.4% of the respondents in the High Courts had employed a lawyer as compared to 36.4% of the litigants in the Magistrates Court (Crook 2003: 11).

43 Besides lawyers’ fees, the costs can include court fees, lost income, travel and accommodation costs, costs of bringing witnesses to court and bribes or speed money.

44 Note that Crook’s data reflect the costs at various points during legal procedures, not necessarily nearing the end (Crook 2003: 11).

45 In Crook’s research, in Kumasi High Court a combination of Twi and English was used in 78.3% of the cases. In 13.0% only Twi was spoken, and in 8.7% only English (Crook 2003: 12-13).

46 In Kumasi High Court, 42.5% of the respondents said they could not answer this question because they had not started their trial yet (35%) or had not understood the trial (7.5%). Only 4.4% gave a negative answer, 1.3% a mixed answer, and 51.9% a positive one (Crook 2003: 13-14).
The jurisdiction to hear and determine any matter relating to chieftaincy is placed exclusively in the hands of the Traditional Councils – consisting of the paramount chiefs and their subchiefs – and the Regional and National Houses of Chiefs (sections 15 (1), 22 (1), 23 (1) of the Chieftaincy Act 1971 (Act 370); see also chapter 22 of the 1992 Constitution).

Section 117 (1) Courts Act 1993 (Act 459).

From a rule of law viewpoint this is a dangerous development, since it leads to the Asantehene – a very important administrator in the field of stool land – as almost the only ‘judge’ in this field. That again could evolve into the Asantehene as the main law-maker, when his ‘decisions’ would be published and taken as a leitmotiv in other disputes and administration in general. The Asantehene is currently taping all his dispute settlements, opening up the possibility of publicizing them in future (interview legal advisor of the Asantehene, 21 September 2005).

Even after being confronted with all the adjournments and delays, 61.2% of the respondents in Kumasi High Court stated that going to court was worth all the trouble. Female litigants were the most enthusiastic of all, 70.4% saying the case was worth it. This might be explained from a deeper dissatisfaction with the – male-biased – traditional system. Litigants in cases involving unauthorized disposition by a chief or by a stranger were less satisfied (50%), which according to Crook suggests that in these cases delay is critical, since land once alienated is difficult to reclaim (Crook 2003: 14-15).

As an illustration, of all reported cases between 1961 and 2004, 69% of all plaintiffs and 73% of all litigants were farmers (Kotey, Dowuona-Hammond, and Atuguba 2004: 110-2).

These reasons explain why the rate of out-of-court settlement is extremely low in Ghana. In Kumasi High Court, of the group going straight to court – 52% of the respondents – 33% specifically mentioned the authority of the court as main reason; 28.3% said to be frustrated by the lack of response of the other party or the unwillingness to reach an agreement. They therefore saw a court action as a way of using an authoritative force to get the issue resolved.

Of those respondents who went through other forms of dispute settlement before the court, as many as 73% said that ‘enforcement’ of the judgment was their main reason to turn to court (Crook 2003: 8).

In Crook’s research 12.8% of the land cases studied dealt with unauthorized dispositions of rights in land by chiefs or strangers (Crook 2003: 6).


The modern legal system of Ghana came into existence in 1876 with the passing of the Supreme Court Ordinance 1876, which set up a Supreme Court with the power to administer all the laws of the Gold Coast, including customary law. Until 1916 customary law had to be proved as a fact, which could be done by calling witnesses or by providing documentary evidence found in textbooks. In 1916 the doctrine of judicial notice was accepted in Angu v. Attah ((1916) P.C. ‘74,’28, 43 (P.C.)). This decision says that customary law must be proved in first instance by calling witnesses “until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them”. Even if customary law is the indicated law, its application may be excluded by reason of some other supervening factor. Such factors can be classed under two heads: (i) incompatibility with legislation for the time being in force in the territory; (ii) repugnancy to natural justice, equity or good conscience. See Allott 1960: 72-98, 194-5; Allott 1970: 25.

This section describes judicial customary land law in entire Ghana, not specifically in the Ashanti Region. Despite the tendency of courts to unify the various customary laws (Asante 1969: 101; Koeseone 1985: 98), certain cases have no bearing on the Ashanti situation. This section presents a selection of those cases that are most relevant for and
comparable with the Ashanti situation. Such cases do not abound in Ghanaian case law, for which a number of explanations can be named. First the fact that in cases involving unauthorized disposition by a chief or stranger delay is critical, since land once alienated is difficult to reclaim (Crook 2003: 14-15). The delays in the judicial system might make state courts an unattractive option for the aggrieved party. Secondly, the farmer often chooses to resist the buyer instead of the chief. This might also lead to a court case, but the buyer might also go back to the chief to claim a different plot of land. Thirdly, many people still do not feel comfortable in suing their own chief. Either because of socio-cultural inhibitions, or because of the chief’s powerful position in the village.

The Supreme Court Law Reports 2003/4 have also been published, but I have not been able to get hold of it during my stay in Ghana.

For the selection of relevant cases until 1986, I have benefited strongly from Woodman’s elaborate analysis of customary land cases in the Ghanaian courts (Woodman 1996). The Council for Law Reporting is the institution that compiles the Ghana Law Reports. All courts of superior judicature – High Courts, Court of Appeal and Supreme Court – send (part of) their decisions to the Council. The author wishes to express her gratitude to the council’s editor and librarian, for their generous co-operation and discussions, as well as to the interviewed lawyers, for their insights and case files.


According to Ollennu “the word “usufruct” does not appear to be a correct legal term for this sort of estate in land because it suggests rights and attributes less than really are the case. The estate in question is both inheritable and alienable and these both negate the word “usufruct”” (Ollennu 1962: 10).


This court functioned as the Court of Appeal for all British colonies in West Africa from 1928 until 1957.

Golightly v. Ashriffe (1955, 14 W.A.C.A. 676) – this was the appeal case of the Kokomlemle Consolidated Cases, see note 287; Bannerman v. Bossman (Unreported judgment of WACA of 27 February 1957, quoted in Ollennu 1962: 56).

This was stated explicitly in Kotei v. Asere Stool [1961] G.L.R. 492, at 495; and in Ollennu and Woodman 1985: 66.


"For customary law abhors the placing of fetters on a usufructuary title other than the obligation to provide commutable services".

Unreported judgment, No. 5/97 of 13 May 1997.


See above, especially note 294.


Unreported judgment, No. 98/95 of 18 December 1997.


101 Unreported judgment No. 59/95, 10 April 1997. When the usufructuary rights are alienated to a stranger, proper provision needs to be made for commuting the customary services. It is the stool whose duty it is to commute the customary services, commuting is not the responsibility of the subject-transferor. The usual custom is that when a stool notices a stranger on a portion of the stool land the stool calls upon him to come for consideration of his case as to whether the stool would admit him to performance of the customary rites to the stool, or whether the stool would commute the services (Total Oil Products v. Obeng [1962]1 G.L.R. 228, at 235-6).
102 Robertson v. Nii Akramah II (consolidated) [1973] 1 G.L.R. 445. The case Atta Panyin v. Nana Asani II ([1977] 1 G.L.R. 83) did not specify the land use of the transferred land, but since it dealt with land of a whole village, it can be assumed that this included both farmland and residential land.
109 (1982-85) 16 University of Ghana Law Journal 167, at 171. The following are the criteria as set out in the headnote in Kwan v. Nyieni: “(1) as a general rule the head of family, as representative of the family, is the proper person to institute a suit for recovery of family land; (2) to this general rule there are exceptions in certain special circumstances, such as: (i) where family property is in danger of being lost to the family, and it is shown that the head, either out of personal interest or otherwise, will not make a move to save or preserve it; or (ii) where, owing to a division in the family, the head and some of the principal members will not take any steps; or (iii) where the head and the principal members are deliberately disposing of the family property in their personal interest, to the detriment of the family as a whole. In any such circumstances the Courts will entertain an action by any member of the family, either upon proof that he has been authorized by other members of the family to sue, or upon proof of necessity, provided that the Court is satisfied that the action is instituted in order to preserve the family character of the property.”
111 Id.: 173.
113 Id.: 497.
114 Id.: 506.
115 Contrary to family property, where the Head of family (Accountability) Law, 1985 (PNDCL 114) allows the head of family to be sued for an account.
This information is based on extensive interviews with and a survey held among inhabitants of nine villages in peri-urban Kumasi. It is also supported by evidence from other areas of Ghana, see the literature mentioned above, note 221.

Unreported judgment, no. 5/97 of 13 May 1997.


Personal communication, 5 September 2003.

Chanock severely criticizes the tendency to: “use custom and customary law as expressive of a long-lived and homogeneous value system which represented what people actually did. (...) It is important to remember that custom is not simply what people do; that it is a set of values expressive not simply of communal life, but of a way of maintaining order and relations of power. (...) Which patterns of behavior are put forward as representative of custom is (...) a matter of current politics (Chanock 1989: 173-4, 185).

Interview researcher KNUST, 30 July 2003.

Article 11 (3) of the 1992 Constitution

In certain cases a court may consider it justifiable to question the reliability of the evidence on which the first decision was based, and look to fresh evidence. Where past decisions do not establish the customary law on a point beyond possibility of doubt, it is necessary to rely in addition on other types of evidence. These are, in descending order of reliability, texts recognized as authoritative by the courts, past decisions of native courts, all other accounts of native practice. And, of course, if precedent is lacking it is necessary to seek sociological evidence (Woodman 1996: 37-48).

Another difference is that whereas changes in local customary law are induced by the society, changes in judicial customary case law will necessarily be judge driven, and might therefore take a different direction from changes in local customary law.

According to Koesnoe, “when the English common law was getting similarly fossilized by reason inter alia of the doctrine of stare decisis, the rules of equity developed to mitigate the rigors of the common law. There has been no corresponding development in the customary law in Africa” (Koesnoe 1985: 99).

Other state institutions also cling to the fiction of uniformity of customary law. For instance the Lands Commission has been directing land buyers in the Upper West Region to the local chief, whereas in that area land ownership is separated from chieftaincy and lies with the tendamba, the earth priest (interview researcher KNUST, 30 July 2003).

Doctrines of state law pose that courts are bound not to adopt as customary law any rule or principle which is contrary to statute or overriding policy – comparable to the ‘repugnancy clause’ of the colonial period, which read that courts were bound not to apply any rule which in its opinion was “repugnant to natural justice, equity and good conscience” (Ekow Daniels 1991-2: 74-5; Koesnoe 1985: 98).

For these attempts the same doctrines can be used as in the preceding footnote.

As said before, due to a lack of literature, this chapter does not discuss the execution of court decisions in Ghana.

“ Chiefs coat their actions in custom” (Interview OASL Kumasi, 27 June 2003). Dr Adinkrah, a legal scholar and a chief himself, calls this “the prostitution of customary law by the chief” (Interview Dr Adinkrah, 4 September 2003).

Interview member Plot Allocation Committee Besease, 29 May 2003.

Interview elder Kyidomhene, 7 May 2003.

Mnookin and Kornhauser 1979. Especially the media and NGOs could play a significant role in awareness creation. Whereas there are hardly any local NGOs working on land
matters in Ghana, the media are to a certain extent already involved. For instance the
Kumasi based radio station Capital Radio broadcasts a weekly show on land matters and
newspapers regularly comment on court cases.

135 See a.o. Daily Graphic 25 August 2003: 3; Ghanaian Times 5 August 2003: 1, 25 August
2003: 3.

136 Interview District Assembly Ejisu, 12 January 2004. Chiefs are said to be especially in-
fluential in the Ashanti Region with its hierarchical chiefly structure with the Asante-
hene at the top.

137 Due to article 276 (1) of the 1992 Constitution chiefs are not allowed to take part in ac-
tive party politics. Any chief who wishes to do so and seek election to Parliament has to
abdicate his stool. The second clause of this section does however permit a chief to be
appointed to any public office for which he is otherwise qualified.

138 See for a more elaborate discussion of the functioning of these state institutions Ubink
and Quan 2008, in press.

139 In many areas chiefs have even drawn up their own unofficial planning schemes with-
out involving the District Assembly.

140 As said above, this is another way to denote the usufructuary interest.

141 The ratio decidendi of this case was that ‘family lands’ are not subject to the administra-
tive regulations that the Lands Commission imposes on ‘stool lands’, nor are they
caught by article 167 (5) of the 1992 Constitution.

142 He deducts this from a number of factors. First, he implies that the rationale behind the
article was to assure some intergenerational equity, through the prohibition of perma-
nent alienation and resultant loss of stool lands in a manner detrimental to the future
generations of the stool subjects. The grant or existence of the customary freehold is in
no way inconsistent with this policy objective. Secondly, the operative part of article 267
(5) is ‘shall be created’. This does not apply to the subject of the land-owning stool, be-
cause the subject’s entitlement to a customary freehold is inherent and not based on an
act of creation. Thirdly, article 267 (5) starts with the words “subject to the provisions of
this Constitution”, which makes provision to read and construe the article in the light of
other provisions of the Constitution. The article should therefore be read and interpreted
in the light of article 267 (4), which provides: ‘All stool lands in Ghana shall vest in the
appropriate stool on behalf of, and in trust for the subjects of the stool in accordance with
customary law and usage’ (emphasis added). One of the most important customary laws
is that the subject of a stool is entitled as of right to a portion of vacant stool land and
upon such occupation the member acquires the customary freehold. It is most illogical
to fathom an interpretation of article 267 (5) which takes away this time-honored cus-
tomary principle. Had the Constitution sought to make such a radical departure from
an age-old custom and practice, the Constitution would have clearly done so categori-
cally, clearly and unambiguously.