

# Note

## Building on Custom: Land Tenure Policy and Economic Development in Ghana

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*This Note addresses the intersection of customary and statutory land law in the land tenure policy of Ghana. It argues that improving the current land tenure policy demands integration of customary land law and customary authorities into the statutory system. After describing why and how customary property practices are central to the economic viability of any property system, the Note gives a brief overview of Ghana's customary and statutory land law. The Note concludes with specific policy suggestions about how Ghana could better draw on the strength of its customary land sector.*

### INTRODUCTION

Land makes up nearly three quarters of the wealth of developing countries,<sup>1</sup> and development leaders,<sup>2</sup> businesspeople,<sup>3</sup> and academics<sup>4</sup>

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1. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 86 (2000).

2. The World Bank's 2002 development report was clear in its support for property rights as a prerequisite for economic growth. See THE WORLD BANK, *BUILDING INSTITUTIONS FOR MARKETS* 34-38 (2002) (discussing land rights). UN Secretary-General Kofi Annan has also stated his belief that "without rules governing contracts and property rights; without confidence based on the rule of law; without trust and transparency - there could be no well-functioning markets." United Nations Secretary General Kofi Annan, Address Before the

have long argued that well-crafted property rights are necessary to unlock the value of that land and encourage economic development. Though some celebrate the notion that property rights are constantly evolving towards efficiency,<sup>5</sup> scholars are increasingly recognizing that the emergence of efficient, enforceable property rights is not inevitable, especially in the developing world.<sup>6</sup>

Recent high-profile work on property rights has sparked renewed popular interest in legal solutions to land-based development issues,<sup>7</sup> but unfortunately that interest has often been “directed at the viability in emerging market societies of these ideas, relationships, and institutions as transplanted from Western industrial democracies, not at unearthing their roots and nurturing those roots within the local communities.”<sup>8</sup> Across Africa, for example, attempts to craft property rights have largely been state-driven, top-down programs which attempt to replace customary forms of land ownership with Western-style property practices such as formal land title registration.<sup>9</sup> Programs attempting to implement these reforms have largely failed. The present wave of land tenure reform in Africa is uniquely placed to learn from these mistakes and craft a new and more development-friendly approach to land tenure policy.<sup>10</sup>

This Note argues that rather than attempting to undermine norms

United States Chamber of Commerce (June 10, 1999).

3. E.g., O. Lee Reed, *Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 AM. BUS. L.J. 441, 446 (2001).

4. E.g., YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* (1989).

5. See generally Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (arguing that legal rules surrounding property evolve to reach efficient outcomes); Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL. STUD. S331, S331 (2002) (refining Demsetz’s thesis to allow for the impact of social norms and interest group politics); Saul Levmore, *Property’s Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181 (2003) (exploring the impact of politics on “the conventional and optimistic story . . . that the emergence of property rights in personal and real property has been a story of evolutionary success.”).

6. See, e.g., Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L. J. 996, 999 (2006).

7. See generally DE SOTO, *supra* note 1; HERNANDO DE SOTO, *THE OTHER PATH* (1990) (arguing that registration of extralegal property can spark economic development); see also Jonathan Manders, Note, *Sequencing Property Rights in the Context of Development: A Critique of the Writings of Hernando de Soto*, 37 CORNELL INT’L L.J. 177 (2005) (arguing that de Soto over-emphasizes the existence of property rights in achieving development goals and fails to address when those rights should be established, how quickly, and by whom); Jane Kaufman Winn, *How to Make Poor Countries Rich and Enrich Our Poor*, 77 IOWA L. REV. 899, 922 (1992) (reviewing HERNANDO DE SOTO, *THE OTHER PATH*, and arguing that law and development solutions were not culturally-attuned and were thus rejected).

8. Maxwell O. Chibundu, *Law in Development: On Tapping, Gourdng and Serving Palm-Wine*, 29 CASE W. RES. J INT’L L. 167, 207 (1997).

9. KLAUS DEININGER, WORLD BANK, *LAND POLICIES FOR GROWTH AND POVERTY REDUCTION* 39 (2003); Kathryn Firmin-Sellers & Patrick Sellers, *Expected Failures and Unexpected Successes of Land Titling in Africa*, 27 WORLD DEV. 1115 (1999).

10. Camilla Toulmin & Julian Quan, *Evolving Land Rights, Policy and Tenure in Sub-saharan Africa*, in *EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA* 1, 2 (Camilla Toulmin & Julian Quan eds., 2000).

about property, successful land tenure reform must use those norms as the basis for an integrated property system that combines custom and statute. Building from theory and using Ghana as a case study, the Note seeks to address why and how customary land practices must be incorporated into formal land law in order for land tenure reforms to promote efficient and equitable economic growth. In doing so, it attempts to build a bridge between the theoretical underpinnings of property reform, exemplified by the New Institutional Economics approach described in Part I, and the practical issues of land administration in developing countries.

Reconciliation of customary and statutory property law in Africa has never been more important, nor more difficult, than it is now. Countries across Africa are currently struggling to create rational, efficient land policies that merge modern statutory law with the traditional customary law that governs many people's day-to-day lives.<sup>11</sup> The costs of failure, of the divergence between formality and reality, can be alarming. The government bulldozers that destroyed thousands of homes and businesses throughout Zimbabwe in the summer of 2005 as part of President Robert Mugabe's Operation Drive Out Trash gave a particularly vivid representation of this battle.<sup>12</sup> Those homes, like the shanties, kiosks and unofficial markets that make up a large share of Africa's "informal" economy, existed outside of Zimbabwe's formal law. This made them, in Mugabe's vision, "trash." Although some scholars have begun to address the issue of how property rights transition from customary or Marxist systems into private capitalist systems,<sup>13</sup> few have taken on the difficult and relatively unglamorous task of proposing feasible, country-specific solutions for how custom and informal rights can be integrated with statute into a nationwide economy. At best, failure to turn theory into practice deprives the informal sector and hence the economy of growth opportunities. At worst, it leads to destructive conflicts like Operation Drive Out Trash.

Ghana is not as extreme an example as Zimbabwe. But, like most sub-Saharan African nations, it depends on land as the basis of its economy while simultaneously struggling to solve land-related problems and

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11. See, e.g., CHRISTIAN LUND, *WAITING FOR THE RURAL CODE: PERSPECTIVES ON A LAND TENURE REFORM IN NIGER* (1993); MICHAEL MORTIMORE, *HISTORY AND EVOLUTION OF LAND TENURE AND ADMINISTRATION IN WEST AFRICA* (1997); ROSE MWEBAZA, *HOW TO INTEGRATE STATUTORY AND CUSTOMARY TENURE: THE UGANDA CASE* (1999); LUNGISILE NTSEBEZA, *LAND TENURE REFORM IN SOUTH AFRICA: AN EXAMPLE FROM THE EASTERN CAPE PROVINCE* (1999).

12. Michael Wines, *Zimbabwe Police Resume Drive to Raze Slums*, N.Y. TIMES, July 27, 2005, at A3; *Editorial: Truth Telling on Zimbabwe*, N.Y. TIMES, July 26, 2005, at A16; see also Solomon J. Greene, *Staged Cities: Mega-events, Slum Clearance, and Global Capital*, 6 YALE H.R. & DEV. L. J. 161 (2003) (examining slum clearance programs aimed at improving the profile of cities hosting major events).

13. See Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. S359 (2002); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 678 (1998).

reconcile a legal system that is divided between custom and statute.<sup>14</sup> Land is Ghana's single most valuable asset and the foundation of the national resource base.<sup>15</sup> Agriculture accounts for more than sixty percent of the country's jobs.<sup>16</sup> Despite its economic importance, however, the land sector in Ghana is plagued with a number of major problems.<sup>17</sup> The National Land Policy (NLP) of Ghana, published in June 1999 after years of broad consultation, provides a good overview of the nature and scope of the obstacles to land sector development, including indeterminate boundaries, weak land administration, and inadequate land tenure security.<sup>18</sup> These problems, and the importance of land itself, are representative of problems across the countryside.

Land sector problems are particularly acute in urban and peri-urban areas, where the growing population has increased social and economic demand for land.<sup>19</sup> Rather than being able to profit from rising land values, some Ghanaians have found their livelihoods sold out from under them by unscrupulous chiefs or government administrators. Lacking the power to claim just compensation, many Ghanaians are doomed to landlessness.<sup>20</sup> In peri-urban Kumasi, not only are instances of "rough sleeping" (on verandahs, kiosks, or pavements) increasingly common—one in six men and women do so—but overcrowding is also on the rise, with some villages averaging six to twelve people per room.<sup>21</sup> The housing crunch has also led to occasional hostility between displaced landowners and the chiefs and developers they perceive to be benefiting from their calamity.<sup>22</sup> Recent studies report that customary ownership rights in rural areas, too, are becoming less secure as commercial transactions and development increase.<sup>23</sup> The homelessness, poverty, and violence springing from these property failures demonstrate that land tenure security is a problem not just of economic development, but of human rights.

Government interventions meant to address these problems have sometimes worsened them.<sup>24</sup> Well-intentioned but ill-considered land

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14. LENNOX KWAME AGBOSU, *LAND LAW IN GHANA: CONTRADICTION BETWEEN ANGLO-AMERICAN AND CUSTOMARY CONCEPTIONS OF TENURE AND PRACTICES 1-3* (Land Tenure Ctr., Working Paper No. 33, 2000).

15. MINISTRY OF LANDS AND FORESTRY, REPUBLIC OF GHANA, *NATIONAL LAND POLICY 1* (1999) [hereinafter *NATIONAL LAND POLICY*].

16. AGBOSU, *supra* note 14, at 2.

17. *NATIONAL LAND POLICY*, *supra* note 15, at 3-4.

18. *Id.*

19. CENTER FOR DEMOCRACY AND DEVELOPMENT, *CORRUPTION AND OTHER CONSTRAINTS ON THE LAND MARKET AND LAND ADMINISTRATION IN GHANA: A PRELIMINARY INVESTIGATION 10* (2000).

20. R. KASIM KASANGA & NII ASHIE KOTEY, *LAND MANAGEMENT IN GHANA: BUILDING ON TRADITION AND MODERNITY 18* (2001).

21. *Id.*

22. *Id.*

23. 1 GEORGE SARPONG, *THE LEGAL FRAMEWORK FOR PARTICIPATORY PLANNING: FINAL REPORT ON LEGAL ASPECTS OF LAND TENURE, PLANNING AND MANAGEMENT 13* (1999).

24. DAVID TABACHNICK, *LIBERAL CONTRACTS, RELATIONAL CONTRACTS AND COMMON*

reforms can exacerbate the division between custom and statutory law, leaving vulnerable groups such as women with less protection than they had under customary systems.<sup>25</sup> The government's acquisition of vast tracts of land in high-pressure urban areas only compounds the problem, especially when that land is cleared and then left unused. Shanties and kiosks begin reappearing almost overnight, stubbornly asserting customary claims in the face of government bulldozers.

Moreover, competition for land rights has led to a rash of land disputes,<sup>26</sup> draining time and resources away from land development. The wave of land-related litigation has completely overwhelmed the government bodies responsible for dealing with property disputes. Formal land courts are themselves hampered by poor case management, corruption, staff shortages, and antiquated procedures such as recording of evidence by the judge in long hand.<sup>27</sup> Customary courts, which are still popular and powerful, offer a potential alternative to the state courts, but they lack state power to compel attendance or enforce decisions.<sup>28</sup>

This Note argues that many of these problems can be solved by better integrating customary law and customary authorities into the statutory system. Part I introduces the theoretical analysis, using New Institutional Economics as a framework to argue that the economic success of a property system is dependent on the degree to which it integrates social norms and customary law. Parts II and III then flesh out the theory by describing the various statutory and customary land rights which prevail in Ghana. Understanding of these rights is an essential predicate to the formulation of feasible policy proposals. Part II describes the statutory land law of Ghana, which, like that of most African nations, is heavily influenced by colonialism. Part III briefly describes the other half of Ghana's dual property system: customary property law and its attendant rights and structures. Finally, Parts IV and V translate the first three Parts into specific policy prescriptions for Ghana, suggesting, in Part IV, practical ways to integrate legal systems, and, in Part V, methods of integrating legal authorities such as chiefs into the formal system.

In keeping with the argument of this Note that land tenure policy must be country-specific and attentive to practical realities, these policy solutions are meant to be both flexible and specific to Ghana itself. They certainly do not comprise a one-size-fits-all land reform for all of Africa. Nonetheless, it is hoped that they can be valuable both to academics and to government officials contemplating land reform.

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PROPERTY: AFRICA AND THE UNITED STATES 13 (1998) ("[T]he greatest source for unpredictable interference with economic/social relationships may come not from the breakdown of a local, informal world of relationship networks, but externally from the state.").

25. GEORGE BENNEH ET AL., WOMEN'S ACCESS TO AGRICULTURAL LAND IN THE HOUSEHOLD: A CASE STUDY OF THREE SELECTED DISTRICTS IN GHANA 4 (1995).

26. 1 SARPONG, *supra* note 23, at 11.

27. KASANGA & KOTÉY, *supra* note 20, at 10; 1 SARPONG, *supra* note 23, at 57.

28. A. KODZO PAAKU KLUDZE, CHIEFTAINCY IN GHANA 57-58 (2000); *see infra* Part V.C.

## I. THE ECONOMIC AND SOCIAL ROOTS OF PROPERTY

This Note argues that land-based economic growth in developing countries like Ghana depends on the successful integration of statutory and customary land law.<sup>29</sup> In other words, the two foundations of property – as formal law and as a social agreement – must be closely aligned in order for property to play a role in enhancing economic efficiency.<sup>30</sup> In support of that practical argument, and to give theoretical justification to the policy prescriptions in Parts IV and V, this Part draws on New Institutional Economics (NIE) theory, which recognizes the value of both formal and informal institutions and applies a transaction costs-based approach to property rights and social norms.<sup>31</sup> By emphasizing practice as well as law, and taking a broad view of the institutions that make up an economy, NIE helps frame and explain the problems which the rest of this Note seeks to address.

This Part briefly explores two major characteristics of property rights institutions: First, that property rights play a role as an economizing institution, but second, and equally crucial, that they are also created by and dependent on social norms. Those two arguments can be synthesized into a third: The ability of formal property rights to provide economic benefits is largely dependent on how well those rights build on pre-existing custom. In other words, two foundations of property – as formal law and as a social agreement – must be closely aligned in order for property to play a role in enhancing economic efficiency.<sup>32</sup> Well-drafted property laws do more than simply set down clear regulations for people to follow and rules for them to respect. They build on social understandings already in place. When they do not, the “transaction costs” of legal change can threaten the success of reform. Losing touch with realities of property practice can be particularly costly in societies such as Ghana where practice diverges significantly from written law.<sup>33</sup>

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29. See Jean Ensminger, *Changing Property Rights: Reconciling Formal and Informal Rights to Land in Africa*, in *THE FRONTIERS OF THE NEW INSTITUTIONAL ECONOMICS* 165, 165 (John N. Drobak & John V.C. Nye eds., 1997); DE SOTO, *supra* note 1, at 172.

30. Reed, *supra* note 3, at 441-42.

31. My intention here is only to give a brief overview of the theory underlying property rights and development, not to advance the already substantial literature surrounding the theoretical economics of property rights development. For a more thorough discussion see Fitzpatrick, *supra* note 6.

32. Reed, *supra* note 3, at 442.

33. “Nowhere is this cleavage between textbook law and social reality more glaring than in the customary land law of Ghana.” Samuel K.B. Asante, *Interest in the Customary Law of Ghana – A New Appraisal*, 74 *YALE L.J.* 848, 849 (1964). Gray and Gray point to a specific example elsewhere in the commonwealth: “[I]t was, significantly, the conceptualization of property in terms of abstract right rather than empirical fact which, for two centuries, disabled the common law from recognizing the proprietary nature of Australian native title.” Kevin Gray & Susan Francis Gray, *The Idea of Property in Law*, in *LAND LAW: THEMES AND PERSPECTIVES* 15, 37 (John Dewar & Susan Bright eds., 1998).

### A. New Institutional Economics: Property Rights as Economic Institutions

Ronald Coase gave initial foundation to the notion that property rights could positively affect economic outcomes and helped set the stage for institutional analysis. Coase's *The Problem of Social Cost* illustrated the point that, given the assumptions of neoclassical economic analysis,<sup>34</sup> a clear delineation of property rights would lead to an economically efficient allocation of resources. "[I]f market transactions were costless, all that matters (questions of equity apart) is that the rights of the various parties should be well-defined and the results of legal actions easy to forecast."<sup>35</sup> But Coase himself recognized that transactions *are* costly; indeed, the neoclassical economy "only lives in the minds of economists but not on earth."<sup>36</sup> He warned:

A better approach would seem to be to start our analysis with a situation approximating that which actually exists, to examine the effects of a proposed policy change and to attempt to decide whether the new situation would be, in total, better or worse than the original one. In this way, conclusions for policy would have some relevance to the actual situation.<sup>37</sup>

Douglass North writes that Coase's "most important message, one with profound implications for restructuring economic theory, is that when it is costly to transact, institutions matter."<sup>38</sup> Indeed, the major efficiency-related contribution of institutions, and the most important economic reason for their existence, is a reduction in the transaction costs of exchange.<sup>39</sup>

North writes that institutions are "the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction. . . . [They] are perfectly analogous to the rules of the game in a

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34. THRÁINN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* 38 (1990) ("Implicit in the basic neoclassical model are two assumptions: that all valuable rights, including the right to airwaves, the space around us, and sunrays, are privately held; and that these rights are unattenuated by the state.").

35. Ronald Coase, *Problem of Social Cost*, 3 J.L. & ECON. 19 (1960). The theorem's assumptions—no transaction costs and no importance attached to equity or distributions concerns—are essentially those of the neoclassical model.

36. R.H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 714 (1992). See also Howard Stein, *Institutional Theories and Structural Adjustment in Africa*, in *THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT* 109, 109 (John Harris et al. eds., 1995); EGGERTSSON, *supra* note 34, at 96.

37. Coase, *supra* note 35, at 43.

38. DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 12 (1990).

39. *Id.* at 27 ("[M]easurement and enforcement costs are the sources of social, political and economic institutions.").

competitive team sport."<sup>40</sup> Institutions are thus central to all human interaction and organization, and economists and other theorists have proposed appropriately broad frameworks to explain institutions' nature and functions. New Institutional Economics (NIE) is the most successful of these theories.<sup>41</sup> It suggests that institutions can reduce transaction costs by regularizing interactions and spreading knowledge through norms and other mechanisms. North argues that the "major role of institutions in a society is to reduce uncertainty by establishing a stable (but not necessarily efficient) structure to human interaction."<sup>42</sup> Property, specifically, is the institution most uniquely focused on reducing transaction costs.<sup>43</sup>

## B. Social Norms, Transaction Costs and Property

Not all cost-reducing institutions are created by the state. Informal property institutions like social norms and custom can perform an economizing function just as formal property institutions such as statutory law and government do.<sup>44</sup> Indeed, property theorists have come to accept that community norms, operating independently of formal law, can lead to efficient resource allocation.<sup>45</sup> Sometimes this means that "social" property institutions act to address market failures.<sup>46</sup> A strongly held norm or custom of transparency in dealings in land, for example, "may render many economic transactions possible without a need to rely on elaborate and costly safeguards. In this, custom may contribute to economic efficiency."<sup>47</sup> Indeed, property conventions, norms, and customs are often more predictable and unchanging than statutory law itself,<sup>48</sup> as the

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40. *Id.* at 3-4. Compare to a similar definition proposed by Lin and Nugent: "[A]n institution is defined as a set of humanly devised behavioral rules that govern and shape the interactions of human beings, in part by helping them to form expectations of what other people will do. In so constraining behavior, institutions may be reflected in the appearance of certain behavioral regularities or norms." Justin Yifu Lin & Jeffrey B. Nugent, *Institutions and Economic Development*, in 3 HANDBOOK OF DEVELOPMENT ECONOMICS 2306-07 (J. Behrman & T.N. Srinivasan eds., 1995).

41. See Philip M. Nichols, *A Legal Theory of Emerging Economies*, 39 VA. J. INT'L L. 229, 239 (1999) ("Across the variety of social sciences, the theoretical approach that possibly has the most currency is institutionalism.").

42. NORTH, *supra* note 38, at 6.

43. DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* 8 (1973).

44. See generally ROBERT ELLICKSON, *ORDER WITHOUT LAW* (1991).

45. See, e.g., JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* 142-44 (1988); ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990).

46. Robert H. Bates, *Social Dilemmas and Rational Individuals: An Assessment of the New Institutionalism*, in *THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT* 27, 35 (John Harris et al. eds., 1995).

47. Ekkehart Schlicht, *On Custom*, 159 J. INSTITUTIONAL & THEORETICAL ECON. 178, 180 (1993).

48. See generally Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719 (1973) (arguing that semi-



lurching changes throughout the history of Ghana's own statutory land law demonstrate.<sup>49</sup> Internalized norms are often followed even when their violation would go undetected by society,<sup>50</sup> making formal policing less necessary and thus lowering enforcement costs.<sup>51</sup> This suggests that transaction costs can be lowered not just by improvements in statute, or technology, but by trust and noting consistent behavior.<sup>52</sup> In societies that do not have effective formal enforcement mechanisms, values such as trust and honor play an important economic role by filling the "enforcement gap."<sup>53</sup> It is thus common, when statutory law cannot meet the economic needs of the people, to turn to custom and other "institutions that act as alternatives to contract law."<sup>54</sup> In Ghana, where courts often cannot be relied on to enforce contracts, social relationships and norms take on an especially important role, just as they would in any society where state-run enforcement mechanisms do not adequately address enforcement costs. And besides aiding in enforcement, social norms can also help reduce search and measurement costs.<sup>55</sup> Because bargaining and measurement costs are high, particularly in developing countries, most contracts are incompletely detailed,<sup>56</sup> and thus informal agreements inevitably play a large role in their performance. Relying on these agreements when possible, rather than on costly formal institutions, minimizes the transaction costs associated with measurement and enforcement of contracts.

The importance of this informality reinforces the notion that property is in essence a relationship, not an object or a written rule. It is "simply an abbreviated reference to a quantum of socially permissible power exercised in respect of a socially valued resource."<sup>57</sup> In a legal and philosophical

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autonomous social norms mediate the impact of legal reform on social change). *But see* KATHRYN FIRMIN-SELLERS, *THE TRANSFORMATION OF PROPERTY RIGHTS IN THE GOLD COAST: AN EMPIRICAL ANALYSIS APPLYING RATIONAL CHOICE THEORY* 17 (1996) (describing chiefs' attempts to define and redefine property law in colonial and post-colonial Ghana); *NEGOTIATING PROPERTY IN AFRICA* (Kristine Juul & Christian Lund eds., 2002).

49. *See infra* Part III.

50. Jon Elster, *Social Norms and Economic Theory*, 3 J. ECON. PERSPECTIVES 99, 104 (1989).

51. Jean-Phillippe Platteau, *The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment*, 27 DEV. & CHANGE 29, 76-77 (1996).

52. *See, e.g.*, Eric A. Posner, *Law and Society & Law and Economics – Common Ground, Irreconcilable Differences, New Directions: Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 577-82 (arguing that trust relationships allow parties to achieve utility that would otherwise be blocked by transaction costs).

53. Nichols, *supra* note 41, at 272-273.

54. *Id.* at 273.

55. Clifford Geertz's seminal study of North African bazaars showed that traders in the bazaar lessen search and negotiation costs through a process of "clientalization," or repeated face-to-face trading between the same buyer and seller. Clifford Geertz, *The Bazaar Economy: Information and Search in Peasant Marketing*, 68 AM. ECON. REV. 28 (1978); *see also* Richard A. Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 J. L. & ECON. 1, 3 (1980).

56. *See generally* BARZEL, *supra* note 4 (describing costs of establishing perfectly accurate property rights).

57. Gray & Gray, *supra* note 33, at 15; *see also* 2 THE ECONOMIC FOUNDATIONS OF PROPERTY

sense, then, “property” does not refer to a physical object, but rather the rights to use it.<sup>58</sup> This is why, in legal parlance, one does not own land but rather rights *in* land, and these rights exist not as against other pieces of land but as against other people. The strength of property rights obviously depends on their acceptance by others, and thus social norms play a crucial role in the creation and maintenance of property.<sup>59</sup> Indeed, as Platteau has argued, “[t]he point is that, if property has no social legitimacy, it is no property because it lacks the basic ingredient of property, recognition by others.”<sup>60</sup> Kevin and Susan Gray also point to the relational nature of property: “[T]he deep structure of property is not absolute, autonomous, and oppositional. It is, instead, delimited by a strong sense of community-directed obligation, and is rooted in a contextual network of mutual constraint and social accommodation mediated by the agencies of the state.”<sup>61</sup>

Understanding property as a set of social norms makes it clear how broadly those norms apply. At times they overlap with formal rules, at times they compete with them,<sup>62</sup> and at other times they fill in gaps where formal rules do not or cannot reach. Social acceptance of property rights is thus of paramount importance not only in supposedly communal systems but also in systems that are relatively formal and give significant scope to “private” property rights.<sup>63</sup> Even in systems which seem to be dominated by considerations of market efficiency, social norms play an enormous role.<sup>64</sup> In such formalized systems, social convention may still serve as a kind of interpretive framework for deciding difficult property-related issues, such as in situations where the rule or law seems indeterminate.<sup>65</sup> Moreover, people often choose to rely on social agreements even when they are fully aware of the requirements of formal law.<sup>66</sup>

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RIGHTS: SELECTED READINGS 3 (Svetozar Pejovich ed., 1997).

58. Coase himself has written: “I explained in *The Problem of Social Cost* that what are traded in the market are not, as is often supposed by economists, physical entities but the rights to perform certain actions and the rights which individuals possess are established by the legal system.” Ronald Coase, *The Institutional Structure of Production*, in NOBEL LECTURES IN ECONOMIC SCIENCE 11, 17 (Torsten Persson ed., 1997).

59. Franz Benda-Beckmann & Keebet von Benda-Beckmann, *A Functional Analysis of Property Rights, with Special Reference to Indonesia*, in PROPERTY RIGHTS AND ECONOMIC DEVELOPMENT: LAND AND NATURAL RESOURCES IN SOUTHEAST ASIA AND OCEANIA 15, 36 (Toon van Meijl & Franz von Benda-Beckmann eds., 1999).

60. Platteau, *supra* note 51, at 46.

61. Gray & Gray, *supra* note 33, at 41.

62. See Shem Migot-Adholla et al., *Indigenous Land Rights Systems in Sub-Saharan Africa: A Constraint on Productivity?*, 5 WORLD BANK EC. REV. 155, 164 (1991).

63. Kevin Gray, *Property in Thin Air*, 50 CAMBRIDGE L.J. 252, 303-04 (1991); David E. Ault & Gilbert L. Rutman, *The Development of Individual Rights to Property in Tribal Africa*, 22 J.L. & ECON. 163, 166 (1979).

64. NORTH, *supra* note 38, at 36; see also JEAN ENSMINGER, *MAKING A MARKET: THE INSTITUTIONAL TRANSFORMATION OF AN AFRICAN SOCIETY* 154 (1992); KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1957).

65. J.W. HARRIS, *PROPERTY AND JUSTICE* 320 (1996).

66. See generally ELLICKSON, *supra* note 44.

### C. Intersection between Property Laws and Social Norms: The Transaction Costs of Legal Change

Social norms play an even more important role in countries like Ghana, where formal property systems face special structural obstacles, such as the number of decision makers, the heterogeneity of their interests, their skills, and the framework for changing rules.<sup>67</sup> Options for change are often also limited by a society's administrative capabilities or knowledge base.<sup>68</sup> Perhaps the most important factor contributing to the persistence of inefficient property institutions, however, is the impact of politics.<sup>69</sup> The political elites who in some cases control institutional growth often have self-interested reasons for maintaining an inefficient system.<sup>70</sup> In colonial Ghana, for example, chiefs often have used their social and political power to redefine property rights for their own personal benefit.<sup>71</sup>

Even an "efficient" formal property rights regime will not delineate *every* right, because at some point the marginal benefit of delineating a particular right will be outweighed by the enormous cost of doing so.<sup>72</sup> Land parcels in most of the world are not measured down to the millimeter, for example, even though such precision might yield some miniscule marginal gain. Enforcement costs, too, will sometimes be prohibitive. Police protection is costly,<sup>73</sup> and enforcing every transaction may be too expensive for a developing nation without resources to spend on such efforts. In these circumstances, social norms, which are generally cheaper to operate than statutes, play an especially important role.

Legal reformers should have already learned some of these lessons. The early law and development movement floundered when the legal reforms it suggested (generally, the establishment of Western-style law) met with overwhelming cultural resistance in developing countries.<sup>74</sup> Scholars of law, society, and development have subsequently accepted "the fragility of law's grasp on social life,"<sup>75</sup> reinforcing the argument that "social life" may be more important to a system of property than the status of written law is. The failure to account for social realities can prevent legal reforms from providing economic benefits, and can even detract from total efficiency by dividing the market instead of unifying it: "In a system held

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67. OSTROM, *supra* note 45, at 198.

68. Lin & Nugent, *supra* note 40, at 2324 n.21.

69. ENSMINGER, *supra* note 64, at 126.

70. NORTH, *supra* note 38, at 48; *see also* EGGERTSSON, *supra* note 34, at 275-76; John C. North, *The New Institutional Economics and Third World Development*, in *THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT* 17, 20 (John Harris et al. eds., 1995).

71. *See generally* FIRMIN-SELLERS, *supra* note 48.

72. *See generally* BARZEL, *supra* note 4.

73. *Id.* at 88-89.

74. Nichols, *supra* note 41, at 294 n.309; *see also* David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 4 (1990).

75. *Id.* at 42.

to be illegitimate, where people are inclined to cheat every time they can get away with it, there may be little profit.”<sup>76</sup> This “cheating” may eventually become so widespread and regularized that it forms a distinct system of informal law, in competition with the formal state system.<sup>77</sup> Hernando De Soto has strenuously argued that reliance on informality is a natural response to inefficient formal law.<sup>78</sup> Even so, the larger the gap between practice and formal law, the less the latter can provide the stability crucial to the economic function of any property rights regime: “Because such law generally fails to embody internal social conventions, it often amounts to no more than the paper on which it is written. Far from enhancing predictability, it is a source of confusion and a trap for the unwary [sic].”<sup>79</sup> A system that cannot deliver on its promise of predictability may be worse than no formal system at all.

Social legitimacy is thus crucially important for any property system. If formal property rights are to perform the economizing function expected of them, they must have the real support of society, and this support will come only gradually.<sup>80</sup> The task for institutional reform is to draft formal laws that will work with custom to promote tenure security and reduce transaction costs. Bruce writes, “The appropriate tenure system for a given country is ultimately one that will mesh well with its other basic economic and social institutions, be they socialist, capitalist, or whatever.”<sup>81</sup> Drafters of property laws must thus recognize and take into account the interconnectedness of formal property law, social norms, and economic outcomes.

## II. CUSTOMARY LAND LAW IN GHANA

Of course, drafters of property laws cannot properly integrate formal property law with custom unless they first understand the content of each. This Part provides a very brief overview of Ghanaian customary land law.<sup>82</sup> Part III addresses statutory land law.

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76. ENSMINGER, *supra* note 64, at 1.

77. EGGERTSSON, *supra* note 34, at 36. Katz observes that the “real lesson of the Coase theorem” is “that private lawmaking is as important as public lawmaking, if not more so.” Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1758 (1996).

78. DE SOTO, *supra* note 1, at 102.

79. Chibundu, *supra* note 8, at 257.

80. North, *supra* note 70, at 25; *see also* NORTH, *supra* note 38, at 45 (“Equally important is the fact that the informal constraints that are culturally derived will not change immediately in reaction to changes in the formal rules.”).

81. John W. Bruce, *A Perspective on Indigenous Land Tenure Systems and Land Concentration*, in *LAND AND SOCIETY IN CONTEMPORARY AFRICA* 23, 38 (R.E. Downs & S.P. Reyna eds., 1988); *see also* NORTH, *supra* note 38, at 46.

82. Not only is customary law’s content contestable, its very definition is unclear. For the purposes of this Note, I attempt to follow The Interpretation Act (1960), Acts of Ghana C.A. 4, § 18(1), which provides a partial and generally unhelpful definition: “Customary law, as comprised in the law of Ghana, consists of rules of law which by custom are applicable to particular communities in Ghana. . . .”

Customary land law is the basis for most landholding in Ghana.<sup>83</sup> In principle, customary law overlaps with and is subordinate to the statutory law described in Part III, but in practice it often replaces statutes. It is also difficult to systematically describe. Ghanaian courts “have not been given, nor do they consider that they need a precise definition of customary law.”<sup>84</sup> They instead tend to generalize about customary practices.<sup>85</sup> Although it may sometimes be relatively easy to distinguish customary law from other types of law,<sup>86</sup> the sources of customary law are as varied as the regions, tribes, and communities in Ghana, and its content is correspondingly diverse. This Note necessarily relies on generalizations that reflect customary land law as it is professed by customary authorities, or recognized by statutory courts,<sup>87</sup> but not necessarily as it is performed everywhere at all times.<sup>88</sup> The picture that emerges is of a body of law that, despite its shortcomings, can claim advantages of legitimacy and efficiency.

### A. Domain of Customary Land Law

Nearly three quarters of all undeveloped land in Ghana is held through customary law by individuals, families, stools<sup>89</sup> and *tendamba*,<sup>90</sup> and understanding of customary land law appears to be as widespread as the law’s reach. One Ghanaian customary land law authority has asserted: “Everybody truly knows the law.”<sup>91</sup> Customary laws claim such popular legitimacy in part because they “are not expressed in esoteric language requiring a great learning . . . to fathom their meanings. They are in simple language which requires no particular expertise or training to

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83. See 1 SARPONG, *supra* note 23, at 4; KASANGA & KOTEY, *supra* note 20, at iii-iv. This is true throughout most of Africa. AGBOSU, *supra* note 14, at 11; John W. Bruce, *Do Indigenous Tenure Systems Constrain Agricultural Development*, in LAND IN AFRICAN AGRARIAN SYSTEMS 35, 35 (Thomas J. Bassett & Donald E. Crummey eds., 1993).

84. GORDON WOODMAN, CUSTOMARY LAND LAW IN THE GHANAIAN COURTS 40 (1996).

85. *Id.* at 49.

86. See *id.* at 48-49.

87. Ghanaian courts are competent to deal in customary law, except for in certain issues such as chieftaincy disputes.

88. For more classical treatments of Ghanaian customary land law, see KWAMENA BENTSI-ENCHILL, GHANA LAND LAW (1964); NII AMAA OLLENNU, OLLENNU’S PRINCIPLES OF CUSTOMARY LAND LAW IN GHANA (2d ed. 1985); and JOHN MENSAH SARBAH, FANTI CUSTOMARY LAWS (1968). For more recent commentary, see WOODMAN, *supra* note 84.

89. In Ghana, “stool” refers to the customary throne, or more generally to a tribe or tribal leader.

90. See KASANGA & KOTEY, *supra* note 20, at 13. In the northern regions, land was traditionally claimed by the *tendamba*—descendents of the original settlers in an area—rather than by chiefs. However, the position of the *tendamba* (also referred to as *tindana*) has been largely usurped by the chieftaincy over the past century, due in part to colonial interference and government acquisition of land. R. Kasim Kasanga, *The Role of Chiefs and “Tendamba” in Land Administration in Northern Ghana*, in DECENTRALISATION, LAND TENURE AND LAND ADMINISTRATION IN NORTHERN GHANA 53, 61, 63 (1996) [hereinafter DECENTRALISATION].

91. KLUDZE, *supra* note 28, at 235.

understand.”<sup>92</sup> In addition to this apparent transparency, customary law remains more grounded in personal relationships, social status, and constant negotiation. As in many traditional societies, “not one group but a hierarchy of groups is the focus of land rights, with each ascending group larger and embracing several groups of the next lower order, pyramiding toward a king or paramount chief of the tribe.”<sup>93</sup> This system of rights embeds land rights within a well-established social structure—the tribe in some places, the clan or family in many others—that exists outside of the world of statutory law.

## B. Customary Land Rights

Ghanaian customary law begins from the basic tenet that all land has an owner.<sup>94</sup> In fact, nearly all land has multiple owners, with a chief holding the highest title, and numerous other rights-holders claiming lesser rights of possession, use, or transfer. This embedding of the individual’s land rights within certain group or secondary rights is perhaps the major difference between customary and Western property law.<sup>95</sup> In tying together different land rights, customary law builds on the social and political structures, such as the chieftaincy, that play an important part in many Ghanaians’ lives.

The Law Reform Commission of Ghana identified four specific categories of interests in land in Ghana,<sup>96</sup> which were subsequently officially recognized in the Land Title Registration Law of 1986. Those four categories are the allodial title, the freehold title, leaseholds, and other lesser interests in land. *Leaseholds*, which are derived from common law, are not discussed in detail here.

The *allodial title* is the highest interest in land known in customary law, above which there can be no other interest.<sup>97</sup> Land is generally thought to be vested in the “stool”—that is, the entire community—while the actual title to that land is legally held by the chief or other traditional leader who acts on behalf of that community.<sup>98</sup> Thus, even though chiefs officially hold the highest title to land in most areas, they do so only in a capacity somewhat resembling a trusteeship, administering it for the benefit of their subjects—those living, dead, and not yet born. Allodial titleholders “execute judicial, governance, and management functions” over land,<sup>99</sup> but

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92. *Id.*

93. Bruce, *supra* note 81, at 26.

94. See OLLENNU, *supra* note 88, at 4.

95. See David A. Atwood, *Land Registration in Africa: The Impact of Agricultural Production*, 18 WORLD DEV. 659, 662 (1990).

96. 1 SARPONG, *supra* note 23, at 4-6.

97. WOODMAN, *supra* note 84, at 53.

98. 1 SARPONG, *supra* note 23, at 4. Confusing the issue even further, chiefs themselves are sometimes referred to as “stools” in common parlance.

99. KASANGA & KOTÉY, *supra* note 20, at 13.

under customary law they are not allowed to alienate that land solely for personal benefit.

The *freehold title*, which can be held in both customary and common law forms,<sup>100</sup> is superior to all interests but the allodial title. The customary freehold, or usufruct, is an interest held by individuals or groups in land that is held allodially by a chief, clan, or other owner.<sup>101</sup> The holder of a customary freehold title has nearly unlimited rights to develop and cultivate his property, subject only to restrictions imposed by the allodial owner. These restrictions might include a requirement to commence development within a year, or to construct only residential buildings. The customary law freehold is perpetual, subsisting as long as its holder continues to acknowledge the higher title of the allodial owner, and it is inheritable.<sup>102</sup> The usufruct also cannot be alienated to another person or group by the allodial owner without the usufructuary owner's consent. Though the allodial title remains the highest interest in land, it is at the individual freehold level where real control over land is increasingly exercised.<sup>103</sup>

The final category of land rights is something of a catch all, and includes all *lesser interests* that can be created by allodial and customary freehold owners. Sharecropping agreements<sup>104</sup> are the most common forms of these interests, particularly for tree crops such as cocoa.<sup>105</sup> A 1989-1990 survey of the oil palm belt in Ghana found that more than forty percent of farmers relied at least partially on sharecropping to secure their land.<sup>106</sup> Even the government itself issues share contracts, through the state-managed Ghana Oil Palm Development Company.<sup>107</sup> The two major types of sharecropping contract are *abusa*, under which the landowner and

100. Common law freeholds are similar to freeholds under English law, and are not addressed in detail here. They can be created through gift or sale by an allodial owner or by a grant by the owner of a customary freehold. Under such a grant, the parties either explicitly or impliedly agree that their grant should be regulated by common law. 1 SARPONG, *supra* note 23, at 5.

101. Article 266 of the Ghanaian Constitution bars the creation of freeholds in favor of non-citizens. CONST. OF THE REPUBLIC OF GHANA art. 266.

102. 1 SARPONG, *supra* note 23, at 4.

103. See *Kotei v. Asere Stool* [1961] G.L.R. 492 (Ghana); WOODMAN, *supra* note 84, at 180; Interview with Dr. L. Odame-Larbi, Executive Secretary, Lands Commission, in Accra, Ghana (Apr. 22, 2002) (expressing the view that were it not for constitutional provisions banning freehold, customary lands would by now be individually owned under law). Gordon Woodman's recent work on customary land law in the Ghanaian courts argues that in contemporary Ghana the customary freehold "effectively supersedes the allodial title," even as it remains closely bound up with that title. WOODMAN, *supra* note 84, at 87.

104. The Akan word is *domayenkye*, or "weed and let us share." KOJO S. AMANOR & MAXWELL KUDE DIDERUTUAH, INT'L INST. FOR ENV'T. AND DEV., SHARE CONTRACTS IN THE OIL PALM AND CITRUS BELT OF GHANA 1 (2001).

105. The classic discussions of cocoa farming and share contracts in Ghana are POLLY HILL, THE GOLD COAST COCOA FARMER: A PRELIMINARY STUDY (1956) and POLLY HILL, THE MIGRANT COCOA-FARMERS OF SOUTHERN GHANA: A STUDY IN RURAL CAPITALISM (1963).

106. AMANOR & DIDERUTUAH, *supra* note 104, at 3.

107. *Id.* at 20.

laborer split returns into thirds, and *abunu*, under which returns are split in half. Whether a tenancy is *abusa* or *abunu* depends on a number of factors, including the availability of land, the kinship or social connection between landlord and tenant, the intensity of labor required for cultivation, and the reputation of the tenant farmer.<sup>108</sup>

Though the concept of sharecropping tends to inspire fears of exploitation, contemporary sharecropping has become a vital and generally equitable part of the Ghanaian agricultural economy, changing and developing over the years to meet the needs of landowners and farmers. For example, sharecropping contracts are increasingly being written down, with the landlord, tenant, and a witness each keeping a copy of the terms,<sup>109</sup> rather than relying on the perceived social standing of the landowner and the laborer. Moreover, sharecropping serves a number of straightforward economic functions. It can, for example, serve to hoard labor in times of shortage, share risks when and where a failed risk can be catastrophic, offer incentive through selective exclusion, and increase productivity through the maintenance of continued relationships.<sup>110</sup>

### C. Acquiring Land under Customary Law

The customary rights in land described above can be acquired in a wide variety of ways, including grant, rent, share contract, inheritance, and gift.<sup>111</sup> The forms and mechanisms of transfer under customary law are of course drawn from tradition, but also reflect the contemporary social and economic needs of each individual area.

Subjects of a chief can sometimes claim a tract of unused stool land free of charge simply by virtue of their membership in the stool community, though population pressures have made such unused land increasingly rare. A “stranger” (a member of another tribal community) can acquire interest in stool land by explicit grant, contract, or some other means of transfer. Residency or use of land, however, will not suffice: Long undisturbed possession by a non-owner, whether a trespasser or a person with a limited interest, cannot ripen into title to land under customary law.<sup>112</sup> When stool land is allocated, recipients of stool land pay “drinks money” to the proper chief, after which no additional rent-type payments are generally required.<sup>113</sup> Though this drinks money was traditionally paid

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108. *Id.* at 6, 15-16.

109. *Id.* at 17.

110. Pranab Bardhan, *Alternative Approaches to Development Economics*, in 1 HANDBOOK OF DEVELOPMENT ECONOMICS 39, 49 (Hollis Chenery & T.N. Srinivasan eds., 1988).

111. The customary law of land transfers has been superseded by state law in those few areas declared to be registration districts, WOODMAN, *supra* note 84, at 405, but it remains the basic form of conveyance for most Ghanaians.

112. See Kasanga, *supra* note 90, at 31 (citing *Kuma v. Kuma* [1938] 5 WACA 4 PC).

113. R. KASIM KASANGA ET AL., LAND MARKETS AND LEGAL CONTRADICTIONS IN THE PERI-URBAN AREA OF ACCRA GHANA: INFORMANT INTERVIEWS AND SECONDARY DATA



in the form of kola nuts or schnapps, today it can amount to millions of cedis in cash, essentially reflecting a purchase price.<sup>114</sup> The chief generally does not share these payments with the rest of the community, since their original function was as a symbol of allegiance to the chief, not as valuable consideration.

The exact form of land transaction varies greatly from area to area, and government attempts to impose uniformity on customary modes of inheritance and other forms of transfer have largely failed.<sup>115</sup> Even without formal state mechanisms, customary transactions are usually accompanied by some kind of traditional publicity or other "documentation," often the presentation of some small bit of property such as drinks or an animal.<sup>116</sup> In many Akan areas, for example, the *gualha* ceremony accompanies all land sales.<sup>117</sup> Since written documentation is not sufficient (and may not be necessary) to affect a valid transfer of customary land rights,<sup>118</sup> these ceremonial requirements help facilitate and guarantee customary transactions.

#### D. Roles and Powers of Chiefs

As the preceding description makes clear, the basic customary land law in Ghana remains deeply embedded in the social and cultural systems of tribes, clans, and other traditional groups, despite the competing machinery of the modern state. This is true in most African nations, but particularly so in Ghana, where traditional authorities command an exceptional amount of power. As one Ghanaian commentator put it: "Land matters are inextricably linked with the roles of traditional authorities."<sup>119</sup> As the allodial titleholders of tribal land, customary authorities at the top of that structure nominally own nearly eighty percent of the land in Ghana. The day-to-day management of land, however, is left to those individuals, families and sub-chiefs who hold customary freeholds, leases, and other lesser interests.

Rathbone writes, "[I]t is pointless to demand to be told precisely what a Ghanaian chief was or is."<sup>120</sup> Not only do individual chiefs vary

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INVESTIGATIONS 1 (1996).

114. *Id.* The cedi is the basic unit of Ghanaian currency.

115. See Migot-Adholla, *supra* note 62, at 164; KASANGA & KOTÉY, *supra* note 20, at 13.

116. See WOODMAN, *supra* note 84, at 370 (discussing whether publicity is necessary for a valid customary conveyance).

117. *Id.* at 350. AGBOSU, *supra* note 14, at 16-17.

118. WOODMAN, *supra* note 84, at 367.

119. Benjamin Kunbuor, *Decentralisation and Land Administration in Northern Ghana - A Legal Perspective*, in DECENTRALISATION, *supra* note 90, at 84, 88; see also AGBOSU, *supra* note 14, at 11-12. See also KLUDZE, *supra* note 28, at 236.

120. RICHARD RATHBONE, NKRUMAH AND THE CHIEFS: THE POLITICS OF CHIEFTAINCY IN GHANA 1951-1960, at 9 (2000). Article 277 of the Ghanaian Constitution defines a chief as "a person who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queenmother in

immensely in power, wealth, charisma, and responsibility, but customary authorities take many different forms throughout the country, from the *tendamba* “land chiefs” of the north, to the powerful centralized chieftaincies of the Akan, to the family and clan leaders who dominate the Volta region.<sup>121</sup> Though these leaders no longer claim much formal political or military authority,<sup>122</sup> the chieftaincy appears to be gaining in popularity across the country and its power remains great.<sup>123</sup> Even in areas of Ghana where they do not exercise major administrative power over land, chiefs remain the most important source of information about land matters for the majority of Ghanaians.<sup>124</sup> Despite their importance, however, government land policy has scarcely tapped the power that chiefs command and the information they control. Indeed, chiefs are generally not even aware of government land policy, objectives, and programs.

Some of this disconnect can be traced to the colonial period, which had a lasting impact on the chieftaincy and has serious implications for any discussions of future government-chieftaincy partnerships.<sup>125</sup> Faced with the prospect of setting up a successful colonial administration in the Gold Coast with very limited resources, British colonial officials turned to the chiefs.<sup>126</sup> Attempting to capitalize on chiefs’ social legitimacy, the British made them the lynchpin of their “indirect rule” approach to administration.<sup>127</sup> One of the most lasting impacts of this exploitation was the alienation of stool land in contravention of traditional customary law, as chiefs sold stool land for their own benefit,<sup>128</sup> stoking the anger and popular power of the educated urban elite, who exacted their revenge after independence.<sup>129</sup> Because chiefs retain real political power,<sup>130</sup> attempts to

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accordance with the relevant customary law and usage.” CONST. OF THE REPUBLIC OF GHANA art. 277.

121. KLUDZE, *supra* note 28, at 35-36. Chieftaincies are often referred to as “stools,” after the throne-like stools that serve as symbols of tribal identity. Though they exist in physical form, stools are unlike thrones in that they are not meant to be sat upon, nor often seen by the public. *Id.* at 236. For simplicity’s sake, this paper will use the terms “traditional authorities,” “stools,” and “chiefs” to encompass the myriad chiefs, clan leaders, family heads, *tendamba* and other figures who hold customary power over land.

122. E.A. BOATENG, *GOVERNMENT AND THE PEOPLE: OUTLOOK FOR DEMOCRACY IN GHANA* 156 (1996).

123. *Id.* at 143.

124. A 1999 study of the private and customary land market reported that chiefs, elders and families were the most commonly cited source of land information (62% of men and 63% of women reporting them as such), along with friends (56% and 63%). Newspapers were the next most often cited source (24% and 20%), with land sector agencies (9% of both men and women) and District Assemblies (8% and 7%) significantly less common. CENTER FOR DEMOCRACY AND DEVELOPMENT, *supra* note 19, at 71.

125. *See infra* notes 133-145 and accompanying text.

126. RATHBONE, *supra* note 120, at 10.

127. R.B. Benning, *Land Ownership, Divestiture and Beneficiary Rights in Northern Ghana: Critical Issues*, in *DECENTRALISATION*, *supra* note 90, at 20, 28-29. *See generally* FIRMIN-SELLERS, *supra* note 48.

128. RATHBONE, *supra* note 120, at 15.

129. *Id.* at 11.

restrict their official authority have actually undermined attempts to make them more accountable<sup>131</sup> by ignoring the reality of their influence. Kludze suggests that “any reform of chieftaincy, and it certainly needs reform, must have as its objective the integration of chiefs into the institutional structures of modern government,” without again making chiefs administrators for central government policy, as they were in colonial times.<sup>132</sup> Part V of this Note suggests such a reform.

### III. STATUTORY LAND LAW IN GHANA

#### A. Colonial Period and its Impact

Early colonial enactments<sup>133</sup> served to officially introduce the contemporary law of Britain— “[t]he common law, the doctrines of equity, and the statutes of general application”—as the fundamental law of the Gold Coast (as Ghana was then known), though “these provisions merely confirmed the existing position of English law on the Gold Coast.”<sup>134</sup> As early as the 1844 Gold Coast Jurisdiction Order-in-Council, judges in the Gold Coast had been instructed to apply English law where customary law was not “compatible with the principles of the Law of England.”<sup>135</sup> This was consistent with colonial practice throughout much of Africa, as colonial powers generally introduced their own law as the basic law of the colony but allowed custom to continue in certain areas of law so long as it did not run afoul of the colonial administration or “civilized” notions of justice and equity.<sup>136</sup> Early colonial ordinances almost universally left land tenure within the ambit of customary law.<sup>137</sup>

As the colonial government took a more active part in the daily rule of the Gold Coast, however, it became clear that customary law was accepted and supported only to the degree that its legitimacy and stability could be exploited, particularly by involving chiefs in colonial administration.

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130. SARA B. BERRY, CHIEFS KNOW THEIR BOUNDARIES 115 (2001) (“Excluded *de jure* from electoral politics and formal administration in postcolonial Ghana, chiefs are extensively involved *de facto* in both.”).

131. *Id.*

132. KLUDZE, *supra* note 28, at 533.

133. *See, e.g.*, The Supreme Court Ordinance, No. 4 (1876); THE ORDINANCES OF THE GOLD COAST COLONY (1909) (extending extant British law to Ghana) (currently codified as The Courts Ordinance (Cap. 4, 1951 Rev. Laws of the Gold Coast)).

134. ANTONY ALLOTT, NEW ESSAYS IN AFRICAN LAW 17 (1970). The land law “received” by Ghana and the other English colonies in Africa was the “old” land law, as it stood prior to the major 1925 land law reforms in England, which introduced widespread titling and other reforms. Patrick McAuslan, *Only the Name of the Country Changes: The Diaspora of “European” Land Law in Commonwealth Africa*, in EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA, *supra* note 10, at 75, 79.

135. ALLOTT, *supra* note 134, at 17 (quoting the Order-in-Council).

136. *Id.* at 11.

137. *See* T. OLAWALE ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW 6 (1956).

Customary rights were abused as some chiefs leased communal lands to foreign capitalists.<sup>138</sup> Certain privileged natives, generally chiefs and the literate or law-educated, could benefit from this system through speculation or brokerage, with disastrous results for the average Ghanaian.<sup>139</sup>

Following independence in 1957, the new Ghanaian government, like many others in Africa, was torn between the desire to modernize and the desire to reclaim traditions that had been shattered by colonial rule. In the revolutionary spirit of the times, this apparent dichotomy claimed crucial importance:

On the one hand, they, as African governments, feel it essential to reject those parts of their legal systems which appear to be an alien imposition, and to go back to a more "African" law relying on indigenous cultural and moral values; on the other hand, the same governments are prepared ruthlessly to sweep away any of their old institutions which seem to hold up progress or national unity.<sup>140</sup>

A nationalist and increasingly urban Ghanaian elite tried to shrug off traditional leadership in favor of "modern" state socialism, and Kwame Nkrumah, Ghana's revered independence leader, pursued a devastating political and legal campaign against the chieftaincy.<sup>141</sup>

Nkrumah's approach persists, albeit in much less radical form, in the 1992 Constitution, the most important legal document affecting contemporary land law in Ghana. Apparently drawing from historical experience, the Constitution leaves land law partially in the domain of custom, while simultaneously continuing a relatively elaborate machinery to control the use and sale of stool land.<sup>142</sup> Following customary law principles, Article 267(1) of the 1992 Constitution vests all stool lands in the appropriate stool or skin (chief or other traditional authority) in trust for the subjects of that stool "in accordance with customary law and usage."<sup>143</sup> But although the Constitution recognizes chiefs' customary ownership of lands, it also establishes broad state oversight of that ownership. Article 36(8) of the Constitution formalizes chiefs' fiduciary relationship to their subjects, declaring that land ownership, particularly for chiefs, carries with

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138. L.K. Agbosu, *Land Registration in Ghana: Past, Present and the Future*, 34 J. AFR. L. 104, 107 (1990); see also Concessions Ordinance, 1939 (Gold Coast).

139. AGBOSU, *supra* note 14, at 20-21.

140. ALLOTT, *supra* note 134, at 14.

141. RATHBONE, *supra* note 120, at 3-7; see also FIRMIN-SELLERS, *supra* note 48, at 114-18.

142. 1 SARPONG, *supra* note 23, at 9.

143. CONST. OF THE REPUBLIC OF GHANA art. 267, § 1 ("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.").

it a “social obligation to serve the larger community.”<sup>144</sup> Article 267(5) controls the use of stool land by prohibiting the creation of a freehold interest in any stool land: “[N]o 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.”<sup>145</sup> Though the impact of this provision is somewhat unclear, it was apparently intended to prevent chiefs from alienating stool lands, whether vacant or occupied by subjects.

## B. Government Administration of Customary Lands

The Constitution sets up governmental machinery to oversee, and in some cases effectively take over, the management and administration of stool lands. The two government bodies with major responsibility in this area are the Lands Commission and the Office of the Administrator of Stool Lands (OASL). The Lands Commission’s constitutional charge includes managing public lands, formulating land policy, advising traditional authorities on land use, and assisting in the execution of a title registration program throughout the country.<sup>146</sup> The Lands Commission and its regional offices, the Regional Lands Commissions, consist of representatives from various groups including the National House of Chiefs, the Ghana Bar Association and, at the regional level, each District Assembly within the region.<sup>147</sup>

Though the Lands Commission retains important authority over stool land, particularly the power of concurrence described below, the state’s power is largely wielded by the Office of the Administrator of Stool Lands (OASL). Under the Constitution, the Administrator of Stool Lands and the Regional Lands Commissions are jointly charged with consulting the chiefs and other traditional authorities to form “a policy framework for the rational and productive development and management of stool lands.”<sup>148</sup> The OASL is also responsible for collecting all rents and revenues generated by stool lands. Revenue thus collected is disbursed by the OASL as follows: ten percent to the Administrator of Stool Lands for administrative expenses, twenty percent to the “traditional authority,” fifty-five percent to the District Assembly in the area, and twenty-five percent “to the stool through the traditional authority for the maintenance

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144. CONST. OF THE REPUBLIC OF GHANA art. 36, § 8 (“The State shall recognise that ownership and possession of land carry a social obligation to serve the larger community and, in particular, the State shall recognise that the managers of public, stool, skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin, or family concerned and are accountable as fiduciaries in this regard.”).

145. CONST. OF THE REPUBLIC OF GHANA art. 267, § 5.

146. CONST. OF THE REPUBLIC OF GHANA art. 258, § 1.

147. CONST. OF THE REPUBLIC OF GHANA arts. 259-61.

148. CONST. OF THE REPUBLIC OF GHANA art. 267, § 8.

of the stool in keeping with its status.”<sup>149</sup> The OASL is required to keep separate accounts for each stool’s lands and to submit these accounts annually to the sector Minister (the Minister for Lands and Forestry), who must then bring them before Parliament.<sup>150</sup>

Perhaps the most controversial role of stool land administration—a power actually exercised by the Lands Commission, not the OASL—is that of providing consent and concurrence to the disposition of stool lands. The government must approve all stool land transactions involving monetary consideration.<sup>151</sup> This power has been justified as preventing duplicate grants of the same piece of land and ensuring that the intended use of the granted land conforms to zoning and planning restrictions and generates enough revenue for the stools and District Assemblies.<sup>152</sup> In practice, few of these goals have been met. Duplicate grants and freeholds continue to spread almost unabated, as chiefs have consistently and effectively resisted government attempts to define what transactions they can and cannot carry out, at times by misreporting grants and rents. For example, the concurrence requirement does not apply to grants of land to subjects who are entitled to that land through their status as members of the community, and the customary “drinks” payment associated with these grants—traditionally a nominal honorarium, not a sale price—has been exempt from reporting.<sup>153</sup> Over time, that small payment has grown so that it now approximates the market value of land, allowing chiefs to essentially sell land without reporting its cost.

The government has worsened these problems by failing to meet its own administrative responsibilities. In 1996, one study reported an average turnaround time of five years to secure concurrence to a private land transaction.<sup>154</sup> Even a government-commissioned 2001 consultancy report estimated five months turnaround time, during which a total of perhaps sixteen days of “effort time” would have to be expended by the party seeking concurrence.<sup>155</sup> These transaction costs are not merely frustrating; they can be insurmountable. Institutional failures on the part of government have thus effectively made the concurrence requirement a ban on the disposition of stool lands.<sup>156</sup> Even when concurrence is given and stool land is legally sold or transferred, the distribution of revenue from

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149. CONST. OF THE REPUBLIC OF GHANA art. 267, § 6. See *infra* note 121 for an explanation of the “stool.”

150. Office of the Administrator of Stool Lands Act, 1994, §§ 14-16.

151. See WOODMAN, *supra* note 84, at 72.

152. 1 SARPONG, *supra* note 23, at 36-37 (internal citations omitted).

153. The drinks payment was originally conceived as an honorary gift, often gin or schnapps, given to a chief in return for free customary land. Over time it developed into a cash payment, which has grown in size over time.

154. KASANGA ET AL., LAND MARKETS AND LEGAL CONTRADICTIONS, *supra* note 113, at 51.

155. NATIONAL INSTITUTIONAL RENEWAL PROGRAMME (ACCRA), COMMERCIALISATION OF THE LAND TITLE REGISTRY: PROJECT SUMMARY AND RE-ENGINEERING PLAN 52 (2001) (report of C2SI Richard Morny & Associates Link-Consult Consortium).

156. KASANGA ET AL., *supra* note 113, at 7.

the transfer has sometimes been inequitable. Chiefs and their subjects frequently express dissatisfaction with how District Assemblies utilize the stool land revenue they receive.<sup>157</sup> The money Assemblies receive from stool land revenue is after all required by law to be spent for the benefit of the stool community.<sup>158</sup>

The most damning problem with stool land administration, however, is not so much practical as it is principled. As Kasanga et al. point out, “[i]t is difficult to reconcile the idea of stools owning land and managing it day to day while the government and its officials control all other important decisions affecting land, including the timing of land disposal and the distribution of the income therefrom.”<sup>159</sup> The government thus controls both the collection of rents and the transfer of land, perhaps the two most crucial incidents of land ownership. The latter power is “negative” only, in that the government cannot grant stool land, but in any case the government’s control comes very close to full ownership.

### C. Domain of Statutory Land Law

The most telling evidence of statutory land law’s failure is the fact that most people ignore it whenever possible. Statutory policies from administration of stool land to title registration have faced massive intransigence. Kasanga suggests that perhaps only ten percent of land acquirers in the North ever approach the Lands Commission for official, formal documentation of their landholding.<sup>160</sup> In his 1988 study of rural Ghana, in fact, only a single respondent out of more than 400 was reported as complying fully with agricultural legislation.<sup>161</sup> Even the rate of compliance in cities, where landowners are close to the government’s administrative machinery, is not encouraging, and after fifteen years of land title registration less than five percent of the country was registered. In a 1999 study, only half of the respondents who had registered their land were able to do so in less than a year, with the remainder spending up to ten years to do so, and at a cost that most Ghanaians could not afford.<sup>162</sup> With such obstacles in their way, it is unsurprising that most people avoid statutory land law and administration.

The picture that emerges from this brief history is nuanced. Colonial law was not overtly and directly hostile to customary law. It did not seek to eliminate all customary authorities, nor to wipe out their rules. However, only those rules and authorities that conformed to colonial expectations were tolerated. The legal changes imposed by statutory property law were

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157. 1 SARPONG, *supra* note 23, at 34.

158. *Id.*

159. KASANGA ET AL., *supra* note 113, at 52.

160. KASANGA & KOTÉY, *supra* note 20, at 20.

161. Kasanga, *supra* note 90, at 48.

162. CENTER FOR DEMOCRACY AND DEVELOPMENT, *supra* note 19, at 17.

made not at the behest of the mass of small landowners—most of whom were still living under customary land law and adapting that system to meet their needs—but from above. This is not the parable envisioned by property rights theorists who see property law “evolving” in response to changing social or economic pressures.<sup>163</sup>

#### IV. INTEGRATING CUSTOMARY AND STATUTORY LAND LAW

Part I of this Note argued that the integration of formal and informal institutions is key to the success of any property system. Parts II and III broadly sketched the content of statutory and customary law—the formal and informal institutions in question. This Part suggests how customary law can be better identified and integrated with Ghana’s statutory system.

##### A. The Process of Identifying Customary Land Law

If integration of formal and customary land law is ever to succeed, it will require the systematic, careful, and precise study of Ghanaian customary law in all its local variations. In order to be flexible, equitable, and accurate, such a process must partner appropriate customary authorities (who have knowledge of and authority over customary law) with government authorities (who have the power to formally recognize it) and stakeholders (whose rights are being identified). Decentralization of this partnership is not merely prudent; it is necessary.

Setting up local forums to clarify the customary rules of each community would be an excellent foundation for this identification.<sup>164</sup> Drawing on a broad membership, local forums could be charged with the creation of suitable standard tenancy agreements for their area.<sup>165</sup> In doing so they would have to incorporate each community’s particular property-related practices, drawing up custom-friendly agreements<sup>166</sup> in familiar terms while simultaneously carrying out documentation and organization. Similarly, Delville suggests a two-part process that would combine local recognition of the details of an agreement with acknowledgement of its existence by the government.<sup>167</sup> In both cases, strengthening the connection between the customary and state sectors is key. To further that goal, local government administrators could draw up simple draft transaction

163. See generally Platteau, *supra* note 51.

164. PHILLIPPE LAVIGNE DELVILLE ET AL., SECURING SECONDARY RIGHTS TO LAND IN WEST AFRICA 19 (Int’l Inst. for Env’t & Dev., 2001).

165. 1 SARPONG, *supra* note 23, at 17.

166. Sarpong suggests that these agreements should include the particulars of the parties and capacities in which they are transacting; the nature of the interest conveyed; an accurate description of the land, which may include a proper survey where necessary (such as in some urban areas) or perhaps a traditional demarcation in other areas; the consideration, if any; any covenants; and the agreement of relevant sub-stools or paramount chiefs. *Id.* at 17-18.

167. DELVILLE, *supra* note 164, at 15.



documents in both the local language and the language of government. Furthermore, the government could make better use of already-existing Ghanaian legal mechanisms. Under the Chieftaincy Act, for example, the National House of Chiefs has the power to make declarations of customary law, which can in turn be given legal effect by the President in consultation with the Chief Justice.<sup>168</sup> This power, which is currently rarely used, could be employed to help shape the general principles of customary land law, or to resolve local-level disputes about its content. At a more grassroots level, better recording mechanisms for local land tribunals could eventually lead to the evolution of a common law of custom.<sup>169</sup> Though it is too much to expect that the decisions of local land tribunals would immediately lead to a precise, consistent body of customary land law, their decisions might well be valuable for establishing certain broad principles such as whether possession of land can ever ripen into ownership, or whether sales in a particular area require the agreement of the allodial titleholder.

After the general rules of ownership in a given area are clarified, attention can be given to identifying the actual legal rights that attach to each physical parcel of land. Just as local-level committees should identify local rules of ownership, individuals themselves should identify landholding practices at the parcel level. Many African nations, notably Ghana's western neighbor Côte d'Ivoire,<sup>170</sup> have employed a participatory, parcel-level system of recording individual rights with some success. Côte d'Ivoire has in fact been held up as a model for nations seeking to integrate customary law with a land registration program. Its innovative approach to participatory titling, 1998's Rural Land Plan (PFR), was sketched out in a letter to the Council of Ministers in December 1988:

The PFR involves [. . .] a survey of existing rights to plots of rural land, by establishing their geographical boundaries on a 1/10,000 map and by entering each surveyed plot on a register [. . .] The PFR will take stock of the present land tenure situation by recording rights to land as they are perceived and recognised by the village people and the administration, and as they emerge from agreements between individuals, neighbours, families and villages. To be recorded, such rights must be expressed before one of the pilot project survey teams and must not be contested by other interested parties.<sup>171</sup>

The PFR is thus based on a participatory approach that takes as its starting point the range of existing customary rules of land tenure.<sup>172</sup> Plot

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168. Chieftaincy Act, 1971, 370 § 42(3).

169. McAuslan, *supra* note 134, at 94.

170. See VOLKER STAMM, *THE RURAL LAND PLAN: AN INNOVATIVE APPROACH FROM CÔTE D'IVOIRE* (Int'l Inst. for Env't & Dev., Issue Paper No. 91, 2000).

171. *Id.* at 2 (quoting the letter).

172. *Id.* at 3.

maps are based on aerial photographs, and rights over land are established individually, through a plot-by-plot enquiry resulting in a form signed by the head of the survey team, the land manager, land users, neighbors, and any other interested parties.<sup>173</sup> Perhaps because the implementation employs such a grassroots approach, it has been well received by most villagers, and reported disputes are remarkably low, involving only two percent of all plots.<sup>174</sup>

Unfortunately, the innovative, participatory *process* of the PFR is not matched in its actual treatment of customary rights. Most notably, it seems to adhere too closely to a belief that “modern law” can solve the problems of the land sector, a presumption embodied in the fact that formal ownership rights can only be acquired through the register, and that customary rights must be registered within ten years or else revert to the state.<sup>175</sup> Moreover, customary land rights are reduced to two categories—land management and land use—and there has been little provision for protecting the already tenuous rights of women.<sup>176</sup> In order to improve on the PFR, Ghana should establish a system wherein government land administrators visit actual landholdings and record their size and incidents alongside the property owner, neighbors, and other interested parties such as tenants or secondary rights holders. The resulting agreement, since it incorporates the views and potential objections of so many relevant parties, should be more secure than titles granted by a far-away government agency.

Identifying custom community-by-community is not a simple process, however, and will require patience and intensive research. A pragmatic approach to formalizing land rights “should not depend exclusively on the establishment of legal rights to ownership but establish a *process whereby rights, and the assigning of rights, are recognised and guaranteed by clear procedures* which are perceived as legitimate by the various groups of actors involved.”<sup>177</sup> In other words, the initial focus, as laid out here, should be on establishing an equitable and efficient process of identifying customary land rights.

Above all, any attempt to identify customary law must proceed from the recognition that customary law is almost by definition contestable and fluid. Scholars have challenged the very notion of customary law as a system capable of definition.<sup>178</sup> Moreover, as recounted above, self-interested parties will attempt to shape the boundaries of customary law to their own benefit. Various attempts to codify customary law during the colonial period, for example, were accompanied by rent-seeking and abuse of custom. I do not mean here to be overly sanguine about the prospects for

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173. *Id.* at 8.

174. *Id.* at 12-13.

175. *Id.* at 16, 19.

176. *Id.* at 13.

177. DELVILLE, *supra* note 164, at 5 (emphasis in original).

178. See generally NEGOTIATING PROPERTY IN AFRICA, *supra* note 48.

a nationwide identification of customary law. But given the problems caused by the existence of parallel systems and the obvious differences between today's democratic Ghana and the old colonial government, these suggestions are offered in the hope that some improvement is possible.

### B. Statutory Recognition of Customary Rights

Once the content of customary land law has been identified, the next and equally crucial step is to give customary land rights appropriate status and protection under statutory law. This, too, will be a difficult task, for customary rights do not usually fit into the categories commonly recognized by statutory law. Customary law also does not require the same kind of documentation that is common in the statutory system, so a good root of title may mean totally different things in the customary and statutory sectors.<sup>179</sup> More importantly, not every principle of customary law must or even should be given government support, especially those principles that unfairly discriminate against women and migrants. In sum, the formal recognition of customary land law, just like its identification, requires careful and precise legal action.

One obvious way to formally recognize customary law is through the official registration of customary interests, a process that has become common in many African countries. Some nations, notably Niger and Côte d'Ivoire, have even attempted to register customary rights at an individual or household level, but again the effect of registration varies greatly.<sup>180</sup> In Niger, for example, registration results in a formal legal title while in Côte d'Ivoire the certificate of registration carries somewhat less weight.<sup>181</sup>

In Ghana, statutory law does allow for the registration of customary rights, but has not gone far enough towards making such registration a real possibility. The Conveyancing Decree 1973, for example, required customary transactions to be written, a requirement that would have effectively made nearly every customary transaction illegal according to state law. The sections setting up this requirement were fortunately never implemented, and were subsequently repealed by the Land Title Registration Law 1986 (PNDCL 152).<sup>182</sup> The Lands Registry Act 1962 (Act 122) similarly did not allow for the registration of the oral transactions under which most customary land transactions are conducted.<sup>183</sup> This further alienated the customary land sector, which was and is the basis of Ghana's land market. In order to encourage the registration or "formalization" of customary rights, state law must make it easier and more enticing for customary rightsholders to participate in the state

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179. DE SOTO, *supra* note 1, at 166.

180. Toulmin & Quan, *supra* note 10, at 20.

181. *Id.* at 20-21.

182. WOODMAN, *supra* note 84, at 347 n.1.

183. Agbosu, *supra* note 138, at 120-21.

system. Better connections between traditional authorities and the private sector, especially lawyers and surveyors, would facilitate this process. But the law itself could also be more accommodating of customary modes of conveyance such as the public *guaha* ceremonies described in Chapter III. Rather than requiring adherence to particular state-provided conveyancing forms, for example, land sector agencies could accept proof of a properly conducted *guaha* ceremony as sufficient evidence of a conveyance's legitimacy.

Recognizing customary rights does not always require major changes in law, but rather a more careful and imaginative use of the tools already at the state's disposal. Courts could, for example, rely more often on the concept of the trust to more accurately reflect the interlocking land rights in most Ghanaian customary communities, since the chief's "ownership" of stool land, as described in Part II, is more analogous to that of a trust administrator than to that of a fee simple owner.<sup>184</sup> Enforcing that trust, rather than trying to eradicate or replace it, should be a major goal of the courts. In Kenya, courts have employed the concept of an implied trust to uphold the claims of some aggrieved parties who assert ownership under customary law to land registered in the name of another,<sup>185</sup> thus mitigating registration's potential impact on customary rights. In such cases the courts, supported in practice by the Chief Land Registrar and Attorney General, "simply infer the existence of a trust from the relationship of the parties and the surrounding circumstances" and restrain the proprietor from acting to the detriment of the beneficial owners.<sup>186</sup>

### C. Caveat: Protecting Secondary Rights

Land registration programs throughout Africa unfortunately have often inadvertently extinguished secondary (also known as "derived") rights by overly simplifying land ownership. Future tenure reform must take care not to repeat the same mistake. Increased security for the registered owner of a parcel of land often means greater insecurity for secondary users who also have some un-registered rights in the same land.<sup>187</sup> Derived rights arrangements reflect the overlapping nature of land

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184. CONST. OF THE REPUBLIC OF GHANA art. 267, § 1 ("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."); CONST. OF THE REPUBLIC OF GHANA art. 36, § 8 ("The State shall recognise that ownership and possession of land carry a social obligation to serve the larger community and, in particular, the State shall recognise that the managers of public, stool, skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin, or family concerned and are accountable as fiduciaries in this regard.").

185. Simon Coldham, *The Effect of Registration of Title Upon Customary Land Rights in Kenya*, 22 J. AFR. L. 91, 107-08 (1978).

186. *Id.* at 107.

187. Platteau, *supra* note 51, at 40.

rights, and are dependent on the social relationship between the contracting parties. Statutory changes which make that relationship irrelevant can simultaneously take away the security it provides. As Adams argues, “[t]enure reform must propose ways of recognising the multiple uses of land rather than simplistically conferring formal recognition on established occupants and/or resource users.”<sup>188</sup> For example, when a land register records a single owner for a piece of land rather than recording the multitude of secondary rights holders (often women and migrants) who have customary rights of access, use, or possession to that land, the latter group’s rights may disappear due to non-registration. This statutory extinction of land rights due to non-registration seems overly harsh in Ghana, given that knowledge of registration procedures is anything but widespread.

Fortunately, the Land Title Registration Law 1986<sup>189</sup> attempts to provide for the protection of derived customary rights. One of the basic provisions of the law is that a registered title is indefeasible and provides conclusive evidence of land ownership<sup>190</sup> free from all interests except for certain overriding interests.<sup>191</sup> These overriding interests are listed in Section 46, and include easements, rights of way, profits, leases of less than two years, and certain customary rights. Section 46(1)(f) specifically holds that a title is subject to “rights, whether acquired by customary law or otherwise, of every person in actual occupation of the land save where enquiry is made of such person and the rights are not disclosed.”<sup>192</sup> This provision is helpful for securing certain kinds of customary rights, such as public rights of way and the claims of those customary holders who are in occupation of land and in a position to assert their rights. It offers little protection, however, to those who claim secondary access rights to another person’s freehold, or who are not able to claim their rights, or are not aware of the need to do so. For example, statutory safeguards for women mean very little in practice when few women even know of their existence.<sup>193</sup> This problem can be partially alleviated by intensive public education campaigns prior to and concurrent with any titling program, and through the involvement of NGOs and other organizations interested in women’s rights. The state must also be more flexible in recognizing and accepting the validity of traditional contracts such as sharecropping and other derived rights arrangements. Forbidding, ignoring, or attacking derived rights agreements without providing suitable alternatives threatens both efficiency and equity.

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188. Martin Adams et al., *Land Tenure Reform and Rural Livelihoods in Southern Africa*, in *EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA*, *supra* note 10, at 135, 137.

189. Land Title Registration Law 1986 (PNDCL 152). The law is currently applicable only in a few districts in Ghana, most of them urban or peri-urban.

190. *Id.* § 18.

191. *Id.* § 46.

192. *Id.* § 46(1)(f).

193. BENNEH ET AL., *supra* note 25, at 4.

There is no easy way for statutory law to protect secondary users' rights, and clumsy statutory reform can worsen the situation. The best solutions must come from a community-level change in attitudes and the creation of land administration structures that are committed to protecting the land rights of women, migrants, and other secondary rights holders. Part V explores the shape such structures might take.

## V. INTEGRATING CUSTOMARY AND STATUTORY AUTHORITIES

Land tenure reform in Africa often focuses exclusively on the problem of recognizing customary rules, ignoring the customary authorities who are themselves a fundamental part of traditional land tenure regimes.<sup>194</sup> The colonial administration of Africa—which nominally supported customary law, but only through hand-picked and compliant customary authorities—illustrates the point quite clearly. Due to the almost inherently contestable nature of customary law, it is especially important to consider who will be given authority to define and implement that law. This Part thus presents policy suggestions for how customary authorities, like customary law itself, can be integrated into a single unified property system.

In practice, customary authorities' power over the application of law can be just as important for legal outcomes as the written content of the rules themselves. Arguing that traditional leaders should play a role in the machinery of local-level land administration does not mean abandoning concerns of economic efficiency. In fact, "[e]mphasizing a crucial role for village communities is not to fall into the snare of romanticism, but is rather a pragmatic attitude grounded in a realistic assessment of Sub-Saharan Africa's present predicament," especially given the demonstrated failure of state-led land reforms all across the continent.<sup>195</sup> Though traditional land management systems do not always function perfectly, especially in urban and peri-urban areas, they remain, in the words of an article co-written by Ghana's former Minister for Lands and Forestry and a leading law professor, "the only viable option" for land administration because the state system is even more "expensive, tortuous and corrupt. . . . However, the indigenous system cannot sustain itself in urban and peri-urban areas without drastic overhaul."<sup>196</sup> The following discussion suggests ways in which such an overhaul can be achieved through better integration of customary and statutory land authorities.

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194. DELVILLE, *supra* note 164, at 13.

195. Platteau, *supra* note 51, at 75.

196. KASANGA & KOTÉY, *supra* note 20, at 26.

### A. Customary Land Boards: Giving Shape to Customary-Statutory Partnership

Land administration in Ghana is fundamentally a local issue, and a large majority of Ghanaians call for more local power.<sup>197</sup> To meet this demand, government and customary authorities should work together to modify customary land management groups, where they exist, into a system of Customary Land Boards. The Boards should include a wide variety of stakeholders, combining customary and state administration. By adding more technical and administrative expertise to the popular, entrenched land authority of the chiefs, such Land Boards would be better placed than any current institutions to deal with the complex and overlapping rights, issues, and disputes that characterize the Ghanaian land sector. And by regularizing administration and providing a more stable land administration structure, they would facilitate customary-government partnerships.

Land Boards should include the allodial titleholders—whether they be chiefs, family heads, *tendamba*, or other individuals or groups—as well as elders, councilors or other traditional advisors. They should also include professionals such as surveyors and lawyers whose expertise could improve the documentation and formalization of customary land administration, and thus make it easier for customary rights to be recognized in state law. Representation from women's or migrants' groups would help guarantee that their rights are not ignored in this process. Partnerships would also need to be maintained with land sector agencies, including the Office of Stool Land Administration, the Lands Commission, and the Department of Town and Country Planning, but since each of these bodies has had its local-level functions taken over by the District Assemblies under Ghana's recent decentralization plan, establishing effective links with the Assemblies would be most important.

Despite these general outlines, Customary Land Boards would necessarily vary in structure from area to area. Boards would look different in areas with powerful and centralized tribes than in areas with no tradition of a strong chief, or where the chieftaincy's power has waned. One prominent example in Ghana comes from the Ashanti region, where the Asantehene—revered head of the most powerful tribe in Ghana—has forged a robust partnership with the government. The Asantehene's power is greater than that of any other Ghanaian chief, and he has employed it in part to maintain order in the Ashanti land sector through the use of a thriving Lands Secretariat where all land transactions and documentation throughout the paramountcy must receive consent and concurrence to be valid. Customarily, one-third of the revenue from customary land

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197. Over two-thirds of respondents in the June 1999 CDD-Ghana Private/Customary Land Market Survey claimed "community control" was the best remedy to land constraints. CENTER FOR DEMOCRACY AND DEVELOPMENT, *supra* note 19, at 75.

transactions within the Ashanti region is given to the Asantehene, who has a good record of spending it on community development projects such as schools, roads, water, electricity, and other projects.<sup>198</sup> Accordingly, the Asantehene has always played an important role in land administration in the region, and cooperation between his Land Secretariat and the government has proven both necessary and fruitful. In other regions, however, no comparable customary authority exists, and Boards in these areas would have to incorporate family heads, *tendamba*, or other allodial titleholders.

The village of Gbawe, situated just west of Accra in the Greater Accra Region, has drawn much attention for the success of its custom-based land management system.<sup>199</sup> Kasanga and Kotey attribute Gbawe's success to its use of lawyers and surveyors, payment of due compensation to families and individuals who lose land, women's involvement in land management, and the collaboration between the chief, elders, and public land agencies.<sup>200</sup> Successful local-level land administration bodies have been set up in other African nations, most notably in Botswana.<sup>201</sup> None of those nations, however, has had customary land authorities as strong as the Ghanaian chieftaincy. Land management is inevitably a task that requires administrative ability, a quality that is not among those for which chiefs are generally selected. Consequently, many, if not most, Ghanaian chiefs are uninterested in the paperwork and record-keeping that are increasingly necessary for adequate local land administration. Many chiefs recognize this fact, and have proven amenable to and even eager for the participation of professionals to aid in the more technical aspects of land administration.

Since they would include representatives of all the main land sector actors and agencies, Land Boards would have wide influence over land administration at the local level. Generally, the Boards would grant the same customary rights that are currently granted by chiefs and would act only with chiefs' cooperation, but would be able to record those allocations in written form (thus facilitating their registration). This would help provide the "formalization" desired by many property theorists without threatening the legitimacy and efficiency of the customary sector. Customary Land Boards would be compelled to file inventories of the land they administer and the funds they disperse, a task that would be greatly facilitated by the presence of lawyers on the Boards. This requirement

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198. BENNEH ET AL., *supra* note 25, at 31.

199. See KASANGA ET AL., *supra* note 113, at 27-30, for a more complete description of Gbawe's land administration. Gbawe was also one of the areas selected for a Land Administration Programme pilot secretariat project, which will encourage its local management and help judge its scalability.

200. KASANGA & KOTHEY, *supra* note 20, at 19.

201. For information on Botswana's Land Boards, see Adams et al., *supra* note 188, at 148; Julian Quan, *Land Boards as a Mechanism for the Management of Land Rights in Southern Africa*, in *EVOLVING LAND RIGHTS, POLICY AND TENURE IN AFRICA*, *supra* note 10, at 197, 199.



would also make the Boards more transparent and accountable, and thus help obviate the need for overriding state administration of stool lands.

Of course, if such Boards did not prove politically feasible, Ghana could imitate one of the other localized customary-statutory management systems tried in other parts of Africa. One approach, undertaken in Mozambique and proposed in Tanzania, includes a relatively simple measurement and demarcation of village-level boundaries and the granting of rights and responsibilities for that land to a village body.<sup>202</sup> The *gestion du terroir* ("village lands management") approach employed in parts of West Africa is slightly different in that it grants villagers responsibility for land management and use, but retains the government's formal powers to control access.<sup>203</sup>

## B. Title Registration

Title registration has been at the heart of land tenure reform attempts in Ghana, as in many other African nations. But despite registration's importance and the obvious impact it has on customary systems,<sup>204</sup> the government has not made nearly enough effort to partner with traditional authorities in carrying it out. Land title registration in Ghana currently extends only to a few districts, and covers a very small proportion of the country. If it ever spreads, customary authorities could play a role in its success.<sup>205</sup> Without their participation, it will almost certainly continue to fail, as it has throughout Africa.<sup>206</sup> The existence of competing land tenure systems can exacerbate existing uncertainty and insecurity, undermining expensive titling programs.<sup>207</sup>

The register must recognize customary regimes if it truly aims to provide a stable record of all rights in land. Unfortunately, land title registration has been used across Africa to replace customary systems by making a register the only legal evidence of title. If title registration in Ghana follows this trend, it will remain an unreliable record of land rights, "since customary land law, the common law of contract and rules of equity have not been jettisoned, [and thus] enforceable rights in land may still

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202. Toulmin & Quan, *supra* note 10, at 20.

203. *Id.*

204. See Steven E. Hendrix, *Myths of Property Rights*, 12 ARIZ J. INT'L & COMP. LAW 183 (1995) (arguing that land titling is not a panacea, but rather one important ingredient in a larger development strategy).

205. An in-depth discussion of the rationale and success rates of titling in Ghana is beyond the scope of this paper. There is certainly no lack of research on titling in Africa, however. For recent Ghana-specific commentary on tenure security and economic growth, see Timothy Besley, *Property Rights and Investment Incentives: Theory and Evidence from Ghana*, 103 J. POL. ECON. 903 (1995); Migot-Adholla et al., *supra* note 62; Keijiro Otsuka et al., *Land Tenure and the Management of Land and Trees: The Case of Customary Land Tenure Areas of Ghana*, 8 ENV'T & DEV. ECON. 77 (2003).

206. See *supra* text accompanying note 9.

207. Atwood, *supra* note 95, at 668.

exist outside the register."<sup>208</sup> Under Ghana's 1986 Land Title Registration Law, most customary rights are theoretically registerable,<sup>209</sup> but transfers of registered land can only be effective if they are conducted through entries in the register. Currently, chiefs and their subjects perceive few reasons to participate in titling, and consequently tend to ignore the system in preference for traditional tenure protection mechanisms. Thus, "[i]t is rare for an indigenous resident of a community to seek registration, since under both statutory law and traditional custom the tenure of an indigenous person is assured."<sup>210</sup> The Land Title Registration Law recognizes the validity of some of these rights by classifying them as "overriding interests" that retain their strength even if they are not registered.<sup>211</sup> The protection of overriding interests is not a good long-term solution, however, because their existence devalues the protection given by registration and causes massive problems for conveyancers.

Customary authorities must be made part of the solution. Titling in any area should thus begin with the determination and registration of the allodial titles—in most cases meaning the titles held by chiefs—only then moving on to other interests. The rights entered on the register on behalf of the allodial titleholder should be limited to recognition of this administrative authority. Registering the allodial interest with even this limited power is important, as it will help convince chiefs of the security of their authority and thus facilitate the move to improve their management functions even while the power of their legal ownership declines.

At the same time, more customary rights must be brought onto the register, for example by a push to register sharecropping tenancies and derived rights arrangements. Furthermore, though the land title registration law provides for the registration of land in the name of a stool or family, it does not require registration of the customary management committee with responsibility and authority over that land.<sup>212</sup> Failure to register the appropriate management committee makes it harder for a potential buyer to discover the appropriate person or persons with whom he should transact. Rights and boundaries themselves might be more accurately recorded if parcel registration did more to adopt a participatory, on-the-ground approach. Woodman describes a similar system of customary boundary demarcation that involves the participation of neighboring landowners, a practice intended to discourage future land disputes.<sup>213</sup> Ghana's neighbor Côte d'Ivoire has made this customary-style approach the basis of its registration process.

Above all, the government must acknowledge that titling is not an exercise whose cost will justify its benefits in all areas of Ghana. Where

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208. KASANGA & KOTEY, *supra* note 20, at 6.

209. WOODMAN, *supra* note 84, at 402.

210. KASANGA ET AL., *supra* note 113, at 11.

211. Land Title Registration Law 1986 (PNDCL 152), § 46(1).

212. KASANGA & KOTEY, *supra* note 20, at 6.

213. WOODMAN, *supra* note 84, at 352.

titling does make sense, however—such as in Accra, where government machinery is already active—it must take better account of customary law and authorities. The main goal of this customary influence would be to make the law more accessible to the average landowner. Similarly, the government should stress education programs, focusing on the process, requirements, and benefits of titling. Thus far, the registration program makes little provision for effectively reaching its audience, even in the process of registration itself. The only publicity required for a person applying for title is to place an advertisement in one of Ghana's weekly newspapers. There is little chance that this method of publication will reach any but a few careful readers.<sup>214</sup> Unless land title registration reform begins to draw on the strengths of existing customary institutions, it will likely remain as ineffective as those newspaper announcements.

### C. Dispute Resolution

A third area in which traditional authorities play a particularly valuable role in land administration is in the resolution of land disputes, an area in which the government desperately needs help.<sup>215</sup> In colonial Ghana, the policy of recognizing customary law but not giving strength to customary authority led to insecurity, and inadvertently but severely hampered economic growth:

Capitalism failed [in colonial Ghana] because the institutions of indirect rule compelled indigenous actors to enforce property rights at the local level, even as they denied most of those actors the coercive force needed to resolve conflict over the definition of those rights. Throughout Africa, therefore, conflict over custom went unchecked, customary law remained fluid, and property rights were insecure. That insecurity, not the maintenance of customary law, blocked capitalism's expansion.<sup>216</sup>

Moreover, the specific characteristics of land litigation make it particularly amenable to customary resolution.

Customary dispute resolution varies as much as customary law itself, but its rules generally incorporate both respect for tradition and concern for efficiency.<sup>217</sup> In most customary tribunals, chiefs or elders conduct some sort of hearing, which is often public and involves a wide variety of interested parties, including tenants, neighbors, and secondary rights-

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214. KASANGA & KOTEY, *supra* note 20, at 7.

215. R. KASIM KASANGA, INST. OF LAND MGMT. & DEV., LAND TENURE AND REGIONAL INVESTMENT PROSPECTS: THE CASE OF THE TENURIAL SYSTEMS OF NORTHERN GHANA 28 (1999).

216. FIRMIN-SELLERS, *supra* note 48, at 153.

217. MWEBAZA, *supra* note 11, at 5-6 (exploring the role of traditional mediators under Uganda's Land Act 1998).

holders.<sup>218</sup> Rules of procedure in these hearings are not as well-defined or as strict as they are in most state court systems, and the focus is on finding truth and reaching reconciliation rather than enforcing penalties or assigning blame. In part, this is necessarily so, since chiefly courts in contemporary Ghana lack state-backed power to compel attendance or enforce decisions in property disputes.<sup>219</sup>

Nevertheless, it is a testament to the comparative advantage of customary arbitration<sup>220</sup> that despite this restriction customary tribunals remain the dominant dispute resolution body in Ghana.<sup>221</sup> One recent study reported that in the private land market, chiefs and elders were the most common adjudicators of reported land conflicts, more than twice as popular as courts or land administrators.<sup>222</sup> Approximately ninety percent of respondents claimed to be happy with the final outcome.<sup>223</sup> In Kumasi, for example, the Asantehene in 1999 authorized all land disputes in the Kumasi Traditional Council area to be withdrawn from the courts and settled instead by traditional methods. Many disputants responded almost immediately, and several long-standing disputes were quickly resolved.<sup>224</sup> Ghanaian courts could encourage customary resolution by suggesting to litigants that their land disputes might be better resolved in customary courts. Other African countries have already done this: Recognizing the important role played by traditional authorities in dispute resolution, Uganda's Land Act 1998 explicitly allows traditional authorities to serve as mediators, and even allows the state-run Land Tribunals to, at any time during a case, advise the parties that they might be better served by such mediation.<sup>225</sup>

Local adjudication mechanisms are validated further by the fact that most land conflicts arise at the local level, where the force of social sanctions—the stock in trade of customary dispute resolution—is strongest and the parties often share an understanding of customary rules. Moreover, customary dispute-settlement bodies can eventually help develop a customary common law through their decisions, blending local and national practice.<sup>226</sup>

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218. See W.B. HARVEY, *LAW AND SOCIAL CHANGE IN GHANA* 66 (1966).

219. KLUDZE, *supra* note 28, at 57-58.

220. Many Ghanaians see the formal courts as perpetuating elaborate and unnecessary rules. *Id.* at 542-43.

221. *Id.* at 234.

222. CENTER FOR DEMOCRACY AND DEVELOPMENT, *supra* note 19, at 74.

223. *Id.* at 74. In Kasanga's less comprehensive 1988 study, 100% of land disputes were arbitrated by traditional authorities. Kasanga, *supra* note 90, at 57.

224. KASANGA & KOTEY, *supra* note 20, at 26.

225. MWEBAZA, *supra* note 11, at 5.

226. McAuslan, *supra* note 134, at 94 (referring to this customary common law as "a top-down approach, informed by experience and views from the grass-roots").

## CONCLUSION

The argument presented in this Note, though very specific in its focus, has much broader implications for studies of law and development generally. Though cynical about states' ability to swiftly change fundamental property relations, the argument here does not imply that African states have no role to play in making property rights regimes more efficient. As the example of Ghana demonstrates, states can indeed do so by unearthing the property arrangements emerging in practice, recognizing them and facilitating change without attempting to direct it from above. The preceding discussion also highlights the dependence of property rights systems on the legitimacy of the social agreements underpinning them, an issue explored in deeper detail by New Institutional Economics theorists. The treatment of property rights as an economic and social institution remains perhaps the most important application of NIE theory, and further discussion of how those institutions evolve to balance economic and social concerns could be very fruitful, particularly in relation to states with a dualistic legal regime such as Ghana's. Research into these areas may prove helpful in addressing development issues, but, like the present discussion, it is unlikely to offer a simple remedy to land sector problems. Policy proposals that rely on a single, silver bullet solution—land title registration being only the most obvious example—are likely to flounder, just as they have in Africa for the past fifty years. Land sector problems are too complicated, and their solutions too nuanced, for any simplistic, state-driven reform to work.