

# Statutory recognition of customary land rights in Africa

An investigation into best practices  
for lawmaking and implementation



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An investigation into best practices  
for lawmaking and implementation

by

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for the

Development Law Service

FAO Legal Office

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## FOREWORD

Ensuring secure access to land is a key element of protecting the right to food of rural populations that depend on agriculture for their livelihoods. Weak governance and lack of respect for the rights of the poor contributes to tenure insecurity, which in turn can hamper human development, mire people in poverty and contribute to food insecurity. Weak governance institutions are also unable and often unwilling to tackle issues such as women's access to and control over land, which remains discriminatory throughout much of the world.

The issue of how best to increase the land tenure security of the poor and protect the land holdings of rural communities has been brought to the fore in Africa due to increasing land scarcity caused by population growth, environmental degradation, changing climate conditions, and violent conflict. This scarcity is being exacerbated by wealthy nations and private investors who are increasingly seeking to acquire large tracts of land in Africa for agro-industrial enterprises and forestry and mineral exploitation, among other uses. Some nations have received (informal) requests for up to half of their cultivatable land areas, and others are granting hundreds of thousands of hectares to private investors and other sovereign nations.

FAO has initiated a participatory process under the auspices of its Committee on World Food Security (CFS) for the development of *Voluntary Guidelines on the Responsible Governance of Tenure of Land and other Natural Resources*, which will provide guidance on governance with regard to, *inter alia*, administration of tenure, land reform, management of state land, resolving land disputes, attracting sustainable investments, improving gender equity and recognizing indigenous, customary and community rights (FAO, 2010).

Specifically in response to the increased investment interest in land around the world, FAO, IFAD, UNCTAD and the World Bank Group (The World Bank, 2010a) have proposed the following *Principles for agricultural investment that respect rights, livelihoods and resources*:

1. Existing rights to land and associated natural resources are recognized and respected.
2. Investments do not jeopardize food security but rather strengthen it.
3. Processes for accessing land and other resources and then making associated investments are transparent, monitored, and ensure

accountability by all stakeholders, within a proper business, legal, and regulatory environment.

4. All those materially affected are consulted, and agreements from consultations are recorded and enforced.
5. Investors ensure that projects respect the rule of law, reflect industry best practice, are viable economically, and result in durable shared value.
6. Investments generate desirable social and distributional impacts and do not increase vulnerability.
7. Environmental impacts due to a project are quantified and measures taken to encourage sustainable resource use while minimizing the risk/magnitude of negative impacts and mitigating them.

Generally, governments grant large land concessions with the intent of fuelling national commercial, agricultural or industrial growth and contributing to improvements in gross domestic product and local living conditions. However, there is a risk that such land concessions are dispossessing or hemming in rural communities and depriving them of access to resources vital to their food security, livelihoods and economic survival (World Bank, 2010a). Because most land in African nations is owned by the state, communities have little power to contest such grants. This powerlessness is often intensified by the fact that rural communities often operate under customary law and have no formal legal title to their lands or documentation of their claims.

Recognizing and protecting customary land rights is therefore a critical component of protecting and defending the land rights of the rural poor. This study is founded upon the notion that protecting and enforcing the land claims of rural Africans may be best done by passing laws that elevate existing customary land claims up into nations' formal legal frameworks and make customary land rights equal in weight and validity to documented land claims.

Through a close examination of the text and implementation of the land laws of Botswana, Mozambique and Tanzania, this publication investigates various over-arching issues related to statutory recognition of customary land rights, notably:

- How best to integrate statutory and customary legal systems so as to most effectively strengthen tenure security, foster national and

community prosperity, and take steps to extend all of the protections, rights and responsibilities inherent in the national legal system to rural communities;

- How to balance what happens on the ground, organically, against what the state views as "useful" or "valuable" and wants to preserve, enforce or encourage from above;
- How to write a land law that merges the practices of the people with the objectives of the state and arrives at solutions that will simultaneously: be used, adopted and successfully implemented on the ground; advance state interests; advance community interests; and advance individual interests;
- The factors that impact a law's long-term, effective and equitable implementation.

The UN Commission for the Legal Empowerment of the Poor (supported by FAO and others), the World Bank's Justice for the Poor program, and various other bilateral and international initiatives have, in the past few years, focused on understanding and leveraging customary legal systems as a way of ensuring access to justice and extending the rule of law to the poor. FAO has also been involved in supporting nations' efforts to draft and enact laws that integrate customary and statutory land holding frameworks. This publication is an extension of FAO's work in this regard; although it is based on African case studies, it is our intent that the lessons learned from this legislative study may further efforts to integrate and harmonize customary and statutory legal systems and promote greater land tenure security worldwide.

The target audience for this publication is not only legislators, lawmakers and policy analysts, but also international and national civil society groups. FAO hopes that both governmental and non-governmental actors may be able to use the findings and recommendations set out in this study to both craft good laws that protect the land claims of the rural poor as well as help to ensure that these laws are rigorously and equitably implemented.

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## EXECUTIVE SUMMARY

In Africa, the issue of how best to increase the land tenure security of the poor and protect the land holdings of rural communities has been brought to the fore due to increasing land scarcity caused by population growth, environmental degradation, climate change, and violent conflict. This scarcity is being exacerbated by wealthy nations and private investors who are increasingly seeking to acquire large tracts of land in Africa for agro-industrial enterprises and forestry and mineral exploitation, among other uses. In many cases, governments grant such concessions with the intent of fuelling national commercial, agricultural or industrial growth and contributing to improvements in gross domestic product and local living conditions. However, many of these land concessions include lands upon which whole villages live; in many such cases, the concessions dispossess rural communities and deprive them of access to resources vital to their livelihoods and economic survival. Unfortunately, rural communities often have little power to contest such grants. This powerlessness is often intensified by the fact that rural communities often operate under customary law and have no formal legal title to their lands or documentation of their claims.

This study seeks to provide guidance on how best to recognize and protect the land rights of the rural poor. It is founded upon the notion that protecting and enforcing the land claims of rural Africans may be best done by passing laws that elevate existing customary land claims up into nations' formal legal frameworks and make customary land rights equal in weight and validity to documented land claims. The study takes as its starting point that rather than lawmakers inventing theoretical new legal frameworks or borrowing legal models from western nations, land tenure systems must be based in the lived realities of the people, as practiced daily on the ground. The goal is to create a stable investment environment in which communities can maintain their land claims and prosper and flourish alongside investment and national economic development.

This study examines the statutory recognition of customary land tenure in Botswana, Mozambique and Tanzania, which were chosen as case studies because of the diverse approaches to the issue they represent. Botswana's Tribal Land Act (1968) established a system of regional land boards and transferred the land administration and management powers of customary leaders to the boards, which originally included both customary leaders and

state officials among their members. It also codified the customary practices of the Tswana, and elevated their customary land rights and practices up into national legislation. Mozambique's *Lei de Terras* (1997) decrees that anyone living or working on land for ten years in good faith has an automatic *de jure* "right of use and benefit" over that land, and allows for community lands to be registered as a whole, thus formalizing communal customary rights. Communities may continue to administer and manage their lands according to custom, with the caveat that such practices should not contravene the national constitution. Tanzania's Village Land Act (1999) makes the village both the primary land-holding unit and the centre of local land administration, management, record-keeping, and land dispute resolution. It also makes customarily-held land rights equal to formally-granted land rights, and explicitly protects the land rights of vulnerable groups. In doing so, it creates a hybrid of customary and codified law – allowing the village to dictate how things are done but holding it to strictly-defined legal mandates.

Through a close examination of the text and implementation of the land laws of these three countries, this publication investigates various over-arching issues related to statutory recognition of customary land rights, notably:

- How best to integrate statutory and customary legal systems so as to most effectively strengthen tenure security, foster national and community prosperity, and take steps to extend all of the protections, rights and responsibilities inherent in the national legal system to rural communities;
- How to balance what happens on the ground, organically, against what the state views as "useful" or "valuable" and wants to preserve, enforce or encourage from above;
- How to write a land law that merges the practices of the people with the objectives of the state and arrives at solutions that will simultaneously: be used, adopted and successfully implemented on the ground; advance state interests; advance community interests; and advance individual interests;
- The factors that impact a law's long-term, effective and equitable implementation.

The analysis of the case studies in reveals that to successfully harmonize statutory and customary land rights, a law must do seven equally-important things well *within its text*:

1. Flexibly allow for the full range of customs within a nation to be expressed and practiced while implementing restrictions that impose basic human rights standards on customary practices, protect against intra-community discrimination, and ensure alignment with the national constitution.
2. Create local land administration and management structures that: come out of – and look much like – existing local and customary land management structures; are easily established; are low cost both to the state and for users; are highly accessible; and leverage local individuals' intimate knowledge of local conditions.
3. Establish administrative processes and dispute resolution mechanisms that are simple, clear, streamlined, local, and easy for rural communities to use to claim, prove and protect their land rights.
4. Establish appropriate checks and balances between customary/local leadership and state officials, create new, supervisory roles for land administrators, and ensure direct democracy and downward accountability to the people.
5. Include accessible, pragmatic and appropriate mechanisms to safeguard against intra-community discrimination against women, widows and minority groups.
6. Protect community land claims and create real tenure security while allowing for investment in rural areas, ensuring that all development will be sustainable, integrated, and beneficial for local communities.
7. Establish good governance in land administration by: creating appropriate mechanisms to ensure the law's enforcement; penalizing state officials who are contravening the law's mandates; and setting up dispute resolution mechanisms that allow for appeal of customary, community-level decisions up into the national justice system.

The study furthermore finds that for a law that harmonizes customary and statutory systems to be well and widely *implemented*, there must be political will to do so. It suggests that when land laws devolve power and control over land and natural resources management down to the community level and away from the central state - institutionalizing community-level land administration and management and decreasing central state control over land and resources, as in Mozambique and Tanzania - such laws are unlikely to have the political support of state officials, who may act to undermine the laws' successful implementation. Conversely, when land laws elevate power and control over customarily-held lands out of the domain of local leaders and into the hands of central officials - elevating customary law

upwards, clarifying it, formalizing it, making it legible to outsiders, as in Botswana - government officials will implement these laws with zeal and commitment. For the former approach to work in practice, therefore, it is of prime importance to devise ways of ensuring that there is political will to successfully implement such laws. This may be done by establishing new roles for the state and public officials on the one hand, while on the other hand creating safeguards to hinder efforts to subvert the law's intent.

Moreover, oversight mechanisms must be included to make sure that the systems are integrated in a way that promotes justice and provides for both upward and downward accountability for both state officials and customary leaders. Such integration must also ensure that should the rural need to protect or enforce their land claims, they can access and successfully navigate land administration systems. This is important because even if the formal legal system recognizes customary land claims, if the poor cannot access or successfully use the formal legal system, then they have little "real" or actual protection against land speculation by elites and investors.

As a result of such analysis, various "best practices" for statutory recognition of customary land rights have been distilled. The study recommends that laws that seek to recognize customary land rights should:

1. Make customary land rights equal in weight and stature to "formal", certified land rights.
2. Seek places of overlap between customary rules and formal law and start from there.
3. Establish genuine tenure security by placing land ownership in the people themselves, vest ultimate land rights to the land in communities, and create an enforceable fiduciary duty between local land management bodies and community members (the land holders).
4. Explicitly protect the land claims of women and other vulnerable groups and establish women's right to hold or own land.
5. Define "custom" very flexibly so as to be non-exclusionary and to allow for evolution, flexibility and adaptability over time.
6. Be explicit and clear regarding rights of rural communities vis-à-vis the state or external agents, or for the protection of vulnerable groups, leaving no room for interpretations that can weaken these protections.
7. Establish procedures for documenting and protecting community lands as a whole first to protect the meta-unit from encroachment,

- then slowly - over time and according to landholders' volition - allow for documentation of family and individual lands.
8. Create local land administration and management structures that come out of – and look much like – existing local and customary management structures; are easily established; are highly accessible; and leverage local individuals' intimate knowledge of local conditions.
  9. Establish land administration and management systems that are free or low-cost for the poor.
  10. Integrate customary practices and direct democracy and promote good governance in land administration by establishing systems of checks and balances between rights holders, state land administrators, and local/customary leaders and establishing systems that ensure both downward accountability to community members and upward accountability to the state.
  11. Locate customary land administration and management systems close to the land and communities they govern.
  12. Include accessible, pragmatic and appropriate safeguards against intra-community discrimination.
  13. Align legal proof of land claims with customary practice by formalizing landscape-based evidence and allowing oral testimony as proof of land rights.
  14. Explicitly protect communal areas, customary rights of way and shared land use and access rights.
  15. Provide for and encourage the creation of community bylaws and land and natural resource management plans.
  16. Create new technical advisory and supervisory roles and responsibilities for state officials.
  17. Establish a clear system of judicial appeal leading straight from the lowest level of local customary conflict resolution all the way to highest court of the nation.
  18. Make legal representation for communities mandatory during negotiations concerning land-sharing agreements with investors, and ensure that all community-investor agreements are written down and considered to be formal contracts, enforceable or voidable according to national contract law.
  19. Make customary land transactions legal and enforceable or voidable under contract law.
  20. Extend compulsory acquisition laws to state expropriation of community common areas, even those that appear to be "unused."

The study concludes that while each nation should define for itself the most appropriate mechanism to recognize customary land rights within its formal legal system, the harmonizing or integration of customary land rights and formal law may best be done by recognizing custom as the effective, local, and locally-valid means that communities have established over time to administer and manage their lands and natural resources. It suggests that customary and statutory legal systems are not as divergent as may be thought, and identifies areas of overlap that may be useful starting points for creative integration of statutory and customary land law. It recommends that such integration may best be done not through not through strict codification at the national level, but through national laws carving out a space for custom within their legal framework, and then allowing each local community to determine and define for itself its rules and governance structures through fully-participatory processes. Community custom should then be written down *at the local level only* to ensure transparency and justice and to allow it to be held accountable to standards of sustainability, equity, and the protection of the rights of vulnerable groups.

Before they can be protected against outsiders, customary land rights must be recognized under national law. To allow customary land systems to flounder in the realm of illegality deprives the poor of state sanction for and protection of their basic rights. When the rural poor's customary land claims are not considered to be valid because they lack formal recognition, then only the rich and the legally savvy have tenure security. In consideration of various African nations' recent trend of granting of vast areas of land to foreign investors, the urgency of placing real ownership in the hands of the people living and making their livelihood upon lands held according to custom cannot be overstated. True tenure security will only come from elevating customary land rights up into formal law, and making customary land rights equal in weight to registered rights. Accountability systems and oversight mechanisms must then be put into place to ensure that the law is properly implemented, the land claims of rural communities are protected, and the legislative intent of the law is realized.

# I

## INTRODUCTION

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## **1.1 Overview and context**

Over the past two decades, a number of African governments have overhauled their governing land legislation and crafted new laws. The aim of such efforts has been to increase national development and prosperity by both strengthening the land claims of the poor and by attracting investment with the promise of greater tenure security. In many cases, the land laws previously in place were vestiges of colonial rule, perpetuating colonial systems of race-based land categorization. Such laws were neither adequate for addressing modern land-related transactions, particularly the growing land markets in urban and peri-urban areas throughout Africa, nor relevant to the complex and multiple ways that rural Africans use, share and transact land.

However, African lawmakers faced and continue to confront a complex situation, in which the injustices of colonialism and the difficulties of accessing and successfully navigating state land tenure systems have meant that customary land laws and land management practices have flourished alongside the formal ones. In some nations, over 90 percent of land transactions are still governed by customary legal paradigms, and the decisions and rules established under customary systems are recognized as legally valid and binding by their users. The result has been a wide gap between nations' formal legal systems and the rules that govern the lived realities of the majority of those nations' citizens. While the different systems do not operate in complete isolation from one another, a fissure exists between the constructs and laws of the modern nation state, and the legal paradigms and rules that dictate the myriad interactions of the rural poor. The end result is two or more legal systems functioning side by side, blending and mixing, and occasionally clashing at places of intersection. In some nations, the greater part of rural populations govern themselves and their land according to a legal system outside of and unregulated by the state while relevant national legislation remains largely unknown, ignored, or distorted.

Moreover, customary systems, much like common law systems, are in a constant state of evolution, adapting to the changing political, legislative, demographic and ecological circumstances and choosing innovations that work best to accomplish the desired ends. It may be argued that very little pure "tradition" remains; today's "customary law" is a mixture of various practices that have been inherited, observed, transmuted, learned and adopted. As well-stated by Cotula and Toulmin (2007 at 109): "Far from

being clearly delimited and mutually exclusive, the customary and the statutory are usually intertwined in complex mosaics of resource tenure systems."

Problems occur when one system does not recognize the other as valid. Centuries of outsiders who have refused to recognize the strength and validity of customary land rights has resulted in widespread tenure insecurity across Africa. Grappling with this, lawmakers have sought to integrate the two systems by elevating local, customary land rights up into the national legal system. Rather than passing laws built out of ideals and constructions of how society should be run, lawmakers have sent out anthropologists, sociologists, economists, and other researchers to investigate the rules by which the people govern themselves, and then worked to create a space within statutory law to reflect those practices, merging the two systems into one.<sup>1</sup> The impetus for such measures may have been to: adopt laws that derived from a genuinely African perspective; extend state influence out into the customary domain while harnessing the governance structures already in place; strengthen the land claims of the poor; find efficient, cost-effective models for rural land management in post-conflict and resource-scarce contexts; and foster national growth and economic development, among other reasons. Ghana and Botswana were the first nations to undertake this effort soon after Independence, and since then a number of countries including Namibia, Niger, Uganda, Burkina Faso, Mali, Lesotho, Malawi, Swaziland, Mozambique, Tanzania, South Africa and others have followed, adopting a wide range of mechanisms and strategies to varying degrees of success. Some of these nations have created or are in the process of creating new administrative bodies that are not customary in structure but have taken over the management of customary rights (Botswana, Niger, Namibia, Tanzania, Burkina Faso, Mali, Senegal, Uganda) while others have made customary leadership structures the community-level managers of decentralized state land administration (Mozambique and South Africa). Many nations have declared customary land rights to be equal in weight and validity to formal, state-issued land rights, and some have made local-level customary dispute resolution bodies the lowest rung of the national court system, their decisions appealable up to the highest court. (Alden Wily, 2003 at 46–47). Often, these laws are quite innovative, the result of highly creative and thoughtful lawmaking.

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<sup>1</sup> For the purposes of this publication, such efforts will be referred to interchangeably as both "harmonization" and "integration" of customary land rights and statutory law.

## **1.2 Why harmonize customary and statutory legal systems?**

While customary systems are far from perfect, and may in various instances perpetuate inequity and injustice at the local level,<sup>2</sup> efforts to integrate customary and statutory legal systems are critical for a number of reasons. First and foremost, laws and legal systems should have direct meaning, utility and applicability to people's daily lives. Rather than be theorized, crafted and imposed from above, legal systems should reflect the lived realities of a nation's people, encompass the rules that citizens are already adhering to in their daily interactions, and be based on the moral constructs that already order social relations. Recognizing local rules – customary or not – is thus important, as laws meant to increase land tenure security should reflect and legalize the realities of land use and property transactions practiced by the majority of the people in the country the poor, rather than the elite. If they do not, they will not be followed. When social practice and a nation's legal systems are not aligned, the legitimacy of the government – and rule of law – may be undermined and citizens' ties to the modern nation-state weakened; people may come to view laws and the formal legal system not as something that guides, supports and protects their daily transactions, but as a function of state power, through which an elite minority imposes its power upon the poor majority.

Second, statutory recognition of customary law is critical because customary governance systems are currently fulfilling a gap in state administration; in many countries, the customary leaders are the only "local authorities" that the poor have genuine access to. As such, many are already fulfilling the roles of community administrator, judge, land allocator and property registrar. While in some contexts these leaders are despotic, unjust or corrupt, in other contexts they do a fairly good job of resolving conflicts and maintaining peace and equanimity in their communities. For those leaders that govern in bad faith, better integration into the state administrative system can help to limit the injustices they perpetuate, and for those leaders that govern well, their efforts can help to streamline the two legal systems into a more coherent whole. Rather than marginalize customary governance structures on the grounds that they are outdated or oppressive, governments should identify and leverage the best parts of custom and integrate customary systems as partners in effective, decentralized local governance.

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<sup>2</sup> This will be explored fully in Chapter 2.

Third, statutory recognition of customary law is necessary because the continued existence of various legal systems co-existing side by side weakens the validity and power of both, as savvy individuals can exploit the differences and inconsistencies between the systems to achieve specific desired results that may be prohibited in one system or the other, or to avoid unwanted outcomes. The lack of relationship between state and customary dispute forums may foster uncertainty about the legal "bottom line". Delville writes about how the complex relationship between customary and statutory legal bodies ensures non-predictability as to the norms that are supposed to apply. As a result, "the splintering of the system of authority and the unregulated plurality of arbitration bodies" can lead to opportunistic behaviours, "forum shopping" and weak capacity of either body of law to resolve conflicts (Delville, 2007 at 39). Integrating and streamlining the systems can help to address such inconsistencies.

Fourth, population growth, increased international investment in rural areas, the development of new commodity markets (like biofuel), climate change, and other socio-economic factors are contributing to growing land scarcity throughout Africa. This scarcity has in turn led to increased individualization of land claims, greater competition for fewer resources, and a breakdown of the customary rules that have governed the equitable and sustainable use of common resources. These trends are impacting how individuals and families allocate, use and manage their land. Such behaviours are leading to: an increase in land-related conflicts (both large and small); growing informal land markets and accompanying improvised mechanisms for land transfer formalization; and a weakening of women's, pastoralists' and other vulnerable groups' rights to land. In sum - as land grows in value, land markets remain illicit and unregulated, and legal pluralism leaves the "rules of the game" undefined - the land rights of the most poor and vulnerable family and community members are becoming weaker. Woodhouse (2003 at 1715) describes how, "When competition for land intensifies, the inclusive flexibility offered by customary rights can quickly become an uncharted terrain on which the least powerful are vulnerable to exclusion as a result of the manipulation of ambiguity by the powerful". In such contexts, by paying increased attention and devoting state resources to train, supervise and monitor customary systems and leaders, states may have a role to play in ensuring against the perpetuation of intra-community injustice, discrimination, dispossession and disenfranchisement under custom.

Finally and most importantly, to allow customary systems to flounder in the realm of illegality deprives the poor of state sanction for and protection of their basic rights. When the poor's land claims are not considered to be valid because they lack formal recognition, then only the rich and the legally adroit, have tenure security. To refuse to recognize the customary land rights of the poor relegates them to a status as second-class citizens, discriminated against on the basis of class, and outside the bounds of constitutional protections.

As such, integration of these systems must occur if the poor's land rights are to be protected. To this end, governments and legislators are creating new laws that elevate customary rights up into statutory law.<sup>3</sup> However, such endeavours are both extraordinarily *conceptually* difficult in their lawmaking and *practically* difficult in their implementation. These are not simple lawmaking exercises, for two main reasons. First, customary systems vary widely, evolve over time, and often are comprised of a mix of both just and unjust rules. A land law that seeks to recognize customary land rights must both allow a space for custom to be free to continue to successfully address the changing land-related needs of community members, and yet also include protections against those customary practices that perpetuate discrimination and inequity. Second, the blending of two very separate legal systems is a "major exercise in institutional reform" that "goes to the heart of governance" (McAuslan, 2003 at 1). Land laws that strive to efficiently integrate customary and statutory systems *by necessity* create new roles, new structures and new procedures for customary leaders and state officials alike. Such changes may not be well received, or the funding, technical capacity or other resources necessary to successful implementation may simply be lacking.

In thinking about how to best craft legal mechanisms to elevate customary land rights up into statute, various scholars have suggested different theoretical and strategic methods of approaching the question.<sup>4</sup> These

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<sup>3</sup> This has been happening in the context of increasing international attention being paid to the dichotomy between state and non-state justice systems. In the past few years alone, there has been an increasing focus on understanding and leveraging customary legal systems as a way of ensuring access to justice and extending the rule of law to the poor. Of note has been the creation of the UN Commission for the Legal Empowerment of the Poor and UNDP's follow-up, the World Bank's Justice for the Poor program, and myriad other bilateral and international initiatives.

<sup>4</sup> See e.g. Daniel Fitzpatrick's article, *Best Practice' Options for the Legal Recognition of Customary Tenure*, 2005, which suggests that there are three main structures that may be used by legislators when

scholars' analyses are a very useful starting point. However, such overviews are not sufficient to identify the on-the-ground, practical, logistical details of how lawmakers should actually draft the laws and implementing regulations that integrate customary and statutory legal systems. What is needed is critical analysis of what works and does not work, based on (1) detailed legislative analysis of the strengths and weaknesses of how these laws are constructed, and (2) detailed study of how the laws function in practice. Such an analysis must ask: How usable are these strategies? How fully do they protect the land rights of the poor? What obstacles to effective implementation do they inadvertently create?

This publication endeavours to address such questions; its aim is to identify "best practices" that can inform lawmakers' efforts to harmonize customary land rights and statutory law. However, as desk study, the analysis is inherently limited and the effort has led to more questions than answers. As such, this publication does not profess to have the ultimate solutions; rather, it aims to elucidate the multiple factors and considerations that go into efforts to integrate customary and statutory land tenure law. It also implicitly lays out a critical research agenda, where the hypotheses it puts forward can really be tested or examined in the light of on-the-ground experience.

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conceptualizing the foundations of new land laws that locate control over land and natural resource rights within customary arrangements: (1) **the tenurial shell model**, a minimalist approach that should be used when tenure insecurity is caused by encroachment by outsiders or interaction with state officials; (2) **group incorporation**, in which the community takes steps to acquire legal personhood and establishes a leadership structure that can interact with outsiders on behalf of the community; and (3) the creation of **land boards**, state bodies that administer and manage community lands and which may be the best option when the source of tenure insecurity is internal community conflict. (Fitzpatrick, 2005) Similarly, Hubert Ouédraogo's 2002 article, *Legal Conditions for the Recognition of Local Land Rights and Local Land Tenure Practices*, suggests that there are three ways of formally recognizing customary land rights and customary land tenure systems: the legislative, the technical and the contractual. Ouédraogo characterizes the approaches in this way: (1) the **legislative** strategy involves public authorities "setting the rules regulating local land tenure in relation to the general objectives of economic development policy"; (2) the **technical** strategy "consists principally in the belief that the preliminary problem to be solved in making local rights secure is one of clarifying their nature, status and consistency" through the issuance of certificates of land rights and the establishment of institutional bodies to monitor these rights; and (3) the **contractual** strategy "define[s] the general rules governing land tenure relationships...[but does] not dictate the way in which an individual arranges every aspect of his relationship with others" (Ouédraogo, 2002 at 81–83).

### **1.3 What questions must be asked when harmonizing customary and statutory land rights?**

The central question that this study investigates is "How to best draft laws that harmonize and integrate customary and statutory land rights?" In attempting to answer this question, there are various issues, factors and questions that must be identified and addressed head on by lawmakers. The following section, while prescriptive and in many ways the analytic result of the foregoing legal analyses, sets out some of these factors, as they are best considered up front. They are as follows:

First, when thinking about how best to write a land law that appropriately elevates customary practices up into statute, there are two main factors from which all else must be derived:

- 1) What happens on the ground, organically. This includes both the realm of the "customary" (customary land management structures, communal usage and management of land and natural resources, intra-familial rules and roles, etc.) as well as the realm of the state and the market (interactions with and strategic use of the formal state system, emerging informal markets for land, etc.).
- 2) What the state views as "useful" or "valuable" and wants to preserve, enforce or encourage from above, and therefore make into law. This includes both the customary (lower-cost management, dispute resolution mechanisms that function on their own, cultural preservation, etc.) as well as the state and the market (state control over local governance, rural investment that promotes national development, etc.).

As will be explored in the following chapters, both of these scenarios – the organic situation as practiced on the ground and the interests of the central government – have the potential to produce unintended and harmful results and foster abuses if not managed well, balanced against the other, or undergirded by strong accountability mechanisms.

Second, there is another set of oftentimes conflicting underlying concerns that lawmakers must keep in mind and address when writing a land law. This may be summarized as: "How to write a land law that merges the practices of the people with the objectives of the state and arrives at solutions that will

simultaneously: be used, adopted and successfully implemented on the ground; advance state interests; advance community interests; and advance individual interests? Crafting a land law that successfully balances each of these needs while simultaneously and seamlessly elevating customary land tenure rights up into the formal legal system is an exceptionally difficult endeavour. To truly understand the myriad considerations that must go into writing a land law, it is necessary to unpack each of these considerations:

To ensure that laws and policies will be adopted and implemented on the ground, a land law must:

- Be easily merged into existing formal and customary systems, in that it is easy and inexpensive to implement, and can be managed by already-existing governance structures (customary and formal);
- Be flexible and adaptable to local situations and practices;
- Be in line with local socio-religious and cultural ideas of rights and responsibilities;
- Be acceptable to bureaucrats, customary leaders and communities alike; and
- Allow for slow change, at a pace that society can integrate and absorb.

To ensure that a land law will advance state and government (bureaucratic) interests (and therefore be allocated the resources, state energy, and political will necessary for successful implementation), it must:

- Allow for industry and development, creating opportunities for investors and entrepreneurs;
- Create tenure security to attract investors, promote internal stability and decrease land-related conflicts;
- Ensure that land is used most productively to increase the GDP and ensure food security;
- Not radically shift power and funding away from state officials, but rather modify their roles while maintaining some degree of control over land by central and regional officials;
- Allow for some degree of state monitoring and control of customary systems;
- Strengthen provincial and central government by registration and taxation, thus increasing government information and funding;

- Have the capacity to quickly resolve land-related conflicts so as to support national peace and security; and
- Be relatively inexpensive to implement.

To ensure that a land law will advance community interests, it must:

- Promote and foster social cohesion, cultural heritage and religious continuity;
- Allow for community control of land and natural resource use for livelihood support;
- Establish fully inclusive participatory processes to ensure that all community members are involved in community land governance and administration, especially members of minority or vulnerable groups;
- Create a space for the community to establish clear rules for community land and natural resource administration and governance, and mechanism to ensure enforcement of those rules;
- Support communities' sustainable management of their land and natural resources, allowing for flexibility and equity;
- Increase and promote intra-community and inter-community peace, through successful management of land-related conflicts;
- Increase and promote community prosperity and flourishing; and
- Create opportunities for communities to welcome investment and income-generating initiatives into their lands (as desired) in an equitable, fair and just manner, so as to allow for community development, local employment, and the construction of necessary infrastructure.

To ensure that a land law will advance individual interests and promote equal opportunity for all members of society, it must:

- Guarantee individual and family land tenure security;
- Ensure equal access to land and natural resource rights by all community members, by establishing and enforcing the land rights of women, the elderly, widows, children, pastoralists, indigenous peoples, and other marginalized populations;

- Increase potential for the realization of greater family prosperity, allowing land to be used in a way that the family believes will maximize its value;
- Protect against land grabbing, forced dispossession, or unconscionable contracts perpetrated by more powerful community members against more vulnerable members, or by one family member without the knowledge of the rest of the family;
- Provide increased freedom regarding options to rent, transfer or sell one's land claims according to family need;
- Allow families and individuals to sustainably access and use communal areas;
- Reduce land-related conflicts with neighbours;
- Increase the ability to expand and grow holdings if possible or necessary, including elasticity for shifting cultivation patterns; and
- Increase inter- and intra-family cohesion and sense of place and feeling of community.

To write a law that successfully addresses each of these considerations is an extraordinarily difficult task. The following legal analysis therefore includes an implicit contemplation of each law's balance of these various concerns. Specific attention is paid to the laws' "implementability" and balance of protection for and promotion of state, community, and individual interests.

Third, lawmakers must also tackle the challenge of "how to most effectively integrate customary and statutory law in a manner that leverages the best of each legal paradigm while minimizing the places of weaknesses and opportunities for injustice?" As such, a set of specific questions particular to harmonizing statutory and customary systems should also be considered. Such questions include the following, and it is these that drive the central conclusions of this publication:

1. When elevating custom up into state law, how does one maintain the best parts of custom without being overly vague or unduly prescriptive?
2. What kind of management structures and processes are best suited to proper implementation of integrated land administration systems?

3. What kind of local leadership and decision-making structures best allow for downward accountability to local people in the management of customary land claims?
4. What rules and systems may best protect the land rights of the most powerless members of a community? How best to address intra-community discrimination, and protect the land rights of women and other vulnerable groups in the face of discriminatory customary practices?
5. What is the most appropriate role for state officials when land rights are managed locally and according to custom? How best to leverage the technical and administrative powers, skills and capacities of the state?
6. How best to facilitate the merging and streamlining of customary and formal justice systems?
7. How best to address emerging markets in customary land rights within the context of customary land administration and management systems? How best to formalize land transactions so as to best ensure fairness and provide a measure of security?
8. How to address power imbalances during transactions and negotiations between communities and outside investors?
9. Should customary land rights be compulsorily registered?
10. What considerations should inform the *process* of drafting legislation that harmonizes customary and statutory law?

Finally, the publication strives to analyse the factors impact a law's long-term, effective implementation. In this context, the study investigates the factors that impact a government's political will to successfully implement land legislation. It examines the relative advantages and disadvantages of elevating customary rules up to the national level versus bringing state power and apparatus down to the local level.

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This publication is laid out in the following manner: Chapter 2 reviews the relevant socio-legal contexts within which efforts to integrate customary and formal legal systems are taking place. It examines the political, economic and cultural ramifications of increasing land scarcity and competition, and their manifestation in the power dynamics of rural communities. It then outlines the obstacles that impede the poor's access to and use of formal administrative and legal systems and increase their reliance upon customary governance systems.

Chapters 3, 4 and 5 present in-depth statutory analyses of the land laws of Botswana, Mozambique and Tanzania<sup>5</sup> respectively, looking carefully at the mechanics of how they have sought to integrate statutory and customary and tenure systems and investigating how these laws have worked in practice.<sup>6</sup> Attention is paid to the places of vision, creativity and ingenious invention, as well as to the laws' weaknesses, where opportunities for mismanagement, corruption, elite capture, discrimination, and inequity are inadequately addressed and have flourished in the laws' implementation.

Chapter 6 analyses the overall successes and challenges of these legislative endeavours, identifying the strengths and weaknesses of the laws as crafted.

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<sup>5</sup> In these analyses, it is important to keep in mind that the histories, terrain, climate, livelihoods practiced and population densities of these nations are different. Botswana is predominantly arid; the rural areas are largely inhabited by rural pastoralists with a hunter-gatherer minority, and an average population density of 3 people per square kilometre (United Nations World Prospects Report, 2004). Mozambique and Tanzania have more varied terrain, including semi-tropical, savannah and arid regions as well as coastal areas. Mozambique's average population density is roughly 25 people per square kilometre; Tanzania's is 41 (United Nations World Prospects Report, 2004). There are no purely pastoralist groups in Mozambique; Tanzania has a mixture of farmers, pastoralists and some hunter-gatherers. Botswana's population today is 65 percent urban, compared to 34.5 percent in Mozambique and 24.2 percent in Tanzania. Mozambique was colonized by the Portuguese, while Tanzania was administered first by Germany and then by Britain; Botswana was a British colony. Mozambique suffered decades of brutal warfare - first for independence, and then a civil war, while the transition to independence in Botswana and Tanzania was largely peaceful. Such factors have greatly influenced the frameworks of these nations' land laws and their implementation.

<sup>6</sup> The three case studies were chosen (after an extensive review of similar laws) for their variety: in the mechanisms adopted, in their length, and in the degree of specificity, detail, and prescription contained within. The primary methodology used was the author's own textual analysis, which was then under-girded by supporting articles, analysis and policy reports concerning the laws' content and practical implementation.

It identifies general trends and factors that have led to less successful outcomes in the laws' implementation.

The concluding Chapter 7 re-visits the questions identified in this introduction, deriving some suggested answers from the lessons learned through critical assessment of the case studies and makes recommendations for "best practices" of statutory recognition of customary law with the intention of fostering further debate and discussion among policy makers, legal draftsmen, and civil society.

## II

### LAND TENURE SECURITY IN THE CONTEXT OF LEGAL PLURALISM

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Before beginning an extensive analysis of the mechanisms and effects of Botswana, Mozambique and Tanzania's efforts to integrate customary and statutory land systems, some background information concerning the current socio-legal context within which and in response to which these laws evolved may be useful. The following sections briefly define and outline: land tenure security; legal pluralism and its effects; the impediments that restrict the poor's access to the formal legal system; historical and modern manifestations of customary land rights; and the socio-economic, cultural and legal ramifications of increasing land competition in Africa and their impact on customary land administration and management in the context of legal pluralism.

## **2.1 Land tenure security**

Land tenure is the way land is held or owned by individuals or groups. A number of individuals can hold different tenure claims and rights to the same land. These claims may be formal, informal, customary or religious, and can include leasehold, freehold, use rights and private ownership. The strength of one's land claims may hinge on national legal definitions of property rights, local social conventions and multiple other factors. Land tenure rights often include the freedom to: occupy, use, develop or enjoy one's land; bequeath land to heirs or sell land; lease or grant land or use rights over that land to others with reasonable guarantees of being able to recover the land; restrict others' access to that land; and use natural resources located on that land. Land tenure security is the degree of confidence that land users will not be arbitrarily deprived of the bundle of rights they have over particular lands. Tenure security is the reasonable guarantee of on-going duration of land rights, supported by the certainty that one's rights will be recognized by others and protected by legal and social remedies when challenged (FAO, 2002).

Property rights are a social and legal construction, and may be conceptualized differently in formal, customary or religious legal systems. The rights and obligations of individuals, families and communities in relation to land are embedded in the rules and norms sanctioned by local legal systems, which dictate how citizens and officials must behave in the pursuit and enforcement of land rights. Legal systems manage how land rights are administered and enforced and how the rules that make land tenure secure are applied. How and whether the relevant legal system acknowledges one's land rights is the basis for land tenure security.

## **2.2 Legal pluralism**

Bruce defines customary law as: "A body of norms generated and enforced by a traditional, sub-state polity and governing the actions of its members... [that] may or may not be recognized by national law. Customary rules are best not regarded as informal, because they enjoy social sanction by a polity. They come with administrative institutions and powerful advocates and have deep cultural resonance" (Bruce, 2007 at 13). Generally, in areas where state infrastructure and administration are absent or inaccessible, customary legal systems flourish to address communities' legal needs, enforce community rules, and mediate and resolve local conflicts as necessary, among other actions. In some nations, customary leaders adjudicate and resolve almost all rural land conflicts.

In nations where one or more customary justice systems exist alongside the formal state justice system, a situation of *legal pluralism* exists. In the context of legal pluralism, the concurrent existence of two or more parallel, separate legal systems using different rules and legal paradigms to decide land cases may undermine the rule of law, lead to inequity and injustice, and foster land tenure insecurity. Certain actors often prefer one forum over the other; urban investors may seek formal court orders or stamped government certificates as proof of their land rights, while the rural poor may feel their land rights are best protected by the local customary system. Individuals who have the wherewithal to do so may "forum shop", strategically using either the formal or customary system to seek outcomes advantageous to their interests. A resulting lack of continuity between outcomes may create uncertainty within both systems. There may be no clear legal bottom line. Such non-predictability may lead to opportunistic behaviours, lawlessness and weak capacity of each system to successfully resolve land conflicts and protect land rights.

## **2.3 Historical constructions of customary land rights**

A variety of scholars have written on the colonial constructions of land rights in Africa. It is now widely accepted that "customary land rights" as they are known today, were deeply impacted by colonial policy (Berry, 1993; Chanock, 1991; Mamdani, 1996; Moore 1986; White 1965). In the words of one scholar, "Colonization was essentially a quest for land, a mission whose fulfilment necessitated negation or marginalization of pre-existing property

[claims] and property relations and the creation of new, capitalist-oriented property regimes" (Gutto, 1995 at 20). There is ample evidence that in the time before colonial rule, Africans throughout the continent practiced a wide range of property-holding systems. Yet during the era of colonial expansion throughout Africa, the idea that Africans held strong, individual, family and clan-based property claims stood in the way of colonial conquest and development. To suit their purposes, colonial powers chose to highlight and strengthen those parts of custom that enabled the colonial agenda.<sup>7</sup> Colonizers argued that as Africans had no notion of "private property", then all land was *terra nullis*, and free for the taking. Such theories aptly functioned to grant colonial governments' moral and legal justification to forcibly expropriate Africans' land.

While the history and details vary according to colonial power and national context, colonial governments generally allocated the best, most fertile lands to European settlers and moved entire African communities onto more arid, marginal lands. In some nations, lands were zoned as "native lands", "reserve lands" or "tribal lands", within which private land ownership was prohibited and outside of which most indigenous Africans were forbidden to live and practice their livelihoods. Colonial administrators emphasized that under

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<sup>7</sup> Early accounts of "native" land tenure systems by anthropologists, missionaries and colonial administrators deeply impacted colonial understandings of customary tenure in Africa. Central tenets of these perceptions included: the idea that rights in land were vested in the tribe or lineage as a result of either conquest, rights of first clearance, or ancestral claims on the land; that land, being inalienable from the lineage, could not be bought or sold, but belonged to the community as a whole; that a tribe was a single political unit under the leadership of a chief and occupying a fairly distinct geographical territory; that the chief had the power to allocate and distribute land, regulate the use of the land and resolve disputes; and that the chief was either the "owner" of the land or "a trustee holding land for his tribe" (Chimhowu and Woodhouse, 2006 at 349; Ng'ong'ola, 1992). While these findings were indeed either wholly or partly true, the colonial governments chose to ignore other accounts of individual and family land holding patterns and to highlight those aspects that seemed to illustrate that African had no notion of private property or inalienable property rights. In addition, Africans *themselves* may have vigorously asserted the concept of communal land holding in defense of their own interests. The vast tracts of land kept vacant for village expansion, religious ceremony, or the grazing of animals suddenly *had* to be reconceived as definitively *belonging* to someone. Africans literally could not afford to admit that no one had rights over vacant land; to concede that a piece of land was not owned by anyone meant losing that land to settler farmers. This strategy may have served at once to: expand the power of African leaders' negotiations with colonial governments by articulating their claims within a paradigm that the colonizers had created to serve their own ends; maintain African possession of vast, seemingly empty tracts of land; and establish a false reality for the colonizers that allowed for a space of ideological privacy in which actual cultural traditions could be maintained (Chanock, 1991).

customary law, all land was held communally and that ownership and individual claims to land did not exist. Under the rubric of respecting "native custom", these administrators prohibited the sale of land and restricted individual ownership. The "traditional" law promoted by colonizers was a law founded upon collective ownership overseen by the chief, with the colonial government acting as trustee of land.

In an effort to strengthen colonial control over these areas, chiefs were oftentimes made into puppets of the colonial state and forced to enact colonial policies against their communities' best interests. When standing chiefs refused to cooperate, new chiefs were appointed by colonial governments, regardless of any authentic claim of representation by the people they were expected to govern. In some instances, colonial courts responsible for adjudicating "native law" distorted it by filtering its norms through European legal concepts. Thus, while this system had the appearance of maintaining traditional "African ways", in reality the chiefs' powers and the "customs" being enforced were subject to the definition and detailed control of the colonial administration. By closely overseeing chiefs' land transfers and allocations, district officials were able to dictate Africans' land use and land-holding patterns. Chanock (1991 at 69) writes: "There is a profound connection between the use of the chieftaincy as an institution of colonial government and the development of the customary law of land tenure...rights in land were [suddenly] seen as flowing downward. Whatever they were, they were derived from the political authority, rather than residing in the peasantry".

According to Cousins (2007 at 300), such mediation and filtration of the customary by the colonial administration transformed custom by overly emphasizing the group-based nature of land rights, redefining women's land rights as secondary and subordinate to the land rights of men, and eroding "mechanisms that constrained the power of traditional leaders and kept them responsive to rights holders, these being replaced by a requirement for 'upward accountability' to the state, creating opportunities for abuse of power and corruption".

By the end of colonial rule, more than a century of colonial control over land had impacted and warped "custom". The statesmen who came to power at independence therefore had a peculiar job: reconstructing "African" systems of land management and administration and enacting rural policies grounded

in "traditional African practices". Across the continent, African statesmen nationalized land, making it the property of the state to guard it "in trust" for citizens. In Tanzania, Julius Nyerere wrote, "To us in Africa, land was always recognized as belonging to the community... the African's right to land was simply the right to use it; he had no other right to it, nor did it occur to him to try to claim one" (cited in Chanock, 1991 at 80). In Zambia, Kenneth Kaunda asserted, "Land, obviously, must remain the property of the state today. This in no way departs from heritage. Land was never bought. It came to belong to individuals through usage and the passing of time. Even then the chiefs and elders had overall control although... this was done on behalf of all of the people" (cited in Chanock, 1991 at 80). Such assertions of "custom" served the new governments in much the same way they had served the colonial governments: they localized ultimate control over land at the centre, obfuscating the subtle and complex nuances of customary land administration and management as actually practiced on the ground.

## **2.4 Broad overview of customary land rights and practices**

The "custom" of today is not the "custom" of the past. It may bear some resemblance, but centuries of interaction with outside forces have changed it irrevocably. What may be considered to be "customary law" today is a blend of customary African laws and western/colonial laws, coloured by the forces of globalization, technology, capitalism and socialism, local, regional and international political economics, decades of development work, and multiple other factors. Yet debate concerning the "authenticity" of customary land law is to some degree irrelevant, in that custom changes (and should change, just as in common law systems, legal precepts are continually evolving). What matters, rather, is that complex systems of laws, rules and principles govern land relations and land use in communities throughout Africa, and that these local customary systems continue to function and thrive alongside the formal legal systems established by national governments. The "authenticity" of a customary system should thus be measured not by its "purity" in reference to past practices but by whether it has become socially embedded and has legitimacy in the eyes of those who operate within it.

Although customary legal systems are nuanced and location-, culture-, livelihood- and socio-ecologically-specific, the following section is an attempt to set out a basic sketch of some of the commonly-agreed upon elements of contemporary customary law.

Scholars generally agree that the land use and ownership patterns of African peasants are made up of a complex mesh of overlapping and temporal claims, some of which are held privately by families and lineages, others of which are held communally in furtherance of the health, prosperity and religious practices of the greater community. Other areas are left open for the use of future generations, the shifting patterns of agriculture necessitated by fluctuations in rainfall, crop rotation and soil fertility, as well as changing community needs. Land rights are primarily derived from membership in a given group or allegiance to a specific political authority, or by arrangements like sharecropping. Chiefs and sub-chiefs or head men have the responsibility to know their communities' lands and must give approval for new grants of land, although families can oftentimes sub-grant their lands to other individuals or families. Customary authorities adjudicate land and natural resource-related conflicts according to locally-agreed upon rules and concepts of justice.

It is critical to understand that "customary" does not mean "communal." Custom is the *system* under which land is held, and communal is the *way* in which *some* of that land is used. Alden Wily explains that: "Customary domains are territories over which the community possesses jurisdiction and often root title...[W]ithin the domain, a range of tenure arrangements typically apply. These include estates owned by individuals or families, and estates owned by special interest groups in the community [such as] ritual societies or women's groups." This is not to be confused with "properties which are owned by all members of that community in undivided shares, often the larger or remoter pastures, forests, woodlands, swampland and hilltops.... these are Common Properties, defined by virtue of membership to the group, and a group whose composition may change over time" (Alden Wily, 2005 at 6).

**Box 1- General framework of contemporary customary land law in Africa**

Cousins summarizes current pan-African ideas of custom, drawing on the work of various anthropologists, sociologists, and other African scholars, in particular the work of the late Okoth-Ogendo. He lays out various constructs that he suggests are generally true of customary land management as practiced today:

1. Land and resource rights are directly embedded in a range of social relationships and units, including households and kinship networks; the relevant social identities are often multiple, overlapping and therefore 'nested' or layered in character (e.g. individual rights within households, households within kinship networks, kinship networks within wider 'communities').
2. Rights are derived primarily from accepted membership of a social unit, and can be acquired via birth, affiliation or allegiance to a group and its political authority, or transactions of various kinds (including gifts, loans and purchases).
3. Land and resource rights include both strong individual and family rights to residential and arable land and access to a range of common property resources such as grazing, forests and water. They are thus both 'communal' and 'individual' in character.
4. Access to land (through defined rights) is distinct from control of land (through systems of authority and administration). Control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access and resolving disputes over claims to land. It is often located within a hierarchy of nested systems of authority, with many functions located at local or 'lower' levels.
5. Social, political and resource boundaries, while often relatively stable, are also flexible and negotiable to an important extent; this flows in part from the nested character of social identities, rights and authority structures.

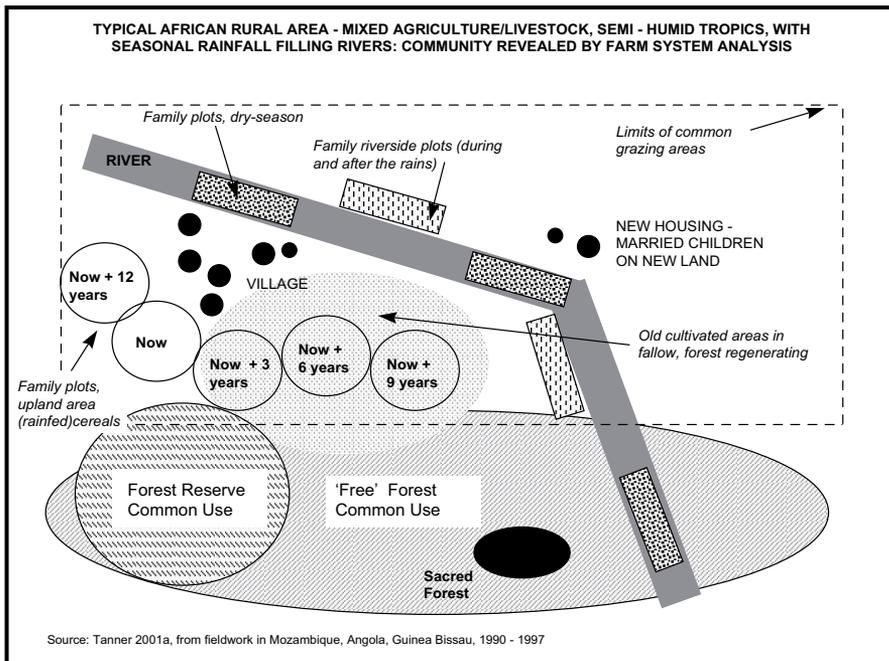
Scholars have found that customary land management and administration systems may also reflect:

*Power relations within a family or community:* Customary land rights are oftentimes "socially embedded;" the strength of one's land claims is negotiable and may be influenced by various cultural and societal factors. For example, the strength of one's land claims may more often hinge on intra-family dynamics, rather than on an individual's place in the community and kinship group. Research has revealed that land rights are negotiable, kinship relations can be manipulated, and, because customary rules can be ambiguous, an individual's rights to resources are highly impacted by that individuals' capacity to navigate various relationships and social forces (Quan, 2007 at 53, citing Berry, 1993; Chauveau *et al.*, 2006).

*Livelihood practiced:* The dominant livelihood practiced by a community greatly impacts the structure of the land tenure rights of that community. Pastoralists, sedentary small-scale farmers and hunter-gatherer groups, for example, will necessarily have different land claims, land use patterns, and rules governing land use. In certain circumstances and at particular times, one piece of land may be shared by groups practicing varied livelihoods, and thus its administration subject to overlapping customary paradigms. Cotula and Toulmin (2007a at 11) summarize that: "For a given piece of land, customary systems may cater for multiple resource uses (e.g. pastoralism, farming, fishing) and users (farmers, residents and non-resident herders, agro-pastoralists; women and men; migrants and autochthones; etc.), which may succeed one another over different seasons." Within a customary system, a range of secondary rights may also exist: rights of way, rights of access to use natural resources located on lands shared by more than one village or community, and seasonal access to common areas for pastoralists or hunter gatherers, whose customary rights include yearly passage through, visits to or use of lands and natural resources considered to be within the bounds of another, sedentary community.

*Ecological context:* Rainfall, temperature, soil fertility and climate may dictate small-scale farmers' use of risk aversion strategies such as shifting cultivation patterns, diversified plots, and leaving fields to lie fallow. Depending on the type of livelihood practiced and the kinds of crops regularly planted, families may rely on highly dynamic, shifting cultivation patterns (that vary according to season, rainfall, and other factors) as well as shared access to common

pool resources such as forests, pastures and water sources. Tanner (2005 at 13) explains that: "Each household requires access to and control over different types of land and resources over the course of a year. Some resources are communally used, such as forests, grazing land and water sources. Others may be regenerating and apparently unused as part of the lengthy rotation cycles commonly seen in this kind of system. [Erroneously] identifying and registering only the individual plots currently under cultivation – the plot labelled 'Now' for example - effectively leaves the vast majority of the local resource base unprotected as apparently 'free' land". See below an example diagram of "typical" African land use patterns in semi-humid tropical regions shown here in **Diagram 1**:



In some respects, these on-the-ground systems are not so radically different than the formal legal systems already in place and designed to manage the same basic human interactions. Both formal state laws and customary rules have been crafted to address the same basic land transactions, such as: allocation and formalization of secure land rights; land transfers and land sharing (long term or short term); land inheritance and distribution within a

family; use rights and rights of way; management of communal or "public" lands and natural resources; zoning and management of local lands (allocating areas for residence, public use, agriculture, industry, etc.); enforcement and protection of land rights; and adjudication of land-related disputes. Similarly, it is worth reflecting on the idea of the "customary" as both "traditional" or "ancestral" and also as "the ways things are done" or simply "community rules." Ouédraogo (2002) expresses this eloquently. He writes:

If the law is seen as no more than a set of norms established by the competent legal authorities, local land tenure practices will be accorded no legal validity and excluded from the judicial arena. But if, on the other hand, one sees law from an anthropological perspective as a social phenomenon for regulating individual and collective behaviour, one is obliged to acknowledge that the realm of justice does not necessarily begin with codified law. African societies have shown that they understand this by imposing models of behaviour on their members not on the basis of pre-established rules, but through a complex of social and cultural mechanisms.

Relatedly, it must be asked whether "custom" is truly just a moniker for "local," particularly given the absence of accessible, useable state systems at the community level. Ouédraogo (2002) describes how "to do justice to the dynamics of local land tenure, authors have gradually stopped referring to 'customary' land rights and have instead focused on 'local' land tenure practices." Every "customary" legal system is indeed local and unique to the community in which it operates; each community has its own particular set of rules and ways of making decisions, similar to its neighbours' but uniquely its own.

As such, it is arguable that the reality of a customary system can never be known by anyone not living and functioning fully within its precepts. Sally Falk Moore (1986 at 319) writes that "The domain of local autonomy is not large, but it is carefully insulated from external interference to whatever extent possible." Similarly, Whitehead and Tsikata (2003 at 94) assert that "a turn, or re-turn, to the customary raises acutely the question of what we know about how customary processes actually work."

## 2.5 The current socio-economic, political, and cultural context

As described above, a certain degree of flexibility and adaptability is inherent in any legal system; as socio-political realities change, the law, in turn, is modified to reflect those changes. Customary legal paradigms are no different: just as western legal systems' laws are constantly being created, amended and overturned, so too, are the rules of customary systems. The principles and "rules" of customary land tenure are often highly adaptive and in constant evolution, changing in response to cultural interactions, socio-economic change, political processes, and environmental and demographic shifts.<sup>8</sup>

Today, custom is changing rapidly as a result of various factors. Structural shifts in agrarian and tenure systems are transforming communities and leading to land scarcity. Climate change, environmental degradation and land speculation by investors are decreasing the amount of fertile, arable land available for allocation to community members. As a result, in many regions fertile land is no longer in abundance, particularly in peri-urban areas closer to main roads, markets, schools, hospitals and other infrastructure. Meanwhile, population growth is increasing demands on arable and productive land. In addition, across Africa, government grants of large land concessions to investors for agro-industrial enterprises, hunting and game reserves, forestry and mineral exploitation, ranches and tourism have served to hem in rural communities and deprive them of access to resources vital to their livelihoods and economic survival. Overcrowding and over-use of family and communal holdings has resulted, increasing degradation and fostering a breakdown in the rules that govern sustainable community use of common resources (Cousins, 2007, 1996; Odgaard, 2003; Taylor 2007).

These trends are impacting how individuals and families allocate, use and manage their land. As land becomes scarce, it grows in value, and as land values rise, land claims become more individualized. In this process, certain groups lose out as other groups gain. With less land to go around, "belonging" and social ties are redefined; outsiders may be pushed out, lose their land or face restrictions on their access to communal resources (Mathieu *et al.*, 2003). Within poor communities, vulnerable groups such as

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<sup>8</sup> McAuslan (2007 at 9), in summarizing the findings of various papers presented at a conference on tenure security in Africa, writes that the case studies presented "all drew attention to the strength and flexibility of customary tenure in adapting to a market economy whilst retaining some of the social concerns of local communities".

women, pastoralists, tenants and people living with HIV/AIDS are losing land to land-grabbing relatives, in distress sales to more powerful villagers, or in land disputes with neighbours (where surreptitious, gradual land-grabbing may be veiled as a "boundary conflict"), (Peters, 2004; Villareal, 2006). Meanwhile, individuals who already have wealth, knowledge, power, stronger kinship ties, and access to powerful decision-makers are more likely to triumph in struggles over scarce or valuable lands and natural resources. Some of these trends are briefly explored below:

**As land values rise, local elites are gaining land while the most marginalized community members lose.** The increasing value of land and the concomitant increase in land "sales" are exacerbating class differences within communities. Studies show that local elites often manipulate what leverage they have – financial and otherwise – to capture further control of available local land and natural resources (Peters, 2004). Citing relevant research revealing increasing evidence of land-related conflict and competition, Peters cautions that such conflict both is caused by and intensifies "deepening social differentiation;" including intergenerational conflicts, gender-based land disputes and resource struggles grounded in ethnic, cultural and religious differences. As such, she suggests that it is folly to assume that socially-embedded systems of land use guarantee full and equal access to all who need it. She emphasizes the point that "struggles within classes" are "as important as struggles between classes" (Peters, 2004 at 285, citing Sider, 1986 at 94). Peters (2004 at 301–302, citing Amanor 1999 at 20) writes that:

...the 'structures of inequality' being documented between generations, genders and communities have to be placed within 'wider processes of commoditisation of agriculture and social differentiation' A key socio-cultural dynamic of differentiation emerging from case studies turns on divisions within significant social units – family, lineage, village, 'tribe' or ethnically defined group. This can be seen as a process of *narrowing in the definition of belonging*. Social conflict over land takes the form of stricter definitions of those who have legitimate claims to resources, or, in other words, group boundaries are more exclusively defined.

Peters (2004 at 279) concludes that the end result of such conflict is an emerging class formation in rural areas. Cotula and Toulmin (2007) foresee that this class formation – and the resulting inequity – will only deepen in the coming decades, and caution that government policies intended to strengthen tenure security may actually end up contributing to an intensification of resource-grabbing. Such trends are leading to increased conflict, dispossession, landlessness, hunger and poverty. Most alarmingly, the land rights of the most poor and vulnerable family and community members are becoming less "embedded", and thus weaker, as described below.

**Women's land claims are getting weaker.** Under customary tenure, very broadly speaking, daughters do not inherit property from their fathers or uncles, but move onto their husbands' lands after marriage. Often a "bride price" is paid to a woman's family before marriage. This "bride price" can be quite high, and oftentimes leads to the tacit and sometimes explicit understanding that the man has "purchased" his wife and that she is his property. In addition, under patrilineal systems, women usually may not inherit their husband's land, as it is passed through the male bloodline from fathers to sons and is considered to belong to the husband's family or tribe. Meanwhile, under matrilineal systems, the land passes from uncles to nephews, also depriving women of their own rights to land. Thus, under customary law: women may not have personal claims to their own land, may lose their land when widowed, may be considered to be "property" of their husbands, and often have little to no decision-making power around questions of household agricultural production and sale.<sup>9</sup> However, there is

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<sup>9</sup> Within these basic parameters, there is some disagreement among scholars as to the relative strength of women's land rights. Many scholars argue vehemently that customary paradigms deeply disempower women, making them equivalent to "property" owned by their husbands. A second analysis is that the strength of women's land rights vary widely depending on each woman's own particular family situation. This view holds that since women's land claims are negotiated through kin (besides and in addition to a husband), women's land entitlements are therefore based on the fulfillment of a range of social obligations to family members, and thus the more well-connected and well-regarded a woman is, the stronger her claims to land (Whitehead and Tsikata, 2003 at 96–97). Whitehead and Tsikata cite Karanja as arguing that in spite of having no inheritance rights, under customary law "women held positions of structural significance, serving as the medium through which individual rights passed to their sons. They enjoyed security of tenure rooted in their structural role as lineage wives..." Whitehead and Tsikata cite a number of authors as concluding that the very strength of women's land claims is in their "embeddedness," and that this embeddedness provides a strong safety net. Other scholars argue a third position: that women's land rights under customary law are actually quite strong. Quan cites Yngstrom as finding that women can be considered to hold primary land use rights because of the recognition of the centrality of women's roles in production and

evidence that women who have been divorced, fled their marriages, or who never married are allocated land out of their parents' land (Giovarelli, 2006; Yngstrom, 2002).

While scholars vehemently disagree over the relative strength of women's land claims under customary systems, there is consensus among scholars, women's rights groups and feminist lawyers that as land becomes scarcer, existing customary safeguards of women's land rights erode. Fearing loss of land, customary leaders and families move from more flexible, negotiable systems of land holding (which take into consideration a woman's need to support herself and her children) to more rigid, discriminatory interpretations of gender-based land allocation. As land scarcity and value increase, customary law may be selectively preserving practices that subordinate women's land claims. Tripp argues that women's access to land has become significantly more precarious as customary protections for women's land rights have been disregarded and "forgotten," and Cotula and Toulmin (2007 at 108, citing Doka and Monimart, 2004) note that in some places men are reinterpreting and "rediscovering" customary rules that undermine women's land rights.

Fearing loss of land, customary leaders and families move from more flexible, negotiable systems of land holding (which take into consideration a woman's need to support herself and her children) to more rigid, guarded interpretations of land allocation for women. Remarkable on this phenomenon, Adoko and Levine (2008) describe how, "Men and women who value the principle that land is family owned are told that their culture is discriminatory and backward...When a widow is thrown off her land by her in-laws, men and women are told that their culture is wrong, not that those who throw widows off their land are wrong." In sum, despite the strength and inherent negotiability of kinship-based land claims, as land becomes increasingly commoditised, the land claims of less powerful members of the

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social reproduction; women's land use rights are secured by husbands' social obligations to ensure that their wives are able to feed themselves and their children. Similarly, Yngstrom finds that land use rights are not allocated and safeguarded by the husband alone, but by the entire extended family network that the woman has married into (Quan, 2007 at 55, citing Yngstrom, 2002). These authors conclude that "women's claims to land are not justified solely through the recognition of their obligations in food production, but that local-level land-management fora make moral and material evaluations of inputs and behaviour between male and female household members over a very wide spectrum when adjudicating land claims"(Whitehead and Tsikata, 2003 at 77-78).

family become more tenuous (Giovarelli, 2006; Peters, 2004; Quan, 2007; Yngstrom, 2002). As a result, women are losing their bargaining powers both among their husbands' kin and within their own families as well (Whitehead and Tsikata, 2003 at 91; Peters, 2004; McAuslan, 2000; Adoko, 2000; Yngstrom, 2002).

Given the consensus that as land becomes scarcer, existing customary safeguards of women's rights to land erode, advocacy by development agencies and governments for a new statutory reliance upon customary laws for land administration at the local level is alarming to many African feminists as well as to other groups with weaker or more vulnerable land rights claims. African women's groups have vehemently argued for free markets in land, titling and registration and other tenets of more "modern" land rights systems that give women the right to inherit, purchase, and own land in their own name. They hold that a return to the customary will only serve to further disenfranchise women's capacity to claim and control their own land. However, there is a fierce disagreement within the feminist community around the issue of women's groups pressing for individual title and land ownership. Accordingly, the criticism is that while richer, more educated urban and peri-urban women may gain from laws allowing women to own land (and for land to be sold) the vast majority of poor, rural women will only lose out as land becomes commoditized. Moreover, there is evidence that titling and registration efforts actually exacerbate gender inequalities: when only the name of the male head of household is put on the certificate, women are effectively stripped of any formal, legal acknowledgement of their land claims.

### **Box 2 - Debate over women's land rights and custom in Uganda**

Across Africa, women's groups have struggled tirelessly for the right for women to own their own land. This fight is best exemplified by Uganda, where a woman's right to own her own land is not yet enshrined in statutory law, and where there has been an on-going national debate around women's land rights for more than fifteen years.

The comments of a focus group convened by the Uganda Land Alliance illustrate some prevalent conceptions regarding women's right to land.

Participants offered such comments as: "Women should not own land. Women do not own their children so how can they own land?"; "Women are weak in the head and may make wrong decisions in relation to land"; "Land is for the clan"; "Why should I give land to someone who is in transit?"; "If female children are given land by fathers, they will not respect their husbands and will leave them at the slightest excuse"; "Women will become prostitutes [if they own land]"; and "When a girl is given land she may become stubborn" (Tripp, 2004 at 42). Asiimwe (2001) notes that in Uganda: "Women's attempts to control, transact, and own property, especially land, are resisted and sanctioned by the community and the clan as misbehavior. In part, this is due to the society's intolerance for women who breach social norms. A woman who purchases land is seen as having "sinister" intentions, using the land to run away from her marital home or as a place to "entertain" other men. Gaining power through land ownership is deemed deviant, because only "improper" women are not satisfied with what their husbands or other male relatives can provide them."

However, such comments and the general debate is best put into the context that the idea of an individual "owning" land is inconsistent with customary paradigms in certain regions of Uganda. Under customary practices, *neither men nor women* can own land. All land is considered held by the entire family or clan, in a line from the ancestors to the future generations, and no one individual should have the right to claim this land as his or hers specifically. Adoko and Levine (2008), writing on behalf of the *Land and Equity Movement in Uganda (LEMU)*, argue a point well-worth repeating at length:

"The conventional starting point in the battle is often the 'fact' that traditionally, women are not allowed to own land. The aim is then to replace traditional systems of ownership ('customary tenure') with more 'modern' laws which give women rights... We believe that the strategy has failed because it is based on a wrong premise, that according to custom, women cannot own land. As a result, we have fought the wrong battle - against 'tradition', instead of fighting for the cultural rights that ... exist, but which are being violated...."

Under customary tenure, land ownership is by families, not individuals. The head of the household would nominally be

referred to as the 'land owner', but it is a common mistake to interpret this as meaning that he has all rights in the land, and that his wife or others only ever enjoys 'access' rights if he gives his permission. Ownership is stewardship, or a trusteeship, and it comes with the responsibility to protect the land itself, and to protect the land rights of all those with a claim in that land – all family members, including future generations. If a man dies leaving a widow, she assumes the role of head of family. However, there would be extreme resistance to regard the land as the personal property of the widow – just as it was never the personal property of her husband....The specific rights that the widow and her late husband held are exactly the same."

**Widows and orphans are being dispossessed of their lands after the death of the male head of household.**

There is growing evidence that the AIDS pandemic is deeply impacting land tenure arrangements. Under customary practice, a widow rarely inherits land upon her husband's death, as the land (and oftentimes the family's livestock, furniture, and all productive assets) is reclaimed by her husband's family, goes directly to her adult sons, or is held in trusteeship by the widow or by uncles and other male relatives until her sons are of age. In the past, widows have usually been allowed to continue to live on the land of their husband's family for the rest of their lives, or until they remarried. Yet as land scarcity increases and land values rise – and as HIV/AIDS leaves younger and younger orphans who cannot assert their inheritance rights – there is evidence that husbands' family members are increasingly exploiting stigmas surrounding HIV/AIDS to dispossess widows and orphans of their lands (Villareal 2006, Strickland 2004, FAO, 2006). Villareal (2006 at 8) reports that instances of relatives stripping widows and orphans of their land and property have sharply increased, and that as a result "such widows and their children are left without shelter, means of livelihood and support networks in the community."

**Families are more apt to terminate the land use rights of long-term tenants, some of whom have been using the land for generations.**

Mathieu *et al.* describe how families who in the past granted long-term "loans" of land to "outsider" migrant families are increasingly reclaiming these lands abruptly, unilaterally, sometimes violently, and without notice. They often then use this land for their own needs or sell or rent it to richer

families or urban investors (Mathieu *et al.*, 2003 at 5). Mathieu (2006 at 4; Mathieu *et al.*, 2002) explains how: "Awareness of the scarcity of land and of the increasing precariousness of land tenure brought about ... [the practice of] indigenous landholders attempt[ing] to recuperate lands ceded to migrants 20 or 30 years earlier (often by the parents of the current land tenure decision-makers) by taking them back unilaterally." Interestingly, Mathieu *et al.* (2003 at 4–5) explain how the "owners" often use customary rationale for reclaiming the land and evicting the tenants:

Since [repossession] is not legitimate or defensible in traditional practice, withdrawals are often disguised in a form of words which refers to socially acceptable motives... [such as] failure on the tenant's part to respect custom or taboo, or a need for land on which to settle the children of the land owner."

**Land sales are increasing.** Increased land scarcity, rising land values, growing urbanization and a host of other factors are leading to growing informal land markets across Africa. Land is being acquired through a range of different kinds of financial transactions - from rental agreements<sup>10</sup> to sharecropping to outright sale and purchase. In many countries in Sub-Saharan Africa, land markets are illicit because national legal frameworks establish that all land is owned by the state on behalf of the people. People have leaseholds, and while they may own their houses or other improvements on the land, they do not own and therefore cannot sell the land itself. The situation is particularly acute in urban and peri-urban areas. Mathieu (2006 at 3) reports that: "These transactions are, however, ambiguous because in many cases they are hidden and made without relying on publicly acknowledged terms of sale and purchase. Moreover, these transactions are rarely accompanied by legal proof of purchase or ownership." There may be uncertainty concerning the content, terms and conditions of the exchange. Some land sellers take advantage of the covert, unofficial nature of the

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<sup>10</sup> Rural to urban migration and increased morbidity and mortality caused by HIV/AIDS may in some situations be serving to *increase* the supply of land in rural areas, as families may have insufficient labour to farm their lands themselves and instead choose to rent out land to individuals lacking the tribal or kinship ties necessary to be allocated land by the chief. Chimhowu and Woodhouse (2006 at 355) write that: "Renting land to 'outsiders' provides landholders with a means to retain control of this 'surplus' land against claims on it from other members of the local community." They hypothesize that "in the absence of formal land markets, and lacking the tribal or 'kinship' entitlement to customary land, vernacular markets offer an initial entry point through land rentals and in some cases land sales."

proceedings to engage in fraudulent practices such as making multiple sales of the same land. Alternatively, the purchaser may find that the seller has made the sale without the consent of other valid landholders in the family, who then challenge the transaction's validity.

Who is renting and buying this land? There are generally three categories of buyers/renters: 1) what Berry has called new rural "big men" – men who have income from a full time job or small business, and use their knowledge of bureaucratic processes to acquire lands upon which to begin agricultural ventures (Berry, 1993); 2) migrants lacking tribal connections who in the past would have been able to request land from customary leaders or prominent families but now must enter vernacular land markets to access land<sup>11</sup>; and 3) "those with rights to land through kinship but, where land is scarce, have to resort to land purchase or rental, often from a senior male relative with land to spare. Although buying or renting from a relative, they still pay the going market rate" (Chimhowu and Woodhouse, 2006 at 358). In addition, women are increasingly leveraging the land market to stake their own personal land rights outside of the usual kinship-based claims.<sup>12</sup>

Who is leasing and selling land? In some cases, the sellers are simply families in need of finances, or with a surplus of land. In addition, there is evidence of increased distress sales among families living with HIV/AIDS; as primary income earners fall sick and are unable to work, and as families urgently need money to pay for medicines and funeral expenses, families are forced to "sell" their land - often at rates far below "market value" – to survive (Villarreal, 2006 at 5 and 7). In other cases, the negotiations and sale of family lands are carried out in secret by one family member for his own

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<sup>11</sup> One illustration of the complex interaction of commercial land transactions and custom can be found in the rules surrounding renters' ability to make improvements to the land they are renting. In many customary systems, renters are oftentimes forbidden to undertake activities like tree planting or well-digging that, under customary paradigms, signify and are evidence of proprietary claims on land. These actions have the effect of conferring greater customary rights to the land in the eyes of the community, and as such, renters are explicitly forbidden to do so.

<sup>12</sup> Tripp recounts how in Uganda, women routinely purchase land as a way of circumventing customary land allocation systems. Interestingly, Tripp cites research by Troutt as finding that by the 1990's: 30 percent of female heads of households had bought land compared with 32 percent of male headed households; female-headed households were more likely than male-headed households to purchase their land holdings; and, in those areas that had the most active land markets, women's holdings most closely resembled those of men. Troutt (2004 at 60) concluded that stronger land markets improved land access for female-headed households.

personal gain, without the knowledge or permission of other family members with equal claim to the land being sold.

Interestingly, accompanying the emergence of a market for land rental and sale is the parallel development of improvised, *de facto* written documentation of these transactions. Mathieu *et al.* (2003) see these documents as a hybrid procedure at the interface between formal legal procedures and custom. Such written certificates of sales are essentially contract documents and receipts, creating "proof" of the exchange for posterity, should the transaction be challenged or questioned. The use of signed documents to legitimize land transactions are a kind of "informal formalization" (Benjaminsen and Lund, 2003) and are intended to reduce the ambiguity and uncertainty of extra-legal and non-customary land transactions. The papers may include the names and identity card information of the parties to the exchange, the amount paid, the duration of the agreement if a rental, the size and boundaries of the land transferred, and the rights and obligations of the parties, etc. The papers rarely mention the words "sell or buy" (Benjaminsen and Lund, 2003, at 124). In addition to the parties to the exchange signing the document, sometimes witnesses observe the transaction and sign as well.<sup>13</sup> However, these papers may not be sufficient to prevent the transaction being contested by stakeholders with prior claims to the land based on custom and kinship<sup>14</sup> (Mathieu, *et al.*, 2003). Chauveau and Colin (2007 at 76) summarize that "While these transactions seem to be more common and visible nowadays, they are still far from being considered publicly acceptable or legitimate. We can therefore talk of a market that is emerging but as yet unmentionable (at least in public), since its practices violate customary principles of land tenure and land legislation as understood at the local level."

**As land relations within communities shift, customary land administration and management practices change.** As explained above,

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<sup>13</sup> In other instances, local officials (who witness these transactions in the name of the government department they represent, but according to "unofficial rules") stamp the documents with an official seal (Lavigne Delville, 2003; Mathieu *et al.*, 2003; Toulmin *et al.*, 2002).

<sup>14</sup> In some instances, the "sales" *should* be challenged, having been undertaken by only one member of a diverse extended family - often the male head of the household. Acknowledging the increased frequency of commercial land transactions and the potential for unilateral and harmful decisions, new laws - such as Tanzania's Village Land Act - include provisions that nullify land sales if the sale has not been agreed to by both spouses, regardless of whether the purchaser/renter was acting in good faith (discussed further in Chapter 5).

there is evidence that customary systems are being re-interpreted to legitimize new practices, address emerging needs and respond to changing circumstances (Woodhouse, 2003 at 1712, citing Lund, 2000). Such transactions are cloaked in the customary processes that have always governed land allocations within rural communities. Scholars describe how, as land becomes a scarce and valuable market commodity, there is a social demand for more individualized, precise and formalized land ownership rights, yet this shift is "totally embedded in social relationships" and therefore "contradictory, complex and ambiguous." In the process, traditional meanings "retain their significance in the local social reality" (Mathieu *et al.*, 2003; Cousins, 2007; Daley, 2005).

For example, while in the past "gifts" and tokens of respect for customary authority were paid to chiefs in exchange for allocation of community land, in some regions such "gifts" are now growing to be more closely related to the market value of the land (Cotula and Cissé, 2007 at 89). Chimhowu and Woodhouse (2005 at 359) observe that even during "standard" customary land transactions, there is a shift towards market values, evident in the "increasing weight placed upon cash, relative to symbolic elements of exchange, and an increasing precision in the 'seller's' expectation of what they should receive." They describe how "the transition from the 'gifts' expected as tokens of acknowledgement of customary authority and of anticipated reciprocity, to payments more closely related to exchange values of the land, is not always easy to define" (Chimhowu and Woodhouse, 2005 at 401). Furthermore, in some countries, there are reports of chiefs redefining their customary stewardship of land as being actual "ownership" and then selling common lands for their own profit (Blocher, 2006; Ayine, 2008). Chimhowu and Woodhouse (2005 at 360) note: "The social embeddedness of vernacular land markets means that those with greatest influence over land under customary tenure (tribal chiefs and heads of patrilineages) will be best placed to gain from the commoditization of land through sales and rents." Mathieu (2006 at 3) writes that:

These new land tenure practices reflect a period of uncertainty, a time of "hesitation" as people find themselves between two systems and two periods: a time not long ago when customary principles were the point of reference; and an uncertain future, in which new rules and norms seem inevitable, including the commercialisation of land. The stability of long-standing customs seems to be weakening in many places, and yet

tradition is still very much alive and meaningful for the communities concerned, as a source of legitimacy and a binding element in social relationships."

## **2.6 Lack of access to justice and legal pluralism**

To a large degree, legal pluralism, extra-legal land dealings, and the kind of mixing of formal and customary practices described above exist because for various reasons, the formal legal system is inaccessible to the poor. As this publication argues, the solution is not to eliminate the customary, but to integrate and harmonize the two systems so that nations' formal legal frameworks mirror, legalize and oversee the customary, which should be allowed to continue to evolve and develop like any body of common law, so long as customary practices do not violate national laws or basic human rights. Such integration must ensure that the poor can actually access and successfully navigate any new land administration and management processes; if they do not, efforts to integrate and streamline the two systems may partially or wholly fail, as exemplified in the case studies below. In such instances, the poor will remain essentially confined to customary land administration and management systems that appear to be increasingly discriminatory towards the land claims of more vulnerable populations, while those with the wherewithal to do so will leverage the formal system to claim valuable lands and resources.

It is important to remember that people may very rationally choose to use customary mechanisms to govern and resolve their conflicts because in certain contexts customary bodies are more successful at their functions and better suited to the local context than state institutions. For example, customary tribunals may: hear a dispute more quickly than the formal court system; be conducted in the language that local people speak; give greater weight to relevant local evidence and culture; address conflicts holistically and arrive at compromises that allow both parties to a conflict to go on living amicably with one another (rather than ruling in favour of one party at the expense of the other); and are generally less expensive and more easily accessed by the rural poor than the formal system.

However, when the formal legal system does not recognize customary rules relating to land holdings and transfer, the poor have little protection against land speculation by elites, investors and state compulsory purchase

processes. While customary systems may provide a high measure of tenure security within a community, they are often insufficient to protect the poor's rights in the event of a violation by more powerful, external actors who may not only possess the wealth and knowledge to access the formal system, but also manipulate it to their advantage.

A succinct summary of the various obstacles to genuine access to and successful use of formal systems is therefore necessary to the foregoing legal analysis. Some barriers are inherent in the very structures of national governance and administration, while other barriers are embedded in social relations: in the gender dynamics within a family, in the class relations between individuals within a community, in the cultural differences between ethnic groups in a region and myriad other interpersonal power dynamics. As the case studies will show, successful implementation of land laws that endeavour to elevate customary rights into the formal system may be impeded by the following factors:

**Lack of knowledge of the national legal system.** The rural poor, often living in small, isolated villages remote from urban centres and government infrastructure, may have only a vague conception of the existence of legal rights other than the customary rules that govern social relations within their communities. They may not know of the existence of basic legal instruments like the national constitution and its guarantees of certain inalienable social and human rights for all people. The poor may learn a law has been passed, but never gain access to information about what rights and obligations the new law has created. Incorrect rumours of what a law dictates may circulate, creating misconceptions and breeding confusion. Even when the poor know that they have rights, they may have little idea how to take action to claim, defend and enforce these rights.

**Administrative offices and judicial systems are often inaccessible.** Legal and administrative systems are often designed and located in such a way that the poor can only access them with great difficulty and effort. Various factors may impede the poor's access to the formal legal system, including:

- **Cost.** Administrative and legal processes can be expensive and are often unaffordable for the rural poor. There may be separate costs associated with every step of administrative and judicial processes, including obtaining necessary documents, making photocopies and

filing applications. Even if such fees are set at minimal levels, the accumulation of multiple fees may amount to prohibitively high costs for the poor. Rights-holders also must bear the costs of travel to courts or government offices, the loss of income that may result from being absent from one's livelihood while pursuing the application in government offices, and, in the case of land titling, the high cost of surveyors' fees. Furthermore, the cost of hiring a lawyer, whose assistance may be critical to the success of a claim, may be too expensive to be possible.

- **Time.** The poor oftentimes simply cannot neglect their jobs or livelihoods for the amount of time necessary to follow an administrative process or pursue a legal case to its conclusion. The opportunity cost of time spent in court or in administrative offices filing appropriate papers and completing technical procedures may take the poor away from their work for too long.
- **Language and communication.** Necessary forms, administrative processes and legal proceedings may be written or conducted in a language that the poor cannot speak; when the poor do not speak the official language of a country and formal legal procedures only take place in this language, this effectively precludes the poor from using them. Furthermore, high rates of illiteracy among the rural poor decreases their ability to navigate administrative procedures, which are often based on written documentation and completion of relevant forms. The poor may be unable to fill out necessary forms and gather required documents.
- **Distance.** Where government offices are located in urban centers, time, resource and cost constraints may prevent the rural poor from accessing them; administrative offices and courts may be located in cities and towns far away from where the rural poor live, necessitating days of travel to reach them.

**Laws and regulations dictate complex processes that are difficult for the poor to navigate.** Laws that grant greater land rights to the poor may nonetheless be accompanied by regulations or administrative procedures that in practice restrict the poor's access to land and set the stage for bureaucratic mismanagement. In administrative situations, laws too often prescribe complex processes with multiple steps to be undertaken at various agencies, involving the approval and signature of different actors in separate locations. Each step adds an additional burden of time, resources and cost for the

poor. The time limits for every step of the process may be clearly set out in the law, but in reality take twice as long. Bureaucratic red tape can hold up each stage of the process, mandating seemingly senseless additions of extra papers, proof, and signatures. Standards and procedures may be inappropriate and excessively inflexible. Such overly multifaceted processes may not even be clear to the officials who perform them, and as a result progress haphazardly.

**Customary rights don't "fit" into formal legal procedures.** Formal state systems may have no "room" for the way that local communities do things. For example, the procedures for formally registering one's land claims may require furnishing proof and evidence that poor villagers cannot provide, or the proof that an applicant *can* provide might not be considered valid or acceptable evidence. As discussed below in the context of Tanzania, pastoralists are losing claim to their communal grazing land because, in the absence of buildings, fences, cleared fields or other markers of "ownership", they are not able to generate appropriate legal "proof" that the lands are theirs (Tenga and Nangoro, 2008 at 10).

**Weak institutions.** State systems that lack funding, capacity and other essential resources make it difficult to implement and enforce laws that protect the land rights of the poor. Poor management and record keeping, lack of necessary finances, overlapping jurisdictions, lack of coordination between government agencies, system confusion, understaffing, lack of capacity of existing personnel, lack of training, lack of access to necessary information (such as local maps), and lack of technical equipment can lead to inefficient and ineffective justice and administrative systems. The responsible institutions may be weak due to systemic failures, such as excessive centralization. As a result, even the most educated and empowered of the poor may be frustrated in their attempts to use formal systems to protect and enforce their land rights. As will be illustrated by the case studies, even good laws may be constrained by training and capacity issues.

**Corruption, rent seeking and elite capture.** Corruption, rent seeking practices and bad faith bureaucratic mismanagement may create enormous stumbling blocks for the poor as they try to claim and protect their land rights within formal legal systems. Laws and institutions may be manipulated by those in power to further secure their access to valuable land, resources and institutional supports. At its most extreme, judges may accept bribes to arrive at certain desired decisions, high level state officials may funnel state funding into their own pockets rather than into pro-poor development

projects, or wealthy investors may exert their power and financial influence to claim or be allocated fertile lands already under cultivation by poor farmers. Corruption and rent-seeking may also be petty, such as when underpaid low-level administrators demand small bribes at every step of an administrative process simply to guarantee that the processes move forward. Oftentimes the corruption is initiated or condoned by those at the very top level of power within a system or office.

Moreover, as will be illustrated in the case studies, even when the laws as written protect the interest of the poor, state officials may choose to frustrate the laws' implementation so as to ensure that they never achieve the intended redistribution of power and resources.

**Limited opportunity for review.** Limited supervision and oversight mechanisms, including judicial review of the decision of lower courts, local administrators and customary leaders, further weakens the poor's ability to ensure that their land rights are protected. In some nations, such appeals mechanisms simply do not exist, particularly for decisions made by customary leaders. When mechanisms for review do exist, they may not be accessible due to location, cost or technicality of the procedures. When there is little possibility for review or appeal of poorly completed procedures or corrupt practices by state actors, the poor may be left without recourse and feeling that they have suffered an injustice. Such outcomes may embitter the poor against state justice mechanism or drive them to seek extra-legal means of seeking justice.

Various nations are working to proactively address these issues by integrating customary and statutory legal systems. Botswana, Mozambique and Tanzania's legal frameworks each successfully address some of these obstacles and phenomena, and fail to adequately address others. For, as illustrated by the case studies, efforts to integrate statutory and customary legal systems must go beyond writing new laws – they must also take on a full restructuring of all administrative and judicial mechanisms and agencies charged with enacting and enforcing land laws. These nations' experiences are explored in the case studies below.

### III

## BOTSWANA'S TRIBAL LAND ACT

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### 3.1 Introduction

Botswana's Tribal Land Act, (ch. 32: 02) passed in 1968, was truly revolutionary for its time. When it was enacted, the Tribal Land Act was heralded as a mechanism for modernizing and ordering existing customary systems of land tenure in Botswana's tribal areas. It was the first land law in Africa to convert customarily-held land claims into formal, secure title, equal in weight to grants of land made by the state. It was the first land law in Africa to rule that land would be governed according to customary laws, and to base its policies on a commitment to providing for the land and natural resource needs of all "tribesmen".

In drafting the Tribal Land Act, legislators intended to preserve customary land tenure principles while creating a modern administrative system. As such, they did not explicitly change the complex rules and systems by which customary tenure was administered. Instead, they overhauled the power structures *behind* those systems by replacing chiefs and headmen with appointed and elected land boards. The land boards were intended to balance custom and modernity and lead the way for the creation of a new, independent state, founded upon principles of uniquely African law. In its creation of land boards, the Tribal Land Act created a mechanism to bring customary authorities, state officials, and elected representatives together to jointly take on the administration and management of land in Botswana. The land board model was and is, at root, a well-designed decentralized system of land administration that relies heavily on a back and forth with local customary leaders.

The primary innovations concerning statutory recognition of customary land rights established by Botswana's Tribal Land Act and accompanying legislation include:

- Customary, elected, and state-appointed leaders administer and manage land together under both customary and statutory tenure, thereby merging the two systems into one;
- Mechanisms to transform customary land claims into legal grants of customary land rights, as valid and enforceable as formally-granted titles;

- Holders of customary land rights have tenure security over their individually-held land, as well as the ability to transfer, sell, bequeath, or assign their land rights;
- All allocation of land is free of charge, as under custom.

The longevity of Botswana's Tribal Land Act offers multiple insights into how systems that integrate customary and state land administration practices evolve and are modified over time. As Botswana has changed, aspects of the land board system have also changed. For example, as a result of a series of amendments over the years, the land boards have been professionalized and modernized. Customary leaders were removed from the land boards and replaced by officials appointed by and accountable to the Minister of Lands. Other aspects of the land board system have remained relatively the same since their inception; for example, the land boards have found it necessary to continue to rely on ward chiefs or headmen (the lower-most level of the customary hierarchy) for their on-the-ground knowledge of local terrain, existing customary claims, and community dynamics. So while chiefs have been phased out, headmen have remained an integral part of Botswana's land management system. However, glaring gaps in the law – particularly regarding the land rights of women and minority ethnic groups – have not yet been filled in, despite recent amendments.

Meanwhile, rural people are more hemmed in and impoverished than they were in the 1960's; in 1975, Botswana passed the Tribal Land Grazing Policy, which gave the land boards the authority to cede large tracts of what had formerly been communal grazing lands, held under customary tenure by rural pastoralists, to private cattle ranchers. The results of this policy have meant overcrowding and over-grazing of grazing lands, and the slow erosion of sustainable, customary management of communal resources in the rural areas. Moreover, the urbanization of Botswana society and the growth of land markets have meant that the definition of "custom" as set out in the Tribal Land Act has had to be manipulated to continue to apply to the policy goals of the modern nation state and the increasing commoditization of land. As described by Nkwae (2008 at 1), "Even after 40 years of experimenting with the land boards, Botswana still describes its land administration system as a 'work in progress'. It continues to adjust and adapt its land administration based on traditional land rights and cultural values to meet the needs of a rapidly urbanizing economy and growing land market".

A careful analysis of how Botswana has shifted the content and procedures of its Tribal Land Act and addressed "custom" over the years yields rich, contradictory conclusions. In essence, the land board model is a potentially very good one. Yet decades of central government mandates about how the boards are to operate and what policies they must enact - and legislators' failure to amend the act to address its complete lack of protections for vulnerable groups - have arguably undermined the promise and intent of the land board model. In this way, Botswana's land board system sheds a clear light on the complex interplay of law and administration, of legislation and its on-going implementation by government actors.

### 3.1.1 History

Botswana became a British protectorate in 1885. Before that, it was populated by majority Tswana tribes governed by rigorous and well-defined political and legal systems. In the 1890's, the colonial administration ordered that the chiefs of the five principal Tswana tribes identify the boundaries of their tribal territories. When the chiefs had done so, the described boundaries were formally mapped and deemed "tribal lands." The colonial administration declared the remaining land to be "crown land," under the jurisdiction of the colonial administration. Any tribes living within "crown lands" lost formal claim to their lands – in particular the non-Tswana minority groups whose leaders were not consulted, most notably the Basarwa (or San) people. The colonial government then allocated crown land to settlers, who held their lands under freehold title. Those areas claimed by the tribes were left to govern themselves according to British principles of indirect rule; the chiefs retained semi-autonomous authority, under which they continued to allocate land within their boundaries, settle disputes, manage natural resources and establish tribal rules according to custom.

Significantly, because of Botswana's semi-arid ecosystem, among other factors, its average population density is three people per square kilometre. The livelihood practices of the Tswana centre around pastoralism, with some degree of small-scale farming. Taylor (2007 at 6, citing Arntzen *et al.*, 2003, based on 2002 agricultural statistics) reports that in 2002, Botswana had one of the highest ratios of livestock to people in Africa, with 1.7 million people to more than 5.2 million cattle, goats, sheep and donkeys. The semi-arid conditions in Botswana and the requirements necessary for successful and healthy livestock grazing mean that even small communities need access to wide expanses of land to ensure access to seasonal natural resources and

sufficient water. To fulfil these needs, the majority of the tribal lands were originally used as communal grazing areas.

At Independence in 1966, the new government inherited a nation that was divided into three separate systems of land tenure: tribal land (48.8 percent); state land, formally crown land (47.4 percent); and land held under freehold title (3.7 percent). Since independence, Botswana's stated policy has been to increase the size of tribal lands, and so significant amounts of state land have been converted into tribal land; by 1998, 71 percent of Botswana's land was characterized as tribal land, 24.8 percent was state land, and land held under freehold title accounted for 4.2 percent of national territory (Adams *et al.*, 2003 at 1). The country's emphasis on providing land to all citizens has its roots in the customary land tenure systems of Botswana, which allocated land according to the principle of the "right of avail": the chief had an affirmative obligation to provide all members of a particular tribe with access to water and the residential, farming and grazing lands necessary to adequately provide for their welfare.

Botswana's new statesmen were serious about preserving Tswana custom; the Tribal Land Act was meant to significantly overhaul the colonially-instituted legal framework governing the country's land. To support these efforts and others, they created a "House of Chiefs" whose function was essentially serve as a fourth arm of government and additional check and balance on the executive and legislative branches of government; the House of Chiefs' role is to represent tribal interests on any pending legislation, regulation or policy of the central government.<sup>15</sup>

### 3.1.2 Overview of customary land management in Botswana

Before turning to a full explanation of Botswana's efforts to formalize customary laws and systems, it is necessary to explain exactly what those

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<sup>15</sup> The House of Chiefs is "entitled to discuss any matter within the executive or legislative authority of Botswana of which it considers it is desirable to take cognizance in the interests of the tribes and tribal organizations it represents and to make representations thereon to the president, or to send messages thereon to the National Assembly" (constitution, art. 88§5). The legislature may not proceed upon any bill or amendment that may affect the designation, recognition, removal of powers of chiefs, sub-chiefs or headmen; the organization, powers or administration of customary courts; customary law, or the ascertainment or recording of customary law; or tribal organization or tribal property unless a copy of the proposed legislation is referred to the House of Chiefs for review and comment" (art. 88§2).

customs were considered to be in 1968, when legislators enacted the Tribal Land Act. The basic customary rules of land and natural resource administration and management among the Tswana are grounded in the fundamental right of every individual to use, hold or access land sufficient for his or her survival and livelihood needs, according to membership in the social group. Of particular note is that for information about how customary land holding and management were practiced, legislators drafting the act relied not on *communities'* articulated experiences but on *Westerners'* anthropological fieldwork among the Tswana tribes<sup>16</sup>, particularly the research and findings of Isaac Schepera.

Generally, under Tswana customary law, when a new settlement area was established, the chief first chose the site of the *kgotla*, or tribal meeting place, and then laid out the sub-sections of the village (wards) in a semi-circle around the *kgotla*, with each ward administered by a ward headman. The land was laid out in concentric circles according to designated use: the areas closest to the *kgotla* was zoned as residential land, then, further away, arable land for cultivation, and beyond that, communal grazing land. The communal grazing land stretched from the edge to the arable lands all the way to the boundaries of another village or tribe (Ng'ong'ola, 1992).

Those land allocations granted by land boards to the Basarwa have generally been smaller than to other groups, on the grounds that they are not *able* to clear or cultivate larger pieces of land (Adams *et al.*, 2003, citing Mitchelsen, 1995).

The land administration of each ward was decentralized to the ward headmen, who would then allocate land for residential and arable purposes to families within the community according to each family's size, current need, and projected future needs. If the land originally allocated became inadequate, a family could approach the headman and requested an additional allocation, often out into the adjacent grazing lands (Machacha, 1982; Ng'ong'ola, 1992). Once allocated, these family land rights were generally exclusive and permanent. No compensation was required for an allocation of land, but there was an expectation that the family would protect, conserve and sustainably use the land they had been allocated

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<sup>16</sup> The emphasis on Tswana custom in the Land Act meant that the practices of other ethnic groups within Botswana were not provided for in the law, and as a result their claims to land and natural resources have become increasingly fragile over time.

(Adams *et al.*, 2003 at 3). Nkwae (2008 at 4) characterizes a family's customary rights to occupy and use land as secure, inheritable, perpetual, and transferable for a consideration amongst group members. Adams *et al.* describe how customary law allowed families the flexibility to transfer interests in residential and arable land among themselves; unimproved land could be transferred freely without the intervention of the chief, and while there were no land sales, there were no rules forbidding compensation for improvements made to the land being transferred. They write, "The free transfer of unimproved land could be taken for granted. It was received free and was given free. It was not viewed as a commercial asset" (Adams *et al.*, 2003 at 3). Meanwhile, families could allow others to cultivate crops on their lands, and could collect payments from the user for the benefits derived.

Communal grazing areas were considered common property for the benefit of all community members and was used equally, as-needed, by members of the tribe. All community members had the right to graze their animals there; there were no exclusive use rights or fences and all animals mingled freely across the area (Adams *et al.*, 2003 at 3). However, these lands were carefully administrated to ensure sustainability; Nkwae (2008 at 6) describes how the communal areas were generally divided into administrative districts supervised by overseers whose permission was needed in order to keep cattle or hunt in an area; he argues that the communal areas were essentially highly regulated common property – carefully overseen to ensure against over-grazing, unsustainable uses, and responsible natural resource management. All community members had the right to gather wood, soil and other materials for fuel and building construction from common areas. Rights to surface waters flowing naturally (springs, rivers, pans, etc.) were also held communally. Any family that sought to sink a well or build a dam had to request permission from the chief. However, once constructed, this family or individual then had exclusive, inheritable rights to this well or reservoir as well as exclusive grazing rights to the land in a specific radius around the well or reservoir (Adams *et al.*, 2003 at 3; Nkwae, 2008 at 6).

Access to other natural resources was highly regulated by the chief. For example, the killing of wildlife was determined by the chief, who could organize community hunts or limit the numbers of animals killed according to value, scarcity, and other principles (White, 2000 at 3). Similarly, the chief would carefully regulate when fields could be burned and when thatched grass, necessary for house construction, could be harvested (after the seeds

had matured). The chiefs' management of the area's natural resources was generally considered to be successful; internal rules and incentive structures functioned to insure against overgrazing and sustainable use of natural resources (Makepe, 2006 at 44).

Under customary law, land disputes were handled in the same hierarchical framework by which the land was allocated and managed; local land disputes would first be addressed by the family head, then the relevant ward head or headman; if no resolution was reached, the matter would be referred upward to the sub-chief and then the paramount chief of the tribe (Nkwae, 2008 at 4).

### **3.2. Tribal land boards**

#### 3.2.1 Composition of the tribal land boards

Whereas before the act was passed, all tribal land was held and governed by chiefs, the Tribal Land Act created state administrative bodies called land boards, and mandated that, "All the rights and title to the land in each tribal area...shall vest in the land board...in trust for the benefit and advantage of the citizens of Botswana and for the purpose of promoting the economic and social development of all the people of Botswana" (art. 10(1)). Land boards are corporate bodies with the capacity to sue and be sued (art. 9). Originally, Botswana established 11 land boards to administer all land in the nation. However, when the land boards started operating in 1970, so many people made applications for grants of land and formal title that the boards were soon overwhelmed.

Moreover, it was soon obvious that most residents of the vast areas these land boards governed were unable to travel the far distances necessary to arrive at their offices, making them all but inaccessible. To remedy this, in 1973 Botswana passed the *Establishment of Subordinate Land Boards Order*, which created a system of more local, subordinate land boards and transferred to these boards the functions of sub-chiefs, heads of villages, and other customary land authorities. While in theory the subordinate land boards were created to preserve local knowledge and understanding of land use and make land administration systems more accessible, in practice, even subordinate land boards still administrate very large areas in rural Botswana and may be located over a hundred kilometres away from the local communities whose land they manage (Adams *et al.*, 2003 at 5).

The Tribal Land Act originally set out the composition of each land board to include, generally: the chief of the area administered by the board or his sub-chief as an *ex officio* member, an individual appointed by the chief/tribal authority, two members elected by the district council, and two members appointed by the minister responsible for lands, for a total of six members (art. 3§1). In their original configurations, one third of each land board's membership was affiliated with the chief and his authority, one third was locally elected, and one third was appointed by the Minister of Lands. In this way, the act built in a solid system of checks and balances on the abuse of power by any one faction – either by chiefs or by centrally appointed authorities. Land board members were both upwardly accountable to the central ministries, downwardly accountable to the local people, and horizontally accountable to the chiefs.

However, the composition of the boards has changed significantly since the act was first passed. Today, chiefs no longer have an established position on the board. In the 1990s, chiefs, sub-chiefs and their nominees were prohibited from standing for selection or election to land boards on the grounds that there was a potential conflict of interest on those occasions when appeals against land board decisions were to be taken to the customary courts, over which some of the chiefs presided (Clement Ng'ong'ola, 1992). As a result, today each land board consists of twelve members: five members elected by the people at the *kgotla*, two members who are representatives of the Ministry of Agriculture and the Ministry of Commerce and Industry, and five members appointed by the Minister of Lands (Adams *et al.*, 2003 at 4).<sup>17</sup> These changes effectively mean that today, on every land board, seven out of twelve of the main land boards (and six out of ten of the subordinate land boards) members are appointees or representatives of the various ministries and the Minister of Lands, accountable only to the central government.

Meanwhile, the elected members are no longer fully the product of direct democracy; their election is now conducted in the following way, as set out by the *Tribal Land Act Regulations* (1973, as amended, hereafter referred to as

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<sup>17</sup> The subordinate boards started with a membership consisting of one member elected by the district council, one elected by the main board, one ministerial appointee and one member elected by headmen and sub-chiefs of villages in its area of jurisdiction. Today, the composition of the subordinate land boards includes ten members: one representative of the Ministry of Agriculture, one representative of the Ministry of Commerce and Industry, four who are appointed by the Minister of Local Government, Lands and Housing, and four elected members.

"regulations"): individuals interested in being elected to the land board must submit applications, to be reviewed by a land board selection committee<sup>18</sup> which then chooses 15 of the applicants to be candidates for election at the *kgotta* (regulations, art. 2§2, 3). On the day of the election, residents of the tribal area assemble at the principle *kgotta* and elect the candidates.<sup>19</sup> From the list of candidates elected by the people, the *land board selection committee* then selects the most eligible members, according to their judgment, and from this list the *minister* makes appointments to the land board.<sup>20</sup>

Commenting on these changes to the appointment/election process, Ng'ong'ola (1992) writes: "The heavy ministerial influence over the composition of the boards ... [appears to confirm] the understated objective of strengthening the hand of the government in the control of tribal land..." White (2000 at 7) found that because the minister has final discretion over the "elected" members, "appointments to the land board are widely viewed as a form of political patronage." Moreover, the minister may require any member of a land board to vacate his or her office, on the grounds that s/he has missed too many meetings without cause, is unable to exercise the functions of his office, or "is otherwise unfit to discharge the functions of this office" (art. 6§3 (a–c)). White (2000 at 7) writes that "While these powers have never actually been exercised, their existence is a constraint to serious defiance of central government's wishes by a land board official."

In effect, therefore, while the land boards started out as a diverse, balanced body composed of customary authorities, elected community members and appointees of the central government, their composition over time has become dominated by appointees of the central government who are only

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<sup>18</sup> The land board selection committee is composed of: the district commissioner (who is the chairperson), the land board secretary of the tribal area concerned, the council secretary of the district council; the chief or sub-chief of the tribal area; and a member appointed by the minister (regulations, art. 2§11).

<sup>19</sup> Originally, people indicated their vote for a candidate by standing in a queue behind that candidate, an innovation designed to mirror customary practices. However, to ensure genuine freedom of choice and expand voting opportunities to community members who may have to work during the meeting time, the process was amended in 2006 to done by secret ballot box (regulations, art. 2§4).

<sup>20</sup> When narrowing the list and making final appointments, the regulations specify that the minister shall take the qualifications and experience of the candidates into consideration and "shall endeavour to ensure that, so far as possible, all relevant parts of the tribal area, including subordinate land board areas, are represented on the land board" (regulations, art. 2§7,8, 10).

upwardly accountable. It may also be noted that despite various modifications and amendments over the past 40 years, gender balance and ethnic diversity on the land boards are yet to be addressed in the text of the act.

### 3.2.2 Function of the tribal land boards

The Tribal Land Act transferred the chiefs' powers over land as a whole to the land boards and subordinate land boards.<sup>21</sup> As such, land boards are meant to function in the place of customary authorities. Specifically, Article 13§1 provides that:

All the powers previously vested in a chief and a subordinate land authority under customary law in relation to land, including: the granting of rights to use any land; the cancellation of the grant of any rights to use any land; the imposition of restrictions on the use of tribal land; authorizing any change of user of tribal land; or authorizing any transfer of tribal land, shall vest in and be performed by a land board acting in accordance with powers conferred on it by or under this act.

This list essentially enumerates the main land-related duties of a chief, translated into modern legal language. The main land boards' functions also include:

- Hearing appeals of decisions of subordinate land boards (art. 13 §2);
- Determining land use zones within the tribal area (pending the approval of the minister) (art. 17§1–3);
- Determining land management plans in consultation with the district council, village development committee and tribal authorities (art. 17§4);
- Maintaining land records;
- Ruling on applications for the creation and allocation of bore holes in their areas;

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<sup>21</sup> Ng'ong'ola (1992) argues that while the asserted rationale for this change was greater democratic control of land and an established series of checks and balances of chiefly power, this system was in reality designed to allow the new government the ability to assert greater control over tribal land administration.

- Implementing national land-related government programmes in tribal areas;
- Formulating and implementing policies to ensure the sustainable management of tribal land under its jurisdiction<sup>22</sup>;
- Allocating land to citizens of Botswana under common law;
- Processing applications for common law land grants made by non-citizens (for which the final decision lies with the Minister of Land and Housing); and
- Creating and enforcing regional policies<sup>23</sup> (Adams *et al.*, 2003 at 5).

The subordinate land boards are entrusted with granting the more common requests made, including hearing and ruling on applications to use land for: building or renovating residences, ploughing large tracts of land, grazing cattle or other stock, and other similar uses and needs (art. 4§1). Subordinate land boards also: make recommendations to the land board in respect to applications for boreholes in their areas; hear and adjudicate disputes concerning customary land grants or rights within their area of jurisdiction; and make recommendations to the tribal land boards regarding applications for common law grants of land" (art. 4§2–4). Again, such functions are essentially a formalized list of functions previously performed by customary authorities.

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<sup>22</sup> When a land board proposes to adopt a policy relating to its functions, it must outline the proposed policy and submit this outline in writing to the district council, who can accept it or reject it (regulations, art. 5§1, 2). In this way, the district council was supposed to serve as a check on the land board's policy-making powers. If the land board disagrees with the district council's decision, it can appeal the matter to the Minister of Lands, who has the final say on the matter (regulations, art. 5§3,4). Then, before any policy can be put into practice, people have to be consulted and their responses solicited; to effectuate this, land boards are to go around notifying people of intended policy changes. Local people's contributions have to be considered in the final implementation of these policies, and land boards must also consult with village development committees, tribal authorities and any other interested stakeholders when determining land use planning, zoning and management (art. 17). However, how these consultations are organized – where they are to be held, how notice of the meetings will be posted, etc. – is not outlined in the act or accompanying regulations. It is thus not clear how well publicized the proposed policy is in practice, or how public participation works in practice and whether the opinions of the public are taken into account.

<sup>23</sup> The types of policies that land boards have the mandate to establish include: creating land use and zoning plans, imposition of restrictions on land use, the planning and "zoning" of areas for exclusive use as grazing areas or commons including stipulation of the numbers of cattle that can graze in the areas around bore holes, and policies that promote sustainable use and management of natural resources in the area for which it has jurisdiction.

### 3.3 Land rights

It is important to note from the outset that the Tribal Land Act created three different types of land rights within tribal areas: customary, common law, and freehold. However, from 1968 until 2008, the land boards had not granted one freehold title; only customary and common law leasehold rights have been issued (Nkwae, 2008 at 10–11, 15).

- **Customary land rights:** customary land rights are exclusive use rights (but not ownership rights) over all family land acquired by custom within the tribal areas. Customary land rights may not be cancelled without just cause. Individuals, groups, or land boards may hold customary land rights. If they desire, holders of customary rights may seek an exclusive, inheritable customary land grant certificate.
- **Common law land rights:** two kinds of common law land rights may be issued for residential, commercial or industrial land uses: 1) a month-to-month lease for land not exceeding five acres; or 2) longer-term leases granted for 99 years for residential purposes, or for 50 years (with a possible extension of a second 50 years) for commercial, farming and industrial purposes. After the term of the lease expires, the land is subject to reversion to the local community. Common law land rights may be registered under the *Deeds Registry Act* (Cap. 33:02) and are mortgage-able and transferable. These rights were designed for foreigners, national investors, and others seeking to freely transact their lands (arts. 23–24).

#### 3.3.1 Formalizing and requesting customary land claims

Although it does not state this clearly in either the text of the Tribal Land Act or its regulations but is inferred, registration of customary land rights is not necessary or required; land allocated according to custom *before* the act was passed does not need to be formally registered for claims and rights to be legitimate and enforceable. This provision elegantly formalized all existing customary land claims the moment the act passed into law and eliminated

the need for rural community members to immediately undergo lengthy and complex registration procedures.<sup>24</sup>

Applications for customary land grant certificates that document pre-existing land claims and for *new* grants of customary land are to be made to and granted by the land boards (art. 13§1). As under custom, all grants of customary land rights are free. Grants of land under customary law may only be made to citizens of Botswana, unless the minister has personally granted an exemption (art. 20). Land boards may not make grants of customary land rights to individuals intending to use the land for trading, manufacturing or other business or commercial purposes, regardless of whether they are a citizen of Botswana (art. 20§2). For these purposes, an applicant must seek a grant of common law land rights (see below).

The mechanics and logistics of how customary land is allocated and formalized are set out in the regulations. The opinion and inclusion of local customary authorities – the ward headman – is mandatory at two discrete moments: before a hearing on the availability of the land applied for, and a literal "pointing out" of the boundaries of the land in front of relevant community members.

When applying for "a customary right to the use of land", an applicant must "produce his national identity card, and furnish *verbally* or in writing to the secretary of the land board" information regarding, among other things, his identity, family status, the nature of the right sought (i.e. for grazing, agricultural, residential or business purposes), the location, description and extent of the land affected, and information regarding and other land rights the applicant possesses (regulations, art. 6§1, emphasis added). Allowing for verbal provision of this information allows illiterate applicants equal opportunity to seek land grants and aligns with customary practice. The applicant bears the burden of identifying the land requested.

An applicant "*may* also produce to the secretary a letter from the head of the ward concerned or his local representative stating whether the granting of the right applied for will conflict with other people's land rights, or with present land use" (regulations, art. 6§2, emphasis added). However, if the

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<sup>24</sup> However, over time, it seems that the majority of rural families have in fact done so, as Botswana has modernized and as the consequences of not having a formal grant of customary land right have come to light.

applicant does not provide this letter, the board secretary *must* consult the ward head to ascertain that the land requested is free and available for allocation (regulations, art. 7§1, emphasis added).<sup>25</sup> As soon as the secretary has received an application, he or she must make this consultation, publish notice of the application publicly, and inform the applicant of the date on which the board will deliberate the application (regulations, art. 7§1). If, after a hearing, the land board is satisfied that the applicant is a citizen of Botswana, the land applied for is unclaimed and available and suitable for the use proposed by the applicant, it makes and records the grant of customary land rights (regulations, art. 8§1–2). In the regulations (First Schedule, Form 1, under regulations 11), applications for customary land grants allow that applicants may list "natural features" to demarcate the bounds of the land.

Before a certificate can be granted, the land board has an affirmative duty to ensure that the boundaries of the land applied for "are pointed out to the grantee...in the presence of the head of the ward or of two responsible heads of family, and such pointing out shall be recorded in the certificate of grant" (regulations, art. 10§4). This process nicely mirrors customary practices, and creates a further check on the precision of the allocation's boundaries. After the boundaries of the land have been agreed upon and demarcated, the board must accurately describe the boundaries of the land allocated in the certificate, referencing any permanent and ascertainable boundary points (by attaching a sketch). Then, the allocation is entered into the registry and a certificate issued.<sup>26</sup>

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<sup>25</sup> The National Land Policy Review, done in 2002 (described below) notes that "In the case of customary grants, the main counterbalance was supposed to be public consideration of the application and ascertaining the attitude of the ward head or his representative towards the grant being made. These precautions were not sufficient to minimise or prevent multiple, conflicting, disorderly and disputed allocations in densely settled areas. The regulations have now been revised to provide for a clearer indication by the ward head whether the allocation proposed would conflict with existing land rights or current land use. However, this assumes that the ward head has access to all the information required. In a rural area, that may be the case, but it is often not so in a rapidly expanding peri-urban area (Government of Botswana, January, 2003 version, p. 148).

<sup>26</sup> This seemingly simple and transparent process is often unfortunately complicated by the land board's lack of information about those customary land rights that were already in existence and immediately become formalized in 1970 when the Tribal Land Act came into force. Given this information gap, the land boards may not know what parcels of land in a given area are free and which are occupied. *Applicants* have an affirmative responsibility to identify the land they would like and bring this request to the land board, who then confirms the choice in the absence of serious objections from the ward headman. Nkwae (2008 at 12) reports that at the time of writing in 2008, the fact that the applicant is expected to identify

Once a customary land allocation has been granted, it cannot be cancelled without just cause and without first having ascertained the opinion of the relevant ward head (regulations, art. 15(1)(b)). The grounds upon which a grant of land may be cancelled include: non-eligibility of the grantee; failure to observe restrictions upon land use; contravention of laws relating to planning or good husbandry; use of the land for a purpose not authorized by customary law or in contravention of customary laws; or to ensure the "fair and just distribution of land among citizens of Botswana" (art. 15§1(a–d)). The grounds for termination were made more rigorous in the 1993 amendments; the provision that if, "without sufficient excuse, the land has not been cultivated, used or developed to the satisfaction of the land board...in accordance with the purpose for which the grant was made" was added to the suitable reasons for cancellation and repossession of a grant of customary land.

Ng'ong'ola (1992) notes that in this respect, the procedural rules and regulations regarding cancellation of customary grants "appear to replicate customary law while masking a rather fundamental transformation of the customary procedures." He argues that land rights under the customary system were enduring and resilient: land was rarely taken away for misuse or non-use, and there was no presumption that unused land had been abandoned. Moreover, this provision grants too wide a scope of powers to the land boards, in that it is too vaguely worded, and dispossession may rest entirely on the subjective opinion of land board officials. How is the land board to determine that the land "has not been cultivated, used or developed to [its] satisfaction"? On what grounds and specific indicators? While the check with the ward head may help to ensure the continuance of customary protections for land claims, the amendment points to an alarming and significant widening of land board powers.

Another considerable deviation from custom is that under the Tribal Land Act, land is granted to individuals, not families, as was the case traditionally. Relatedly, the land rights to be registered make no provision for the rights of family members or secondary use rights. Although applications for customary land grants must include information on whether the applicant is

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the land him or herself, including indicating its particulars and preparing a sketch plan, has been found to "encourage unplanned land development, overcrowding of wards in the villages, [and] multiple or excessive land allocations."

married and how many children he or she has, there is no place on the form to record the names of the spouse and children, and no provisions that allow family members joint or derivative rights in the land (regulations, art. 6(b)). Writing as early as 1982, Machacha (1982, n.p.) observed that:

The registration of plots may result in other members of the family being left out....The man, as the head of the family, applies for land to be used by the family. If the plot is registered in the name of the head of the family, legally the plot belongs solely to him and, in the case of divorce, the other members of the family may have no claims on such land. This means that the registration has worked against their customary interests and rights."

To date, the act and regulations have not been amended to address this.

### 3.3.2 Grants of common law land rights within tribal areas

Common law land grants are issued for residential, commercial or industrial land uses (art. 23). Common law land rights were originally issued largely to foreigners and only outside of tribal areas. However, in the early 1980s this right was extended to citizens of Botswana within the tribal areas. Ng'ong'ola (1992) relates how "In 1983, it was recommended that even Tribesmen who would otherwise be entitled to a customary grant should not be denied a common law grant, especially where this may assist in the use of the interest as security for building or development loans." Adams *et al.* (2003 at 4) conclude that by providing for the granting of common law leases within tribal areas, the act was "an early concession to an emerging land market" and "sanctioned the privatization of the commons." Common law leases have also played another important role in the management of tribal land in Botswana; communities who seek to create community-based natural resource management schemes may be granted common law leases (explained further below).

The process of applying to the land board for both kinds of grant of common law land rights (both small scale and month-to-month as well as large scale and long-term) within tribal areas is complex, necessitating multiple steps, approvals and much documentation. An applicant must go to the land board and provide information concerning such matters as the

nature of the right sought, the location, description and extent of the land desired, and provide proof of citizenship (regulations, arts. 18(1) and 19(1)).

As with the process of customary land grants, the applicant bears the burden of identifying the land requested. The land board then *investigates the registry* to see if the land requested is held under customary rights and draws up a draft agreement of grant including the proposed terms and conditions of the lease, which it sends to the minister along with a diagram or sketch plan that clearly defines the boundaries of the land requested, submitted to it by the applicant (art. 24§4, regulations, 20§1–3). Every common law grant to a non-citizen must be checked by the minister (art. 24§2 and art. 31). There is no other process of "investigation" as to whether the land is already held under customary tenure.

Because customary land rights do not have to be registered under the law, this often has meant that this check of the registry regarding the requested land's availability fails to show that indeed the land is occupied; for those land grants made before 1970, there will often be no formal documentation of customary claims in the registry. It is therefore significant that there is no affirmative obligation for a land board to make a more thorough investigation with local authorities. It is unclear why there is no mandated check with the relevant ward head during this process. Moreover, while a public hearing is mandated before the granting of a customary land right, there is no public hearing requirement for a grant of common law land rights. This has in a number of instances led to the withdrawal of common law land allocations upon the discovery that they infringed upon customary land rights.

If the check of the registry finds that the land *is* indeed held under customary tenure, the holders' consent to the common law grant is mandatory. The land board must certify to the minister that that the customary holders of the land have been informed of and agreed to the proposed common law grant application (art. 24, regulations 20§3–4). Yet the law does not define what counts as "consent", which leads to uncertainty about safeguards in the process for the customary rights holder. The act also fails to include protections to ensure that customary rights holders are fully aware of their right to give or withhold consent or that prevent against coerced consent. There are no oversight mechanisms in the text of the law to protect customary rights holders from losing their land to more powerful applicants for common law land grants.

If all involved parties consent to the application for a common law land grant, the land board then executes a formal contract to this effect which is entered into various registries (regulations, 20§5–7). The land must thereafter be properly demarcated and surveyed and the lease registered in the deeds registry (art. 24§4, regulation 21).

It is noteworthy that the act does not provide for the involvement of the community before the land board allocates common law grants within tribal areas to outside investors. A recent lawsuit has challenged the procedures governing grants of common law to foreigners on exactly such grounds. Adams and Palmer report that two Kgalagadi community trusts challenged a land board's decision to lease what they considered to be their communal grazing land to two foreign-owned companies. The communities argued that "in not consulting the district council or neighbouring communities and not advertising the land (to give citizens a chance to either apply or object) the land board has breached its duty of trust and is acting contrary to the principles of natural justice" (Adams and Palmer, 2007, at 6).<sup>27</sup>

### 3.3.3 Women's and minority land rights

Botswana's Constitution provides that "every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex" to the fundamental rights of "life, liberty, security of the person and the protection of the law; freedom of conscience, of expression and of assembly and association; and protection for the privacy of his home and other property..." (constitution, ch. II, art. 3). It also has a clause that explicitly provides against discrimination on the grounds of "race, tribe, place of origin, political opinions, colour or creed." (constitution, ch. II art. 15) However, there are no explicit provisions on women's right to own land or to protect the land claims of minorities in the constitution, the Tribal Land Act or its regulations.

The Tribal Land Act was amended in 1993 to substitute the phrase "citizen/citizens of Botswana" for what had formerly been "tribesmen," in Article 10§1. At the time, this amendment was "vehemently opposed by some chiefs and members of parliament" (Taylor, 2007 at 6, citing Mathuba, 2001) on the grounds that although the phrase "citizens of Botswana" was

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<sup>27</sup> See [www.mmegi.bw](http://www.mmegi.bw)

more ethnically and gender neutral, it "explicitly transferred the resource rights that were enjoyed at the level of tribal affiliation to the level of citizen....[and therefore] formally opened up the 'frontier' of unallocated communal land to any citizen, rather than restricting eligibility to those whose tribal affiliation was associated with that particular area" (Taylor, 2007 at 6). Tribes argued that the amendment limited their rights to sovereignty over their lands and created a new vulnerability to land speculation by outsiders (Taylor, 2007 at 7).

Generally, under customary law in Botswana, women gain access to land through their fathers, husbands, sons, or paternal uncles, and only sons inherit land from their fathers (Kalabamu, 2006). Perhaps in line with custom, the Tribal Land Act and accompanying regulations do not once discuss women's rights in landholding, inheritance or division upon dissolution of marriage. The act also has no provisions that serve to ensure equitable and fair inheritance or transfer of land within a family.

As explained above, when receiving an application for a grant of land, the board secretary must note the size of an applicant's family. However, there are no rules dictating how the size of the family should be taken into account; nor are there protections regarding putting the names of all of the family members on the certificate. Furthermore, Article 38 (amended in 1993) provides that land rights shall not be transferred without the consent of the land board except in the devolution of such land on inheritance (art. 38§1). This provision, meant to allow for freer inheritance of land within a family, effectively takes away any checks on discrimination against widows, orphans or other less powerful family members who might lose their land upon the death of the male head of household. Criticizing Botswana's "unwavering adherence to gender neutrality" Kalabamu (2006) argues that after decades of gender discrimination, such neutrality is in fact *tacit continuation of gender discrimination*. He writes that "the government has to date never initiated policies seeking to address women's housing needs or land requirements."<sup>28</sup>

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<sup>28</sup> However, other laws may provide some degree of necessary protections; the National Land Policy Review of 2002 reports that before recent amendments to the *Deeds Registry Act*, "husbands alone could deal with the registrar where spouses were married in community of property" but that new regulations mandate that "neither spouse alone can deal with the registrar where a marriage is in community of property. They have to act jointly" (Government of Botswana, January, 2003 at 74). However, when a marriage is not in community of property, this protection does not apply.

Furthermore, because Botswana's Tribal Land Act was designed around anthropological research on the dominant majority Tswana tribe, it essentially functioned to entrench Tswana traditions and rules as "the" customary law of the land. It therefore, by omission, implicitly discriminates against those ethnic and tribal groups that have different residential, land use, and livelihood patterns and practices from the Tswana. White concludes that "there is also an undoubtedly ethnocentric view of what land needs are. These are generally held to be limited to the *motse* (compound), *masimo* (field) and *moraka* (cattlepost) of the traditional Tswana system" (White, 2000 at 12–13). The customary land rights of non-Tswana tribes have to date not yet been recognized in any statute or law or acknowledged in practice. Their territorial rights to areas for hunting, gathering, foraging and the right to exclude others from their customary lands remain unprotected (Ng'ong'ola, 1999). As will be explained below, this has had very negative ramifications for the security of non-Tswana peoples' land tenure security in Botswana.

### **3.4 Natural resource management**

Customary land management in Botswana has various interrelated parts: land allocation, land conflict resolution, and natural resource management. Under custom, land allocation was only part of a chief or headman's land-related duties; *how* the land was to be used was a key piece of customary land governance. Under custom, as described above, the chief and headmen were responsible for managing sustainable use of common resources, and making rules for grazing, hunting, and gathering within common lands. Moreover, in Botswana, the state is the custodial owner of all natural resources, managing them on behalf of the citizens of the country. Under the Tribal Land Act, this responsibility was allocated to the land boards. The Tribal Land Act and accompanying regulations therefore transferred both the land allocation powers and the zoning, land management and planning components of customary authority to the land boards.

Yet neither the Tribal Land Act nor its implementing regulations outline rules for sustainable land and natural resource use and management, or articulate procedures for zoning, land use planning, and land management policies in the tribal areas. Although the act contains a requirement that boards consult with various village-level and customary bodies in their determination of zoning plans (sec. 17§4 allows that "after consultations with the district council, village development committees, tribal authorities and

any other interested institutions, the land board may determine management plans, and their revision from time to time, for the purpose of assisting or giving guidance on the use and development of each land use zone within a tribal area"), 40 years of implementation has shown that this lack of detail has in practice led to the land boards not seriously taking on the management functions of the customary leaders. This has contributed to the adoption of unsustainable policies and practices concerning common lands held according to custom.

About half of Botswana's land is occupied and used communally (Government of Botswana, January, 2003 at 18). For many years, state officials in Botswana worried about potential degradation due to the then-prevalent theory of the "tragedy of the commons". To address this, in 1975, Botswana introduced the Tribal Land Grazing Policy (TLGP) - to be administered by the land boards - which was intended to remedy the perceived overgrazing and degradation of communal areas (and was also likely intended to foster private investment and economic growth). The basic assumption behind the TGLP was that there were vast tracts of "unused land" that could be ceded to large herd owners to establish commercial ranches, thus taking pressure off of the overcrowded and over-grazed communal grazing lands. The stated aims of the policy were to counteract and reduce rangeland degradation while simultaneously fostering sustainable commercialization of Botswana's livestock industry (Taylor, 2007 at 7; Cullis and Watson, 2005 at 7-9). There was considerable opposition - including public protest - to the TLGP, yet the state proceeded with its implementation (Cullis and Watson, 2005 at 7-9).

Under the TGLP, the government re-zoned tribal land into four areas: commercial land (within which individuals and groups would be granted exclusive rights); communal land (allocated and managed according to customary principles); reserved areas (which were unallocated lands to be held as a safeguard for the poor's future land needs); and "wildlife management areas" (in which cattle were permitted to graze but which were primarily reserved for wildlife) (Watson and Cullis, 2005).

Large areas of the communal grazing areas, re-zoned as commercial land, were allocated to wealthy cattle ranchers under 50-year leases.<sup>29</sup> Despite

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<sup>29</sup> Rent for these commercial leases was to be paid to the land boards (Mathuba, 2003). Cullis and Watson (2004) describe how, despite the availability of loans under the TGLP to allow

Article 17§4's suggestion that the land boards make zoning decisions in consultation with various local authorities, the results of the TLGP indicate that such consultations have been a vastly inadequate check against infringement upon the customary land rights of pastoralists and hunter-gatherers already using the lands suddenly zoned as "commercial" (Taylor, 2007; Adams, *et al.*, 2003). The 1991 National Policy on Agricultural Development (NPAD) exacerbated the situation; it allowed owners of boreholes to fence the grazing lands around their borehole, areas that often extended to 3 600–6 400 hectares. This gave borehole owners exclusive 50-year rights to all water and natural resources over the large areas surrounding their wells.<sup>30</sup>

As will be explained further below, these policies have had hugely deleterious impacts on both the sustainable management of communal areas, and on the customary land rights of minority tribal groups like the Basarwa (San). Also, because these policies were national in scope and established by the central government, they have served to erode the land and natural resources management decision-making powers of the land boards as set out in the Tribal Land Act.

### **3.5 Dispute settlement and governance**

#### 3.5.1 Appeals of land board decisions and conflict resolution

Individuals may appeal the decisions of the land boards regarding: the granting of customary rights to use any land; the cancellation of the grant of any rights to use land; the imposition of restrictions on the use of tribal land; a change of user of tribal land; and the transfer of tribal land (art. 14). In addition, an applicant who has been denied a common law land grant may also appeal the decision (art. 27).

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less-wealthy ranchers to acquire commercial land, the large down payments required to secure a commercial lease precluded their allotment to all but the most wealthy. Meanwhile, the government never designated the planned "safety-net" reserved areas, and the stipulation in the TGLP that no single person could be allocated more than one ranch was never implemented, resulting in single individuals holding multiple large ranches (Cullis and Watson, 2005 at 7–9 citing Peters, 1994).

<sup>30</sup> Taylor (2007 at 7) reports that under TGLP, over 2 million hectares, or approximately 4 percent of Botswana's land area of 58 million hectares, were allocated for ranching in the late 1970s and 1980s. By 2005, NPAD had sanctioned the enclosure of an additional 2 million hectares, taking a full 8 percent of Botswana's land area out of the common pool.

The Tribal Land Act's accompanying regulations provide that rights of appeal may be accessed by a wide range of stakeholders: regulations, Article 14 permits that "any aggrieved person" may appeal a land board decision. Appeals can be lodged verbally or in writing. However, because of the amount and depth of information that must be furnished (in writing), the regulations specify that prospective appellants must be helped if necessary.<sup>31</sup> Such rules were designed to ensure that anyone, regardless of literacy, may enforce their rights of appeal. However, neither the act nor its regulations establish rules or guidelines on the factors determining *how* an appeal is to be ruled upon, or what kinds of evidence – customary or not – may be presented.

In the occasion of a local land conflict, subordinate land boards are the bodies of first review; they hear and adjudicate disputes concerning customary land grants or rights within their area of jurisdiction (art. 4§3) Individuals may appeal all decisions of the subordinate land boards to the main land boards. In the original 1968 version of the act, appeals of the land boards' decisions were to be made to the minister. Yet such a process created the potential for a serious conflict of interest; more than half of the members of each land board are either appointed or approved by the minister. To remedy this, the 1993 amendments to the Tribal Land Acts included Article 40, which provided the minister the power to establish separate land tribunals for appeals of certain land board decisions.

In 1995 Botswana passed the *Tribal Land (Establishment of Land Tribunals) Order*. Article 40§3 of the Tribal Land Act allowed then that "any appeal [of a land board decision] which is said to lie to the minister... shall be referred to the land tribunal for the area concerned for settlement." There is a right of appeal from a decision of a land tribunal to the High Court (art. 11). As a result of these amendments and the Tribal Land (Establishment of Land Tribunals) Order, what was originally in 1968 a three-tier appeals structure grounded in administrative bodies (with a fair likelihood of conflicts of interest) is today a four-tier structure that moves from administrative jurisdiction to judicial jurisdiction as the matter is appealed.

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<sup>31</sup> At the subordinate level, the board clerk is responsible for helping appellants frame and enter their appeal (Subordinate Land Board regulations, art. 16§1). At the board level, "where an appellant requires assistance in formulating or lodging an appeal, he may seek such assistance from the district commissioner of the area concerned (regulations, art. 12§3).

While the order does not affirmatively create a space for customary evidence, it does set out that "In hearing and determining an appeal, a land tribunal ... shall not be bound by the rules of evidence or procedure applicable in civil or criminal proceedings, and may disregard any technical irregularity which does not, and is not likely to, result in a miscarriage of justice" (Tribal Land (Establishment of Land Tribunals) Order, art. 6§3). This provision allows for some degree of informality and integration of customary practice within the proceedings; permitting a departure from strict rules of evidence may create the space for customary evidence that may be of equal or greater weight in land-related disputes.

One issue of note is that the chiefs and headmen were barred from being members of the land boards in the 1990's on the grounds there was a potential conflict of interest on those occasions when appeals against land board decisions were to be taken to the customary courts, over which some of the chiefs presided (Ng'ong'ola, 1992). However, nowhere in the laws or regulations are customary courts established as a valid body to which a land board decision could be appealed. Moreover, the *Tribal Land (Establishment of Land Tribunals) Order* created an entirely new judicial institution to ensure against conflicts of interest. Yet customary authorities were not reinstated to the land boards after the order was passed.

### 3.5.2 Control, governance, accountability and supervision

Under custom, chiefs and headmen lived in close proximity to the people they governed and interacted with them daily, which strengthened their accountability to the people. However, as explained above, the land boards and subordinate land boards are both centrally appointed and physically located quite far from communities. On this count, the Tribal Land Act has strayed far from customary checks on abuses of power; there are no mechanisms to ensure downward accountability to local villagers in either the Tribal Land Act or its regulations.

The Department of Lands coordinates the land boards' activities, provides financial and logistical support, communicates policy guidance from the central government, and monitors and oversees their operation (White, 2000 at 11). While the land boards have multiple reporting obligations to the central government, they have no reporting requirements to the communities whose lands they are administering. This gives rise to concern, in light of the

fact that land boards are charged with natural resource management, zoning, and making common law allocations to commercial enterprises within tribal lands. Makepe (2006 at 49) writes that "The structure of the land boards was intended to integrate local participation in land planning and administration. However, the powers and controls established under the act ensured that the management system remained largely centralized because board members were ultimately answerable to the minister."

In regard to zoning, land use management and regional policy formation, land boards receive policy guidance from the district council and the President of Botswana, who "may give to any land board directions of a general or specific character" (art. 11§1, 2). White (2000) writes that in practice, the Department of Lands, acting under the president, "has largely usurped the policy guidance function of the district councils." Financially as well, the boards are rigorously accountable to the central government. As collectors of fees and rents, the land boards are subject to a yearly audit. To this end, they must provide the general auditor and minister with a full accounting of all expenditures and revenues collected (regulations, art. 32). The local communities are not part of this process.

One further aspect related to governance of the tribal areas that perhaps elucidates government views on customary land rights is in the different levels of compensation paid for land that the state has compulsorily acquired under Articles 32 and 33 of the Tribal Land Act. Article 33, as revised in 1993, holds that in this event of compulsory acquisition, the individuals who have had their land expropriated "may be granted the right to use other land, if available, and shall be entitled to adequate compensation from the state for ...the value of any standing crops taken over by the state; the value of any improvements effected to such land, including the value of any clearing or preparation of land for agricultural or other purposes; the costs of resettlement; and the loss of right of use of such land" (art. 32§2). In contrast, Botswana's *Acquisition of Property Act* (Cap. 32-10) Article 16§1 allows that for compulsory acquisition of land held under a common law lease - even if on tribal land - is compensated more highly, according to its market value and other salient factors. The 2002 Land Policy Review (Government of Botswana, January, 2003 at 16) group noted that:

The present policy, under which holders of property rights under customary law on tribal land are entitled to receive less compensation than holders of common law lease rights on

state land and tribal land is unjust. A unified and fair system of land acquisition and compensation should be established that is applicable to all land and all people with property interests in land. ...The scope of compensation offered and the rights of those to be compensated under the *Tribal Land Act* should be extended to achieve parity with the provisions of the *Acquisition of Property Act*.... There is no justification for the continuance of two separate systems of land acquisition and compensation – one for user rights in tribal land and one for all other sorts of rights in tribal land, in state land and in freehold land. The operation of the dual system penalizes the poor and benefits the well off.

### **3.6 Implementation challenges**

Since its passage in 1968, Botswana has had the time and occasion to work to adjust the Tribal Land Act. The longevity of Botswana's Tribal Land Law and its periodic reviews and amendments offer an incisive view of how legislation designed to integrate customary practice up into statute and set out land governance systems according to customary paradigms must be flexible and adaptable to keep pace with social changes. For forty-two years later, Botswana has changed a great deal. Various factors have dramatically altered Botswana's rural areas. For example, in 1966, agriculture generated 40 percent of Botswana's GDP, as compared with 3 percent today. Similarly, 4 percent of the population lived in urban areas in the 1960's, compared to a roughly 65 percent urban population today. Over time, the Tribal Grazing Land Policy (TGLP) has deeply impacted how rural land is used and managed, and by whom. A land market is flourishing across the country. Customary land use patterns, livelihood practices and social systems, therefore, both look different and apply to far fewer people today than they did when the Tribal Land Act was passed.

Briefly, key changes to the Tribal Land Act since 1970 have included:

- Rules allowing for fencing of arable lands (allowing for exclusion of other people's animals even after harvesting);
- Replacement of the word "tribesman" with the word "citizen" in the text of the act;

- The introduction of common law residential leases and leases for commercial grazing and farming ventures for citizens of Botswana within tribal lands;
- The relaxation of restrictions on land allocation to allow allocations of land through inheritance and specific kinds of transfer without board approval;
- Allowance for the exchange of premiums for transfers of developed land between buyer and seller;
- The creation of the land tribunals; and
- The inclusion of rigorous professionalization, oversight and accountability mechanisms for board members and staff, among other changes (Nkwae, 2008 at 10; Mathuba, 1999).

In the years since the Tribal Land Act was passed, Botswana has also had the time to hold several commissions of inquiry and policy reviews. A first Presidential Commission on Land Tenure was undertaken in 1983, a second review and analysis took place in 1992, when the government instituted a Presidential Commission of Enquiry to review the land board's processes, and a third review was undertaken from 2001–2002, which included the Second Presidential Commission on Local Government Structure as well as a National Land Policy Review<sup>32</sup> (LPR). The reviews have highlighted a wide range of difficulties that have hindered the land board's successful operation. Some of these obstacles include: inaccessibility of board offices; lack of technical expertise and capacity; record fragmentation and information asymmetry; lack of accountability/corruption; difficulties enforcing board decisions; and problems of gender, ethnicity and class discrimination. These implementation difficulties are explored below.

### 3.6.1 Lack of technical expertise and professional capacity

The land boards are charged with a broad spectrum of tasks, including policy formation, zoning determinations, and sophisticated natural resource management. Because of the complexity and range of these tasks, the land

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<sup>32</sup> During the National Land Policy Review, a wide spectrum of stakeholders debated the implementation and impacts of the land policy and "concluded that Botswana's overall land policy and institutional framework are fundamentally sound and that, despite the profound changes witnessed by Botswana in the last two decades, the 1983 strategy of careful change, responding to particular needs with specific tenure innovations, remains valid" (Adams *et al.*, 2003).

board system necessitates the involvement of a range of qualified professionals such as land surveyors, land economists, physical planners, computer technicians, and lawyers who are conversant with customary and statutory land laws (Nkwae, 2008 at 14). However, this technical capacity has often been lacking among board staff. Writing in 1982, Machacha (1982), who was at that time working in the Lands Division of Botswana's Ministry of Local Government and Lands, explained that Botswana's land policies "have demanded technical expertise and sophisticated management, which land boards lacked drastically at the time of implementation." The Land Policy Review (Government of Botswana, January, 2003 at 134) summarized:

The land boards got off to a slow start in 1970. Since they were new institutions, their members, even the traditional authorities, were unfamiliar with their functions. It took many years, and substantial efforts to train and guide the members, before they were familiar with their duties. One problem was that many of the people most knowledgeable on local land matters were illiterate; conversely, many of the better-educated people knew little about the land, being better acquainted with urban issues.

The 1993 amendments to the Tribal Land Act directly addressed these capacity and staffing issues. Article 11 was expanded to include 28 new sections that comprehensively define the professional rules and composition by which land board officials must abide. These amendments essentially function to "professionalize" the boards; candidates are now required to meet minimum education requirements, and there are now rigorous training and supervision protocols, age limits, and strict consequences for improper action.<sup>33</sup>

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<sup>33</sup> Among many other mandates, the 28 new sections prescribe: The creation of a director of the land board service, who is a public officer and whose functions include the recruitment, transfer and promotion of land board officers, the administration of a land board service training policy, and overseeing the discipline, training and welfare of land board officers (art. 11D§2); A probationary period of two years after being appointed, after which the offer will either be confirmed, the officer dismissed, or informed of his or her mistakes and given an opportunity to correct them (art. 11H§1–5); Penalties for misbehavior, corruption, and the provision of false information, including disciplinary proceedings, salary withholding (art. 11R§1–5), fines or imprisonment (art. 11T, 11U); and the creation of a land board service commission who can investigate the work of land boards, including inspecting land board offices, examining documents, books or other records belonging to a land board, obtaining

However, even taking into consideration the changes to Article 11, fifteen years later the LPR's inquiry found that

Despite the technical and financial support provided by government there are many complaints about the inadequacies and inefficiencies of land boards. In the view of the 1983 Presidential Commission on Land Tenure "the financial, technical, staff, transport and other resources required to permit this institution to carry out its responsibilities were badly underestimated". This remains as true today as it was twenty years ago. The Report of the Second Presidential Commission on Local Government Structure in Botswana, in 2001, recorded serious public disquiet about the operations of the land boards but nonetheless recommended that they should remain in place (Government of Botswana, January, 2003 at 136).

Such capacity and resource constraints are exacerbated by the unwillingness of qualified professionals to serve on the land boards. Adams *et al.* (2003 at 136) report that land board membership makes heavy demands on members' time, including regular meetings and hearings, informal consultations, and site visits, which in many instances mean travelling long distances and spending several nights away from home. They write that "that active and capable people who might be eligible for land board membership [are] unwilling to serve unless they [are] compensated at a rate equivalent to the opportunity cost of their time." As a result, board members are now paid additionally for each specific task; the LPR (Government of Botswana, January, 2003 at 136) found that "members are paid a 'responsibility allowance', a 'sitting allowance' for each day spent on land board business, a subsistence allowance for each night spent away from home on land board business, and a daily meal allowance" Such allowances add up, and increase costs; if the allowances are borne by applicants, they effectively turn a system of free land administration into one that is quite costly.

Interestingly, at stakeholder workshops held in 2002 related to the LPR, the public indicated that they understood the systems and procedures of the land boards well, including the procedures for dispute resolution, and praised the

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required information from any land board officer, and otherwise undertaking any action that is incidental or conducive to the exercise of the commission's functions (art. 11Z).

land boards for their decentralized and democratic nature, as well as their accessibility. However, the public criticized land board staff's service, and called for both "improving staff capabilities in public relations" and "the development of a 'code of conduct'" for the land boards (Government of Botswana, January, 2003 at 139).

### 3.6.2 Record fragmentation, information asymmetries

Land boards have experienced difficulties with record keeping from the beginning of their operations. Strangely, because the act allowed each land board to establish its own operating procedures (ch. 7§1), each board was therefore left to devise its own record keeping strategies; a system that undoubtedly has led to increased confusion.

Various registry-related problems have hindered the validity of land allocations. First, while the land boards were charged with recognizing pre-existing allocations, they were confronted with the difficulty of having no way to differentiate between valid and false claims of pre-existing rights. In 1982, Machacha (1982) reported that "Anybody could lay claim on any piece of land on the pretext that it belonged to their parents and therefore to them under traditional inheritance laws, or that they were allocated the land by a deceased chief." Moreover, under the act, the impetus was on each family/individual to proactively begin the application process if they wished their land claims to be officially recognized. Besides creating a situation in which the boards were immediately overwhelmed with applications, this policy ensured that the land boards had no knowledge of the rights of those families or individuals who did *not* take action to formally register their land claims, leading the boards to sometimes assume the land was "open" for allocation, and, as described above, to allocate lands to applicants that are already held under custom by other families. The act failed and fails to help ensure against injustices that stem from these distances and disconnects.

Relatedly, as described above, when the land boards allocate common law grants to investors within the tribal areas, they must secure the consent of individuals with customary claims to those lands. However, the law does not clarify what counts as "consent". The act fails to set out: safety mechanisms to ensure that the consent is not coerced; guarantees that the individual will be properly compensated for the loss of the land and any improvements upon it; and procedures to make certain that the individuals or family living

on that land are aware that they have the right to deny the request. Furthermore, the act does not provide for a space or opportunity for the community as a whole to weigh in; when the common law grant requested is quite large or concerns land that the community relies upon for its livelihood or for the collection and use of necessary natural resources, this lack of opportunity for consultation or consent by the community amounts to injustice.

Such information asymmetry has created the need for on-going and continual participation in the process by the ward heads, which has allowed for a continued role for customary leaders in land allocation procedures. Nkwae (2008 at 14) describes how even recently, "Because of inadequate land records on land allocations the land board still relies on the knowledge of the ward heads for information about local land occupation." The LPR (Government of Botswana, January, 2003 at 138) also reported that although the precautionary check with the ward head was initially "not sufficient to minimize or prevent multiple, conflicting, disorderly and disputed allocations in densely settled areas" the regulations were subsequently revised "to provide for a clearer indication by the ward head whether the allocation proposed would conflict with existing land rights or current land use."

Second, The inter-ministerial Committee on Land Board Operations (Botswana 1977) found that "No land board can with assurance declare what land has or has not been allocated ... This weakness continues because there does not exist an adequate register to systematically record allocations [and] relate them to a particular piece of land and to a national map" (cited in Machacha, 1982). As a result, at times boards have been unable to keep track of what land they have already allocated. This may be due to the boards' methods of record-keeping, which have been poorly organized and therefore almost impossible to access. In 1982, Machacha (1982) reported:

Although there are records in land board offices, these records do not in any way help land boards because they cannot be referred to easily. The main problem is that of record fragmentation, so that when one traces the history of a single plot, one may have to go through more than ten sets of records. The tendency is for officers to be reluctant to refer to such records and, as a result, some cases which have been dealt with are replicated over time. Most people have come to realize this handicap and take advantage of it. For example, if a

person appealed and lost a case, he [can] wait for three to five years and resubmit the appeal, well knowing that the land board will not be in a position to know of its former decision.

In addition, Machacha (1982) described how, "sometimes land boards reject the suggestion that they ever allocated [a] plot until a certificate issued by them is produced." Machacha (1982) explained: "As a result, people can themselves extend or change plots without the land boards finding out." He reported that these instances caused people to doubt that the land boards even knew of their own allocations, leaving the system ripe for abuse.

Such problems related to lack of information and proper record keeping have not abated with time; almost 20 years later, Botswana's Presidential Commission on Local Government Structure (2001) summarized the lack of inventory of customary land rights similarly: "Land boards do not have easily accessible information showing what piece of land has been allocated to whom and for what purpose. They do not know how much of their land has been allocated and how much is still available for allocation. Of the allocated land, they do not know how much of their land is being utilized and how much is idling."<sup>34</sup> Similarly, the 2002 LPR (Government of Botswana, January, 2003 at 44) found that "On tribal land there are also numerous residential plots in almost every settlement as well as borehole allocations that have not been developed. Due to poor record keeping, the location of almost all of these plots is unclear to the land board. With time, the identity and whereabouts of the holder also becomes lost. All the urban villages have sprawled much further than necessary due to the large number of undeveloped plots..."

The 2002 National Land Policy Review (Government of Botswana, January, 2003 at 136), concluding that "one problem that has continued to severely undermine the system has been the failure to provide for the recording of all existing customary land rights" recommended various changes to improve access to information regarding land allocations, including: 1) increased gathering of on-the-ground local land information (including topography, size and location, building structures, names and number of occupiers,

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<sup>34</sup> One result of these difficulties is a lack of data. Adams *et al.* (2003) reported that in 2003, there was very little data to be found regarding the amount of land being used for customary purposes, the size of customary allocations, or the amount of land being used for communal grazing.

tenure arrangements); 2) increased use of the [already-existing] computerized Tribal Land Information Management System; 3) increased information-sharing both between land boards and between land boards and urban authorities to address prospecting and hoarding of land; 4) the creation and maintenance of digital maps; and 5) a requirement for more information to be collected and collated about the extent of the land parcel and the agreed sale price or lease rental" (Government of Botswana, January, 2003 at 54).

### 3.6.3 Difficulty enforcing board decisions

By shifting customary land management out of village and community structures and locating land boards far away from the communities they govern, the act cut off the local, personal ties and easy accessibility that could have made the boards downwardly accountable to the people whose land they were governing and undoubtedly has helped to undermine the social legitimacy that boards need to ensure that their decisions are respected and their mandates are followed. Writing in 2008, Nkwae asserts that "the land board system suffers from lack of legitimacy and authority which the chiefs and other tribal authorities enjoyed by virtue of their political positions". As a result, the boards have at times struggled to ensure that their decisions are followed, leading to a general sense of lawlessness and a weakening of the rule of law.

The lack of provisions for enforcement mechanisms in the Tribal Land Act does not make this easier. The Tribal Land Act did not originally provide for any enforcement mechanisms. As a result, people could simply choose not to heed a land board's decision. Previously, the only way for boards to enforce their own decisions was to take defaulters to court and petition for a court-ordered eviction - an expensive, time-consuming process. In 1992, Ng'ong'ola observed that "As experience has also now revealed, the authority of the boards in the discharge of this particular function is severely undermined by the absence of enforcement rules and regulations, especially since the boards did not inherit the political role and clout of their tribal predecessors. The boards lack the wherewithal to ensure that their decisions are respected."

The *Tribal Land (Amendment) Act, 1993* and the *1995 Tribal Land (Establishment of Land Tribunals) Order* remedied this. The tribunals replaced

the minister as the fora for appeals of land board decisions.<sup>35</sup> The order also gave boards the option of referring their cases to the tribunals, who do have enforcement provisions. Now, any land board needing or wanting to enforce one of its decisions may on its own refer a matter to the appropriate land tribunal, which will rule on the issue. (art. 40§5) However, due to lack of capacity, the boards have little ability to monitor whether their decisions are being complied with. As a result, unless the rights of others have been infringed upon and those individuals alert the land boards or file a legal action, the land boards may not know whether their decisions and mandates have been implemented or ignored. Writing in 2006, Makepe (at 50) relates that while the legitimacy, authority and institutional capacity of the land boards has increased over time, "the land boards' limited capacity for the sort of on the ground monitoring needed to enforce decisions and prevent unapproved uses of land poses perhaps the most important challenge."

#### 3.6.4 Lack of land boards' accountability

In 1991, the government established a Presidential Commission of Enquiry to investigate the land boards, which in its view were failing to supervise land dealings and transfers. Corruption and extra-legal dealings in land had become prevalent in peri-urban areas. The commission's report exposed failures in the integrity and competence of the land boards, which led to the resignations of the vice president and the Minister of Agriculture. Its report confirmed that there was a serious problem of "lawlessness" in some of the affected areas, manifested by "a complete disregard of the law and the role of land boards in the execution of land dealings" (cited in Ng'ong'ola, 1992). Such lawlessness included people claiming land that belonged to others and selling it to unsuspecting land seekers, and as well as people making unsubstantiated claims that virgin, abandoned, unused or unoccupied land was once tilled or occupied by their forebears, and thus should be granted to them (Ng'ong'ola, 1992).

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<sup>35</sup> The LPR (Government of Botswana, January, 2003 at 27 and 173) found that creation of the tribunals was a welcome development and suggests that a stronger land tribunal system should be developed for appeals of land board decisions on a range of land-related matters. It argues for this both in efficiency grounds, but also on the grounds of administrative justice; principles of "openness, fairness and impartiality will be met by open hearings before an impartial body which gives reasoned and published decisions rather than no hearings or closed hearings before officials acting on behalf of a minister."

Discussing the situation of accountability, the 2002 Land Policy Review found that "The system is not coping with the pressures of rapid urbanisation on state land in urban areas and has all but broken down on tribal land in peri-urban areas, where there is mounting illegality" (Government of Botswana, January, 2003 at 23). It concluded that, "A choice needs to be made between: either bringing the land boards into a clear and direct line of authority and control under the [Ministry of Lands], or decentralizing decision making and making them more accountable to citizens in the areas they serve" (Government of Botswana, 2002, at xvii). This is increasingly important in the context of Botswana's growing land market; Nkwae (2008 at 15) writes that as land values rise, "The integrity of the land board members is often called into question."

### 3.6.5 Gender equity and women's access to land

Studies have found that as a result of the lack of explicit provisions in the Tribal Land Act that protect and enforce women's land rights (described above), the land boards often minimize or overlook women's land rights. According to Kalabamu's research, "Many land boards do not allocate land to married women without the written consent of their spouses," while "the same rules are not applied when allocating land to married men" (Kalabamu, 2005). Adams *et al.* (2003 at 10) report that unmarried and divorced women with children lack access to productive land, and that land boards at times refuse to allocate land to married women in their own right, on the grounds that under customary law, husbands have "marital power" over all household assets. Furthermore, the 2002 LPR cites a 1998 Botswana Department of Women's Affairs (WAD) report as finding that:

Many land boards conceded that in practice, they did not allocate residential and business plots to married women without the written consents of their spouse, but the land boards did not demand the same from husbands. According to these land boards, traditionally a woman could not request a plot independently from her husband, and to allocate her one would be seen as divorcing the couple; some land boards justified the practice by saying that there was a shortage of land so that each couple should be allocated only one plot (Government of Botswana, January, 2003 at 43).

The LPR concludes that while various laws have been passed to try to remedy gender inequities in land rights, "the constitution exempts customary law from provisions as to discrimination so that customary tenure rules still quite lawfully discriminate against women" (Government of Botswana, 2002 at 61). In response, it suggests that in order to strengthen land rights for women, the government should support policies that: "Educate women about their rights to hold land so that they can assert those rights and make informed choices; remove all *de jure* and official barriers to women's ability to acquire land; address both direct and indirect discrimination in the use or occupation of land and in all decision-making forums; [and] recognize and address differential treatment of women to ensure equal outcomes in land tenure" (Government of Botswana, 2002 at vii).

The LPR also recommends that "action needs to be taken to enlighten land board members and staff on the rights of women and the land boards' duties in addressing them." To this end

Clear guidelines should be drawn up to assist land boards to understand and deal equitably with married women's land rights under the Tribal Land Act, and also to clarify the rights of all women, married or unmarried, to be allocated land in their own capacity. The land boards should be guided as to the precise nature of women's land rights whether they are single, cohabitating or married whether in or out of community of property (Government of Botswana, 2003 at 44 and 150).

Kalambu (2005) argues that Botswana must pass laws and policies that explicitly provide women with rights to hold land and property in their own right, as "gender-neutral policies, however persistently pursued, do not result in women's empowerment." Rather, "there should be positive discrimination in favour of women especially those who are vulnerable and/or disadvantaged by existing cultural norms, practices and poverty. For example, the LPR (Government of Botswana, January, 2003 at 150) recommends a review of marital property law, the reform of inheritance laws, the reform of bank's discriminatory lending practices and advises that "the statute should lay down an express requirement that spouses should act together on all occasions in transactions involving the immovable property of the joint estate."

### 3.6.6 Access to land by non-Tswana tribes

As described above, Botswana's Tribal Land Act has no provisions that extend formalization of customary rights to other, non-Tswana ethnic groups. This has meant that the Tribal Land Act is inherently discriminatory against non-Tswana tribes, most particularly against hunter-gatherer groups like the Basarwa (San) people. For example, because specific rights of hunting and gathering are not recognized under either Botswana's statutory law or in the dominant customary law of the Tswana, the Basarwa's customary rights to hunt and gather over large tracts of land have never been legally recognized.

This has meant that vast territories that the Basarwa have historically depended on for their livelihood and survival have been granted to private ranchers, who have fenced these areas and impeded the Basarwa's access. As a result of the TGLP, "Large numbers of [remote area dwellers] have been dispossessed of their land within living memory, mainly by alienation of land for cattle ranching" (Government of Botswana, January, 2003 at 80). In many instances, these groups can no longer move across the lands upon which the natural resources they depend upon for their livelihood and survival are located - lands that they have used for generations and to which they arguably have customary rights (Adams *et al.*, 2003). Although these land claims are protected under the Tribal Land Act, it has never been invoked to protect them.

The Land Policy Review found that:

The Tribal Grazing Land Policy brought to the surface the insecurity of tenure faced by minority ethnic groups ...[in that it] assumed that there were extensive areas of tribal land that could be zoned and fenced for commercial ranching, but it emerged that the veld was used and occupied by ... Basarwa. In some cases, land boards ... drew up appendices to the lease to be given to prospective ranchers, spelling out in detail the rights of [Basarwa] ranch residents to continue to hunt, gather, graze livestock, cultivate fields and even send their children to school. However, the Attorney General ruled these appendices illegal. Ranch lessees were given exclusive rights to the land (Government of Botswana, January, 2003 at 78).

The LPR relates how the Attorney General's "decision emanated from two legal opinions: the first being the notorious *Re common law leases* which stated that 'the true nomad Masarwa (sic) can have no rights of any kind except rights to hunting'; and the second [legal opinion] that only land rights granted in terms of certificates of customary grant were protected from enclosure by commercial leases" (Government of Botswana, January, 2003 at 79).<sup>36</sup> Various commentators have pointed out that the Attorney General's ruling was unconstitutional, in that Section 8(1) of the Constitution of Botswana protects and guarantees "property of any kind" and "rights or interests in or over property of any kind" and that "the customary land rights of the Basarwa are rights in or over property and should not have been extinguished without due process, as required by the constitution" (Government of Botswana, January, 2003 at 79). The land boards, meanwhile, have granted smaller land allocations (than those given to other groups) to those Basarwa who formally apply for them on the grounds that they are not *able* to clear or cultivate larger pieces of land (Adams *et al.*, 2003, citing Mitchelsen, 1995 and Gulbrandsen, 1994).

Moreover, the establishment of national game reserves has entailed the relocation of San from their lands. In the 2006 case of *Sesana, Setlhobogwa and Others v. Attorney General*, to ensure that the Basarwa were successfully removed from their lands located within a reserve, the government decided to terminate the provision of vital human services such as water, food rations and healthcare in the area. It also withdrew the "special game licenses" that had exempted the San from the legal prohibition to hunt in the reserve, and prevented the San from entering the reserve without a permit. Compensation for the loss of their homes and resources was never qualified or provided, despite explicit provisions for compensation in the event of compulsory land acquisition in the Tribal Land Act (ch. 33). Fortunately, the High Court of Botswana ruled in 2006 that such policies were illegal and that the community should be allowed to return (Adams and Palmer, 2007 at 5).

Taken together, a clear pattern of institutionalized racism emerges. This is underlined by the fact that the Government of Botswana has taken few steps

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<sup>36</sup> This second ruling is quite ominous; it appears to hold that customary rights *must* be registered to be respected; despite longstanding customary claims, if the land holders have not followed the administrative procedures to acquire a Grant of Customary Land Certificate, then their land claims are void. As such, it appears that over time, the Tribal Land Act's implicit allowance that unregistered customary land claims are as enforceable as registered claims has been eroded.

to remedy the inequities entrenched in the law, or to adopt less discriminatory policies and practices. Other than changing the word "tribesmen" to "citizens of Botswana" in the text of the act, it has not amended the act to include protections for secondary land rights such as rights of way that could strengthen the land rights of hunter-gatherers. Nor has it sought to widen the definition of "customary" land rights to include provisions that could apply to the practices of non-Tswana tribes.

The LPR suggested a variety of actions to redress these inequities, including the provision of immediate "redress for already-dispossessed communities" as well as that "future amendments to the Tribal Land Act should provide formal recognition of the customary land rights of minority ethnic groups." It called for immediate legislative action to both protect the San from evictions related to common law leases for cattle ranchers as well as to clarify the land rights of San "squatters" on lands that they used to have customary rights to but are now private cattle ranches (Government of Botswana, January, 2003 at 12 and 81).

The Land Policy Review also advised that the government should create policies that give minority groups greater control over land management arrangements, recognize minority rights to "pursue a different life style and maintain a distinct culture from that of the majority" and promote the economic and social empowerment of all citizens. It recommended that in those areas where the San and other non-Tswana tribes formed a majority, subordinate land boards should be created that consider the customary practices of the groups living in the region, and that local community structures should be established to regulate the use of the land and manage natural resources, including water (Government of Botswana, 2002 at vii–viii and January, 2003 at 12 and 81).

Interestingly, during the Land Policy Review's meetings with various stakeholders, it was noted that "the issue of the land rights of marginalized groups was the most sensitive and difficult which the LPR had to address. Some strong opposition has been voiced to the proposals [extending stronger land rights to minority groups]" (Government of Botswana, January, 2003 at 81).

### 3.6.7 An emerging land market

Botswana has slowly been moving towards a privatized land market. State officials have both implicitly and explicitly supported this transition. Today land sales – or the exchange of premiums between buyer and seller – are allowed. To allow for a land market within Botswana, where under the Land Act all land is legally held by the land boards in trust for the people, lawmakers, judges and other officials have had to go to great lengths to (re)define "custom" as allowing for private ownership and customary land claims as akin to freehold title.

In the early 1990's, the case of *Kweneng Land Board v. Kabelo Matlho and Others* challenged the land board's powers under Article 10, which dictates that "All the rights and title to land in each tribal area ...shall vest in the land board." In this case, the land board was trying to evict Kabelo Matlho as an "illegal" occupier, and in response, Matlho joined as a third party a man named Pheto Motlhabane, who he claimed had transferred the land to him. It was clear that the land had been in Motlhabane's family for generations, and had acquired it under customary law before the land boards were created. However, the land board argued in its application for the eviction order that pursuant to Article 10, it had the right of "ownership" over the particular piece of land and must therefore moderate who was occupying it.

The Attorney General of Botswana submitted an *amicus curiae*, arguing that under Article 10 (1) the tribe is the "residual owner" of tribal land which for the time being is vested in the land board, and that Article 10(2) allowed that land and water rights held by a person in his personal or private capacity remained "vested in, or owned for the time being, by the private person" (cited in Ng'ong'ola, 1992). The Attorney General also called in seminal anthropologists with expertise in Botswana's customary practices to testify that customary law did recognize "private ownership" of wells and water rights, although not of grazing land and that it also recognized possibilities of transfer, by donation or inheritance, of residential and arable land. Ng'ong'ola explains that the Attorney General concluded that "customary ownership is the equivalent of unregistered freehold title subject to the usual planning and land use restriction." Thus, according to the Attorney-General's submission, the third party who had inherited the land from his forefathers was its owner, and he was at liberty to dispose of it to Matlho.

The court accepted the Attorney General's argument and ruled in favour of *Matlho*. An appeal of the case upheld the decision. The appeals judge, writing for the majority, ruled that "whatever the customary law might have been in the past ...the law had apparently developed to permit of private ownership by tribesmen of tribal lands. ...." (cited in Ng'ong'ola, 1993). Ng'ong'ola makes the point that both the Attorney General's argument and the decisions passed down from the courts were political moves, motivated by government officials' desire to move Botswana more quickly towards a private land market.

Interestingly, it appears to have already been moving in that direction in the tribal areas; the 1992 Presidential Commission of Enquiry review culminated in a white paper ("White Paper on Land Problems in Mogoditshane and other Peri-Urban Villages (Republic of Botswana, 1991 and 1992)), which "recognized that to all intents and purposes, what persons who were granted rights in tribal land were getting was a lease and not some traditional customary right" (Government of Botswana, January, 2003 at 34). The review concluded that, "by whatever name called and in disregard of conceptual niceties, a market for developed land was now operative in tribal land in which individual landowners were buying and selling rights to land" (Government of Botswana, January, 2003 at 34).

To underline the *Matlho* decision and begin to formalize the growing land market, the 1993 amendments to the Tribal Land Act allowed for certain land transfers without board approval, including transactions of developed land, devolution of land upon inheritance, and sale of land to a Botswana citizen (art. 38§2). Adams *et al.* (2003 at 7) summarize these changes as making possible "the further extension of the market in tribal land."

Indeed, the *Matlho* decision and subsequent 1993 amendment successfully opened the door for a flourishing land market. The National Land Policy Review found that in comparison with other countries in the region, "facilitation of the land market is relatively advanced in Botswana. Customary tenure has been relatively successfully integrated with a modern and democratic system of land administration." Between 1992 and 2001, the number of annual market transactions of state and freehold land had increased by 56 percent (Government of Botswana, 2002 at 10 and 13).

The review concluded, however, that this opening up of land markets and the "high demand for land in and around urban areas in Botswana has led to

a rise in illegal and extralegal transactions in adjacent tribal land. Many of these transactions fall between customary and statutory law, conforming to neither" (Government of Botswana, 2002 at 10). Unfortunately, by amending the Tribal Land Act to provide for land sales yet failing to include or create protectionary mechanisms to ensure against bad faith transactions, Botswana's Tribal Land Act and related court decisions have now created an unregulated land market that may have various negative consequences, such as distress sales and unjust transactions between individuals with power and information asymmetries.

In response to this problem, the Land Policy Review recommended policy changes to reduce illegal transactions and protect the right of disenfranchised populations such as women and individuals living with HIV/AIDS, who are becoming further disenfranchised as the land market emerges. To meet the rising demands created by a flourishing land market, the review also recommended various changes to the Deeds Registry, such as computerization, standard forms for both land sales and leases, simpler local document registration systems, and "clearer and more rigorously applied land board procedures for registering and recording transfers of customary grants and leases" (Government of Botswana, January, 2003 at 14).

#### 3.6.8 Elite capture and inadequate land and natural resource management

The Tribal Grazing Lands Policy (TGLP) and the National Policy on Agricultural Development (NPAD) have individualized much of what was formerly communal land and allowed elites to claim and fence off extensive areas that were once shared by local communities. As a result, a small number of wealthy families today control vast areas of Botswana's arable and grazing land. Such policies have drastically reduced the grazing land available to small-scale and subsistence herders within tribal areas and led to the growth of a landless rural underclass (Adams *et al.*, 2003).

Even by 1982, Machacha (1982) was concluding that, "While the initial intent of the policy was to benefit all, recently the policy has been labelled as one for the rich. This is because poorer people are being forced out of their traditional areas to make room for richer commercial ranchers." Furthermore, White reports that while in theory all citizens of Botswana have equal access to land in line with the customary edict that all individuals

are entitled to land *according to their needs*, in practice the land boards have instead been allocating land *according to perceived ability to use it* (as in the example of the Basarwa, above.) Wealthy individuals who can demonstrate the capital and resources to make full productive use of large areas of land are allocated large areas of land, while the poor (including widows, disabled individuals, and the landless, among others) who lack the tools, resource and assets to use the land fully are "effectively denied land" (White, 2000 at 12). He writes that "One of the most frequent complaints against the land boards is that they allocate land inequitably, that they favour those with influence and many cattle, and ignore the land claims of those who are politically inarticulate and have few animals" (Adams *et al.*, 2003 at 5).

The main losers have indeed been poorer households in the rural areas. Moreover, contrary to policymakers' goals, the TGLP has furthered the degradation of the communal grazing areas.<sup>37</sup> This is because ranch owners, as citizens of Botswana, retained their rights to use the communal areas for grazing of their animals. They thus had *dual* grazing rights, using the communal areas during the wet season and their exclusive ranches during the dry season and in times of drought. Others "grazed out" their commercial ranches and then moved their cattle to the communal areas. Meanwhile, according to Taylor (2007 at 7) the "unused" land allocated for the commercial ranching scheme was exactly that land that the *communities* has used as a safety net in dry seasons and drought; now, with the poorer community members' cattle forbidden to enter this land, the remaining communal grazing areas were degraded and over-grazed to new and critical levels. Taylor (2007 at 4–5) summarizes: "Diminishing access to land in Africa...is a fundamental constraint to effective environmental management and poverty reduction." In its silence regarding how the land boards should

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<sup>37</sup> Adams *et al.* hold that the theories of rangeland ecology preservation that under-girded the TGLP were proven incorrect; rather, the customary cattle post system is "economically and biologically more efficient, under Botswana conditions, than fenced ranches" (White, 2000 at 11). Similarly, noting that neither a cost/benefit analysis nor an Environmental Impact Assessment have ever been undertaken regarding these policies, the LPR conclude that "scientific advances over the past 20 years suggest that concerns over degradation are overstated. There are biological and economic feed-back mechanisms which protect the land from irreversible damage. High stocking rates have been demonstrated to be sustainable in Botswana. As a result, the communal areas are highly productive and support large numbers of people for whom there are no alternative livelihood opportunities in the present state of development of the economy" (Government of Botswana, January, 2003 at 19).

manage land and natural resources within their jurisdiction, the Tribal Land Act offers no protection against such unsustainable practices.

Taylor argues that Botswana's policies have resulted in the erosion of the strength of traditional natural resource management systems and are exacerbating rural poverty. He writes (2007 at 7–8): "The progressive fragmentation of previously common rangelands into private parcels by a growing number of agrarian capitalists, elites, state agents and multinational investors is therefore likely to have profound impacts on the ability of households to get out of, or keep out of, poverty. Similarly, Cullis and Watson (2005) conclude from their analysis of the commercialization of the common grazing areas that Botswana's land boards, rather than preserving customary systems and safeguarding every individual's customary right to have land adequate for their needs, have actually exacerbated inequities, disproportionately benefiting the elite at the expense and impoverishment of the poor and disenfranchised members of society.

Describing how Botswana's land boards have been used as a model for joining customary and statutory land management systems, Woodhouse argues that there should be concern that "Botswana's land boards have presided over widening inequity of access to grazing and privatization of rangeland" and "it is worth noting another respect in which Botswana's land boards fall short as a model for governance of natural resources. This is the failure to promote meaningful dialogue between resource users and government officials to explore what constitutes "sustainable" land and water use, resulting in conservative land use regulations that stifle local initiative" (Woodhouse, 2003 at 1715).

Part of this is due to what the LPR terms a "management vacuum"; although the Tribal Land Act expressly grants land boards the power to administer and manage communal lands, the boards have only taken on customary leaders' role as land *allocators*; they have left aside chiefs' arguably more important role as land and natural resource managers. Furthermore, while large areas of Botswana continue to be used communally, "the powers of management over these areas have been taken away from the communities which occupy them and vested in remote institutions (which do not exercise them)" (Government of Botswana, January, 2003 at 19). The LPR found that "the consequence of this management vacuum is that local communities now have no say in or control over the allocation of land within their area or the

use of the natural resources derived from that land. Legal power over the allocation of land and the use of natural resources now resides with a number of official institutions, all of which are distant from the community level and none of which are more than remotely accountable at the local level" (Government of Botswana, January, 2003 at 108–109). It concluded that the "National Land Policy should encourage the further democratization of the allocation and management of land and natural resource," and recommended that the Tribal Land Act should be amended to explicitly recognize and protect community-based property rights (Government of Botswana, January, 2003 at 109).

On the grounds that, "it is imperative that the communal area should be better managed, which requires that communal rights are made more secure," the LPR suggests: 1) legal recognition of the existence and validity of community-based property rights; 2) greater involvement by communities in decision-making processes that have a direct bearing on their livelihoods; and 3) the strengthening of local institutions and the organic evolution of customary land law in accordance with changing land availability and local needs, so as to place resource management in the hands of resource users" (Government of Botswana, January, 2003 at 109).

The Community Based Natural Resource Management (CBNRM) model may create a path back toward the sustainable communal land use practices of Botswana's past. CBNRM initiatives have been pursued by communities at the local level for the past 15 years and come the closest to any kind of legally-established customary land management activity in Botswana. CBNRM is a conservation and development natural resources management *strategy* wherein the state devolves or decentralizes management of natural resources within a specific area to the community level. The approach works to empower communities to sustainably manage and use local natural resources for long-term social, economic and ecological benefits (Botswana draft CBNRM Policy, 2004 at 1). What is transferred is not ownership, but management and use rights. Generally, to be allocated these rights, a community must establish itself as a legal body - often a trust - and register itself formally with the land boards. The boundaries of the community are then formally delimited, and the community must adopt bylaws, form a management committee, and complete other processes that organize its financial and legal management procedures. The community then has the right to exclude non-community-members from using the natural resources contained within its boundaries, and may enter into legal contracts without

outside investors to better exploit or profit from the natural resources within its bounds. The profits from these partnerships are then distributed to community members.

In one example of the positive implications of CBNRM in Botswana for promoting and strengthening customary land management systems, Taylor (2007 at 12) reports how, during discussions among the target communities of how best to manage their resources under a pilot CBNRM scheme, "Many of the middle-aged to elderly generation expressed strong sentiments for reinstating the community-based systems of regulation that they were familiar with when younger." The communities in the project were looking backwards to custom to determine how to most sustainably and profitably manage "their" resources. In this way, CBNRM initiatives may allow a return to a time when communities felt more empowered to carefully use local resources. It is arguable that such a return to customary practices in communal grazing areas will help to counteract the degradation of the past few decades.

In Botswana, communities establishing CBNRM associations or trusts in Botswana can apply to the land boards for fifteen-year common law leases. When a community has been granted a lease, it then has the exclusive right to use the resources that are specified in the lease. Subject to the conditions of the lease, the community can then charge access fees or sublease/transfer some of these rights to third parties without the permission of the land board (who is the "owner") (Final Report of the Review of Community-Based Natural Resource Management in Botswana, September 2003).

CBNRM's model of allowing communities to apply for common law leases over vast tracts of land also offers a defence against the further encroachment of commercial cattle ranches into communal range lands. Taylor (2007 at iii) writes that "for states unwilling to devolve authority over land even further and accord full recognition to customary rights...CBNRM [is] one route to promote sufficient recognition of collective rights. Taylor (2007 at 4–5) suggests that:

In the absence of legal systems that acknowledge direct community ownership of land, the granting of management rights may be sufficient recognition of the legitimacy of community control to protect such lands from allocation to

outside interests. If CBNRM approaches are able to become widely established in the semi-arid production areas of Africa, it may play a significant role in protecting the poor from large-scale privatization of previously common-pool resources.

However, it should be noted that the land boards are not obligated to lease Tribal Lands to communities seeking to start CBNRM schemes. Rather, the communities must *compete* with other potential users also bidding for common law leases over the same area. At times, the land boards have denied community applications for leases (White, 2000). Taylor (2007 at 2) reports that 14 years after Botswana's launch of its first CBNRM projects in 1993, "the legitimacy of allowing local communities to control, and derive commercial benefits from, natural resources in their vicinity has been widely questioned by policy makers in Botswana" while privatization of cattle ranches continues to receive wide government support.

The LPR (Government of Botswana, 2003 at 109), suggesting that community-based property rights should be recognized as a type of private property rights, also called for the government to "consider the application of democratic, community based management principles to all land-use activities in communal areas." Through a comprehensive and well-resourced CBNRM policy and implementation plan, Botswana may have the opportunity to align its natural resource management strategy with its expressed land tenure policy; rooting both in custom but allowing space for local development and investment.

### **3.7 Analysis**

Botswana's system of land boards has been touted as a model of land administration in Africa that gracefully combines modern governance with customary practices. Indeed, Botswana's Tribal Land Act does some things very well. Its original configuration of the land boards elegantly balances power between communities, the central state, and local customary authorities. The amendments made to professionalize land board staff may serve as a good example of legislation that improves local or regional land governance and administration. The land boards administer land both under customary and statutory tenure, and thus have over time managed to shift the boundaries between the two in a fairly organic way, allowing for greater harmonization. Similarly, the Tribal Land Act has also created the space for a relatively seamless transition from customary tenure to a fairly-well

functioning private land market while maintaining an important role for ward heads in the process.

In analysing the Tribal Land Act's implementation difficulties, it is important to take into consideration Ng'ong'ola's (1999) reminder that:

A land board system must be capable of accommodating the natural evolution of land tenure without perhaps seeking to engineer, accelerate, or, indeed, obstruct the process. From these various experiences it must also be appreciated that the introduction of a land board system must be seen as a process, not an event. It must be seen as continuing process of land tenure reform that will require periodic adjustments and reorientation.

It may be said that the Tribal Land Act, as originally written, was indeed a legal instrument "capable of accommodating the natural evolution of land tenure without perhaps seeking to engineer, accelerate, or, indeed, obstruct" it.

However, an examination of the Tribal Land Act's implementation and subsequent "periodic adjustments and reorientation[s]" leads to the conclusion that despite a relatively good law that indeed could have worked excellently - with various amendments over time to 1) provide for increased protections for vulnerable groups, 2) allow for the slow emergence of a formal land market, and 3) align with improved surveying, mapping and cadastral technologies - the law has more or less fallen victim to political manipulation. Over the years, rather than methodically and carefully amend the Tribal Land Act to ensure increased fairness, equity, prosperity and sustainable, integrated development in the tribal areas, government officials and politicians have interpreted the law to allow for greater state control, and to facilitate the enrichment of the elite. Many of the implementation difficulties could have been remedied by amendments that were not made (despite various opportunities to do so) or could have been avoided by less deleterious policy decisions. In the final analysis, one may conclude that the Tribal Land Act itself - and the land board system - is quite a good law/system as originally conceived and that rather, it is the "process" that has been to its detriment.

As it was intended by the legislators, the Tribal Land Act was not supposed to significantly change the way that land was administered and allocated in the tribal areas. It merely substituted land boards for chiefs and headmen (giving chiefs a position on the land board to ensure that the boards were administering land according to custom), and shifted the basic functions of the customary authorities to the land boards. The boards have jurisdiction to allocate land, manage the use of natural resources, administer communal grazing areas, rule on the sinking of wells or boreholes, review local land conflicts, and generally govern and create policies for land and natural resources in their region, as per customary land and natural resource management practices. As under custom, the land boards are mandated to consult with local ward heads before allocating lands. Under the law, all existing customary land claims were automatically formalized, and these rights are secure and enforceable, given freely, and transferable, assignable, and permanent.

However, over the past 40 years, through implementation and amendment, the Tribal Land Act has introduced changes that significantly depart from the basic tenets of custom, arguably not to good ends. Putting aside issues of technical expertise, capacity, record fragmentation and difficulties enforcing land board decisions, the most problematic aspects of the Tribal Land Act and its implementation over time are related to the following issues.

First, the de-democratization of and the removal of customary authorities from the land boards, which has eliminated any sense of the board's downward accountability to the people whose lands they manage. The land boards' original configuration - one third of members were affiliated with the chief and his authority, one third were locally elected by the people, and one third were appointed by the Minister of Lands – built a solid system of checks and balances on the abuse of power by any one faction. As designed, this was as optimal a solution to legal pluralism and downward accountability in formal land administration structures as is possible. Yet by removing the customary authorities from the land boards and amending the local elections for board membership (by giving the minister final selection of the various candidates that have been elected), close to 100 percent of all board membership is now controlled by central government. Moreover, by shifting customary land management out of village and community structures and locating land boards oftentimes far away from the communities they govern, the act cut off both the local, personal ties and easy accessibility that could

have made the boards downwardly accountable to the people whose land they are governing

Second, the land boards' failure to fully take on the "management" side of customary land administration, has contributed to the unsustainable and inequitable management of the land and natural resources under their domain. While the land boards are charged with zoning and management of their land within their jurisdiction, land management policies have more often been driven by central government (who have had the promotion of private investment as a central motive) than by local need for sustainable and responsible use of natural resources. Under the TGLP and NPAD policies, the land boards have overseen the allocation of vast tracts of communal grazing land to private cattle ranchers. As under custom and the Tribal Land Act, these common properties belonged to the peoples living and making their livelihood upon them, yet the customary owners have not been compensated. Meanwhile, these communal grazing lands - protected for centuries by customary rules that ensured sustainable use and guarded against overgrazing - have since become degraded by overcrowding and over-use.

Third, Botswana's Tribal Land Act fully fails to include protections for women's rights to land. The longevity of the act and the date of its original adoption is no excuse; the act has been amended as recently as 1993 and could have been amended since. Applications for customary land grants may be put in the name of the male head of household only, and the law does not include provisions that allow family members joint or derivative rights in the land. Lawmakers could have included a few simple oversight mechanisms to ensure that the land rights of vulnerable family members or groups were protected under the act, yet have not done so, and this continues to be reflected in the land board officials' gender-insensitive behaviour when processing women's land claims.

Fourth, the Land Act's failure to explicitly protect the land and natural resource rights of non-Tswana tribes has allowed the space for government actors to discriminate against minority groups; even as late as 2006 the state was forcibly removing the San from their lands, sometimes on the grounds that other "customary" rights applied in the area (Adams and Palmer, 2007 at 5; Fitzpatrick, 2005 at 464). However, in at least one instance (*Sesana, Setlhbogwa and Others v. Attorney General*), despite the act's lack of adequate

protectionary provisions for the land rights of vulnerable groups, the strong rule of law and independence of the courts in Botswana have meant that the act can be used by an activist judiciary to protect the customary land rights of all groups. In this way, Botswana is a good example of how national case law can augment and address the gaps in legislation.

Fifth, customary land rights have been weakened by both changes to the law and its judicial interpretation. Case law and various government decisions have held that unregistered customary land claims are not to be protected; notably, even when a land board took steps to try to protect the land rights of the people in its area, Botswana's Attorney General overruled these efforts and ruled that ranch lessees had exclusive rights to their land and could bar the entry of the land's previous residents and users. In addition, the 1993 amendments' inclusion of more rigorous provisions for cancellation of land grants, on the vague grounds that "the land has not been cultivated, used or developed to the satisfaction of the land board" may serve to weaken customary land rights in that dispossession may rest entirely on the subjective opinion of land board officials.

Interestingly, the LPR concluded that, 35 years after its passage, the Tribal Land Act no longer was a particularly "customary" one. It finds that as a result of changing the words "tribesmen" to "citizen" in the 1993 amendments, "the tribal basis for land allocation by land boards was done away with...[and as a result] the customary law basis for the exercise of powers by the land boards was undermined." In this process, "the system changed from tribe-based local land allocation system to a citizen-based national land allocation system" (Government of Botswana, January, 2003 at 24). In light of this, the LPR therefore recommends something particularly fascinating: the further codification of custom. It explains:

One of the first principles of an efficient and equitable system of land management is that the basic rules for acquiring, holding and disposing of land be transparent, known about and objective in their legal phraseology and operation. Customary law, as the law governing the *substance of land allocation*, needs to be reformed by a statutory code (i.e. a handbook on [customary] procedures) which spells out for all citizens the substantive ground rules applicable to allocation and management, in the same way as statutory rules dealing with the *procedures* applicable to all applications for tribal land

have replaced local customary rules on the matter (Government of Botswana, January, 2003 at 24, emphasis added).

However, despite the various excellent suggestions made by the Land Policy Review, it appears that in the seven years since the LPR's final report, little has been done to implement its recommendations. One of the authors of the report recently explained that "Sadly, there has not been much action on this front. We have long been awaiting a Botswana Government Paper, i.e. the government's response to the Land Policy Review. ...The LPR view is that the Tribal Land Act is now well overdue for revision and possible incorporation in a unified law." Indeed, the LPR suggests that, going forward, it is now time to do away with the various divisions between the kinds of lands and the laws that govern them in Botswana, and to draft and adopt a unified law that addresses all lands.<sup>38</sup>

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<sup>38</sup> It advises that "The ... preferable solution would be to recast all [relevant] existing land laws ... into one new land act divided into chapters dealing with tribal land, state land and land ownership by non-citizens. A further chapter would deal with the land tribunal system. Common sets of definitions and of general and miscellaneous powers applicable to all land matters would also be part of the new act. Common rules applicable to common matters could be provided for in the law. The whole would be a coherent, comprehensive and integrated statute dealing with land contained in one document" (Government of Botswana, January, 2003 at 173–174).

## IV

### MOZAMBIQUE'S LAND LAW

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## 4.1 Introduction

After the end of the Mozambican civil war, the Government of Mozambique established an inter-ministerial land commission to develop a new land policy. The commission took as its starting points a variety of practical realities and "non-negotiables." First, the law had to be an instrument that would define and protect existing land claims, lending *de jure* support to pre-existing *de facto* tenure. Second, as mandated by the new government, the state was to remain the sole owner of all land in Mozambique. Third, private investment needed to be fostered; the growth of the industry, mining, agriculture and tourism sectors were deemed necessary to the development of the nation. Finally, customary land claims – and the customary, local systems that managed them - were to be formally recognized.

Defining "customary law" in Mozambique is a more difficult task than in nations like Botswana that have a majority or dominant tribal group. Mozambique cannot point to one set of rules or practices that define its customary heritage; contained within its national borders are over three dozen different cultures, languages and tribes. Mozambique's customary land tenure regimes vary by region, shaped by factors such as population density, kinship organization, livelihood strategy, local ecology, land quality, and historical experience (Norfolk and Tanner, 2007 at 5). Mozambican lawmakers were thus charged with the very difficult task of writing a land law that was flexible enough to encompass and protect the customary practices and land claims of a wide range of peoples and cultures, maintain state ownership of land, and offer secure tenure and legal safeguards to private investors.

The resulting law is very short– a mere 35 Articles (12 pages) – and flexible enough to encompass within its bounds all of the various land tenure systems practiced in rural communities throughout the nation. Its construction is elegant, and its aims - to integrate not only customary and statutory laws but also customary and capitalist systems within the same locations – are innovative and ambitious. The land law creates new systems of land management and sharing designed to foster integrated rural investment and development and bring prosperity to rural communities. Its length and simplicity have meant that it can be directly translated into many of the languages spoken in Mozambique and read, taught and understood by Mozambicans from all walks of life. Most importantly, the land law elevates custom and all customary land claims up into formal law at a stroke, giving

weight and legal validity to the land claims of the rural and urban poor without the need for formal documentation. Importantly, the law's simplicity and conciseness extends into its implementing regulations, and has meant that it has been easy to directly translate the legislation into six of Mozambique's main languages and to disseminate information about the law widely.

The primary innovations concerning statutory recognition of customary land rights established by the Mozambique land law and accompanying legislation include:

1. Customarily-held land rights are equal in weight and validity to administratively-granted land rights;
2. "Local communities" are the lowest level of land and natural resource management and administration;
3. The "local community" may choose and create the leadership structures and rules by which it will administrate and manage its lands (customary or otherwise);
4. Customary principles of land management (including land transfer, dispute resolution, inheritance, and demarcation) govern community land use and allocation with the "local community";
5. Women have equal rights to hold, access and derive benefits from land independent of any male relatives: this principle overrides any contrary customary rule;
6. No written proof of customary rights is necessary; the oral testimony of an individual's neighbours that he or she has been occupying land in good faith for more than ten years is proof equivalent to and as enforceable as a paper title;
7. Processes for delimitation and registration of local community lands as a whole are established, after which the community becomes a legal entity, capable of transacting with outsiders;
8. Communities must be consulted before an investor or outsider application for land within that community can be granted, and are empowered to negotiate for mutual benefits in exchange for the use of their land;
9. Customary rights of way and other communal areas are explicitly reserved and protected; and
10. The decisions of community-level (customary) dispute resolution bodies are appealable directly up to the highest court of Mozambique.

Yet, the law's implementation has faced various challenges, for two primary reasons. First, (as in Botswana) even the best-drafted laws are prey to the complex manoeuvres of a nation's powerful elite and the reticence of administrative agencies to alter governance systems and power dynamics. As such, one might explain Mozambique's implementation challenges as stemming from the government's efforts to amend and undermine the original intent of the law. Yet a more nuanced analysis may point to a second factor: the limited content of the land law itself. As will be explored below, like Botswana's Tribal Land Act, Mozambique's land law lacks critical systems of checks and balances, oversight structures, and enforcement mechanisms. As such, it does not go far enough to protect the rights of the most poor and vulnerable within rural communities or include sufficient legal protections for communities against external threats.

#### 4.1.1 Historical context

In Mozambique, the Portuguese colonial regime designated specific areas of land for the exclusive use of the African population and proclaimed all other lands free for concession to colonial settlers and private agricultural investment. It removed Africans from the fertile valley lands they lived upon and granted these lands to newly-arriving Portuguese settlers and plantation enterprises. By the mid-twentieth century, the agrarian economy of Mozambique consisted of a handful of large, fertile plantations, hundreds of small, private commercial farms run by Portuguese settlers, and thousands of small indigenous family farms, most often consigned to steep hillsides, floodlands, or arid, less fertile soils. Under the 1961 *Regulamento da Ocupação de Terrenos nas Províncias Ultramarinas*, areas inhabited by Africans were designated "reserve" areas out of which no concessions could be granted, and within which formal legal title was prohibited. In these areas, the colonial administration co-opted the traditional chiefs (*régulos*) as an instrument of indirect rule; chiefs became responsible for levying taxes, recruiting labour and allocating land according to colonial mandates (Norfolk, 2004 at 21).

After more than 400 years of Portuguese occupation and colonial rule, and a ten year war for Independence, in 1975, Mozambicans succeeded in overthrowing the Portuguese and instituting a national government. Upon coming to power, the liberation army, FRELIMO (Front for Liberation of Mozambique) transformed settler farms and company plantations into state-run farms and community cooperatives based on socialist theories of

collective production. A central tenet of FRELIMO's socialist agenda was the elimination of traditional leadership; chiefs were seen by FRELIMO as a vestige of colonial control, having become instruments of the colonial administration, and the cultural and religious foundations upon which their authority was based were seen as having no part in a Marxist state. FRELIMO stripped chiefs and sub-chiefs of all of their powers and replaced them with village party officials who in many cases had no authority in the eyes of the villagers.

FRELIMO's socialist policies created enormous peasant resistance. Its rigid modernization plan, disregard of local cultural institutions, and repressive labour mandates were unpalatable to a peasantry who had just fought for ten years to overthrow a colonial state pursuing similar policies (Bowen, 2000; Hall and Young, 1997). Moreover, the South African and Rhodesian governments, determined to sabotage socialist movements in the region and external support for South Africa's ANC, began funding and training the RENAMO (Mozambican National Resistance) army, which gained support among some factions of Mozambican society. Thus began a brutal 16 year civil war, during which most of Mozambique's infrastructure was destroyed, including roads, bridges, telecommunication systems, schools, hospitals, shops and community meeting places (Bowen, 2000; Hall and Young, 1997). Hundreds of thousands of people were killed in brutal guerrilla fighting, and the Mozambican economy suffered hundreds of millions of dollars in damage. The war created mass displacement: as many as seven million refugees fled to neighbouring countries or were internally displaced within the country.

At the end of the civil war in 1992, many Mozambican refugees and displaced peoples began returning home, to the rural villages where they still had traditional rights over land. However, they often found that their lands had been claimed by other small-scale farmers and private investors. Meanwhile, in the early post-war period, the central government - anxious to bring "empty" land back into agricultural production and prompt national economic growth and rural development - was granting concessions over 'abandoned land' to a host of Portuguese, British and South African companies as well as a new entrepreneurial class of national "investors." These investors included government officials, ministers, war veterans, ex-state farm managers, and family members of government leaders; urban elites speculated on some of the nation's best land, gaining official legal title

through administrative processes rife with contradiction and confusion. Land-related conflicts multiplied, and it became a matter of urgency to craft a new national land policy (Tanner, 2002 at 2 and 5; Hanlon, 2002).

#### 4.1.2 Mozambique's land policy

As explained above, the inter-ministerial land commission established in 1995 was faced with crafting a national land policy that incorporated what at first seemed to be contradictory goals. The aims of the new national land policy were summed up by the government as follows: "Safeguard the diverse rights of the Mozambican people over the land and other natural resources, while promoting new investment and the sustainable and equitable use of these resources" (1995 National Land Policy, cited in Tanner, 2004 at 4–5). Mozambique's land policy also had to be synchronized with the 1990 constitution<sup>39</sup>, which reconfirmed the basic socialist principle in previous constitutions that "all ownership of land is vested in the state and cannot be sold, mortgaged, or otherwise encumbered or alienated" (1990: art. 46§1, 2; 2004: 109§1, 2).

The constitution also affirms that "the use and enjoyment of land shall be the right of all the Mozambican people" (1990: art. 46 § 3; 2004: art. 109§3), and moreover, that this right can be granted to individuals or to groups/corporate persons (1990: art. 47§2; 2004: art. 110§ 2). Importantly, the constitution also mandates that in awarding land use titles, the state should respect existing "rights acquired through inheritance or occupation" (1990: art. 48; 2004: art. 111) although the 2004 version adds the caveat, "unless there is a legal reservation or the land has been lawfully granted to another person or entity." Should expropriation of one's land be necessary, the constitution guarantees the right to just compensation (1990: art. 86; 2004: art. 82).

In relation to concepts of equality and social justice, the Mozambican Constitution explicitly establishes that "Men and women shall be equal before the law in all spheres of political, economic, social and cultural affairs" (1990: art. 67; 2007: art. 36). Therefore, the land law also had to

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<sup>39</sup> Mozambique has amended its constitution since the land policy and law were drafted, in 2004. As such, the sections relevant to the drafting of the national land policy were renumbered, and some of them altered. The current citations are included here, and all changes noted.

ensure that men and women have equal rights to hold, use, and claim land. Furthermore, the 1990 constitution affirmatively protected the rights of Mozambicans living and working on the land, mandating that "the terms for establishment of rights in respect of land shall... prioritize direct users and producers. The law shall not permit such rights to be used to favour situations of economic domination or privilege to the detriment of the majority of its citizens" (1990 constitution, art. 47§3). Interestingly, after several years of consolidating the market economy, this section was removed from the new 2004 constitution.

According to Tanner (2002), Mozambique's land policy explicitly accepted that customary land systems were carrying out an important "public service" at very low cost to the state. Anthropological and sociological research done by a range of other fieldworkers had found that customary tenure systems still accounted for over 90 percent of land tenure rights in the nation, and that customary leaders' control over and management of land and natural resources remained strong and was seen by villagers as legitimate (Norfolk and Tanner, 2007 at 5). This research found that locally, chiefs were more or less successfully distributing parcels of land to community members, mediating internal land-related conflicts, and maintaining and protecting community graveyards, sacred forests, communal areas and sites of historical importance (Norfolk, 2004 at 31–34). The research also confirmed that customary land management units – and the boundaries between these units – were still recognised and considered valid by local people and could be identified through processes of participatory fieldwork (Tanner, 2002 at 9).

After the land policy was approved in 1995, the Land Commission established a multi-sectoral stakeholder committee to discuss specific points of the policy and construct a draft land law. It then sponsored consultation exercises across the nation to ensure that a wide range of civil society groups were involved in the land drafting process. After one of the most participatory lawmaking processes in African history to date,<sup>40</sup> the law was enacted in 1997.

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<sup>40</sup> In 1996, the Land Commission held a National Land Conference to which it invited people from across Mozambican society, including FRELIMO and RENAMO deputies, religious groups, the private sector, academic institutions, traditional authorities, and a range of Mozambican NGO's, as well as UN and other international donor agencies. For three days, over 200 of these representatives debated the central tenets of the new land law and worked to shape its parameters. The commission incorporated these into a final land law bill which then went to the National Assembly. A massive effort was made to involve the public in the

## 4.2 Customary rights in the law

### 4.2.1 Turning customary land rights into statutory rights

Mozambique's land law turned *de facto* customary rights into *de jure* tenure by recognising customary norms and practices as one way of acquiring the state "right of use and benefit" (*Direito de Uso e Aproveitamento da Terra* or DUAT, in Portuguese). Under Mozambique's 1997 land law, land use rights can be attained in three ways:

1. Through "occupancy by individuals persons and by local communities, in accordance with customary norms and practices which do not contravene the constitution" (art. 12(a));
2. By "occupancy by individual national persons who have been using the land in good faith for at least ten years" (art. 12(b))<sup>41</sup> (This is only for Mozambican citizens, and it gives a definitive right only if there is no third party manifestation of a declared and legally recognized interest over the land in question);
3. By "authorization of an application submitted by an individual or a corporate person" to government land administrators, which may then allocate 50-year leasehold rights, after consultation and approval by the community within which the land requested is located (art. 12(c)) (This mechanism is the only route open to foreigners and to national and international companies).<sup>42</sup>

Importantly, the land right is legally the same, regardless of whether it is acquired under customary terms, good faith occupancy, or public application and consultation. In all three cases, it is a private right and holders can

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debate over the bill: a full copy of the land law bill was printed in the national daily newspaper, and the text of the bill was read on national radio. Full copies of the bill were made publicly available at the assembly and during breaks in legislative debate, members of civil society mingled with representatives to discuss the various points of the law. When the bill finally passed into law, it maintained in full form a majority of the tenets that civil society had lobbied for (Negrao, 1999).

<sup>41</sup> Article 157 also makes this point, defining "occupancy" as a "form of acquisition of the right of use and benefit of land by national individual persons who have been using the land in good faith for at least ten years, or by local communities."

<sup>42</sup> It is noteworthy that only senior government figures - provincial governors, the Minister of Agriculture, and the Council of Ministers - can approve these applications, acting in the name of 'the state' as owner. Civil servants cannot approve land claim applications, but are charged with preparing all the necessary application paperwork and documentation.

exclude third parties (Norfolk and Tanner, 2007 at vi; Calengo *et al.*, 2007). Furthermore, "men and women, as well as local communities, may be holders of the right of land use and benefit" and may obtain this right either "individually or jointly with other individual and corporate persons by way of joint titling" (art. 10§1, 2). The use and benefit of the land is free for "family uses, local communities and the individual persons who belong to them" (art. 29(c)).

Under the first two methods of acquiring a right of land use and benefit, affirmatively registering one's land claims is not necessary; Article 14§2 very clearly states that "the absence of registration does not prejudice the right of land use and benefit acquired through occupancy...provided that it has been duly proved..." Under the land law, "Local communities who occupy land according to customary practices" automatically "acquire the right of land use and benefit" (regulations, art. 9§1). Anyone who had been granted land rights "in accordance with customary norms and practices which do not contradict the constitution" before the land law was passed (or who had been living on land for ten years in good faith) thereafter automatically held a formal right to use and benefit, as strong as any paper title granted to an investor. None of these customary rights need to be proactively, formally registered; the absence of paperwork proving title does not factor into the strength or validity of land rights. Land rights exist and are enforceable regardless of whether any administrative action or formalization procedure has been taken. These rights are secure, inheritable, and can be transferred to third parties, either internally within the community or to outsiders through a formal consultation process (described below).

Of particular note is that Mozambique's land law is geared towards creating a model of integrated development. Under the land law, there are no divisions in types of land, as is the case in both Botswana and Tanzania. No artificial lines demarcate "tribal land" or "village land" as separate than land over which the state has more direct control. *All* land constitutes a single Land Fund of the state, and may be occupied by local communities, good faith occupants and other (mainly private investor) approved users. Moreover, the law's extensive definition of the "local community" – grounded in the longstanding existence of customary boundaries – arguably creates an implication that the majority of the national territory is held according to pre-colonial community claims (although the majority remain unidentified and unrecorded on official maps).

#### 4.2.2 Accommodating diverse customs under one law

As described above, lawmakers never attempted to establish one single definition of tradition or "custom" in Mozambique. Rather, the land law was designed to be a dynamic, flexible instrument that would be able to accommodate many different kinds of land rights and landholdings at once and allow for national political and economic change over time. It was also written with enough flexibility to allow each ethnic group within Mozambique to continue to both follow its own land management traditions and be fully within the tenets of the national legal system. To achieve this, the law simply states that a) rights are acquired by customary norms and practices (art. 12 (a)), and that when participating in resource management, conflict resolution and titling, the "local communities use, amongst other things, customary norms and practices" (art. 24). What exactly those practices and norms actually are or should be was left undefined. In so doing, the law created parameters that were sufficiently vague to encompass the nation's myriad customary systems within one law. Tanner (2002 at 25) explains the rationale behind this legal construct:

The new legal concept of the 'local community'...was designed to give legal form ... to the single land unit ...If such a unit could be created, then the issue of codifying and incorporating over twenty distinct customary land systems could be avoided. If the new law recognised the legitimacy of what went on inside any given community, then all that was needed was to recognise the land use rights allocated within that area, *however they were acquired*, provided that the community in question accepted the legitimacy of 'its' customary system. Attention would then focus instead on the relationships between this community and the outside world. Customary law would be integrated fully into the formal legal framework of the modern state without the need for long and complex codifications.

### 4.3 Community land rights

#### 4.3.1 Making the community a formal legal entity

To best safeguard rural smallholders' existing land claims and ensure that villagers would be able to continue planting, harvesting and using the land according to customary usage, lawmakers chose to make the community the

foremost legal entity, whose borders are clearly protected from outsider infringement and within which traditional mechanisms of land use and management may prevail. Mozambique's land law therefore establishes that generally, as under custom, community lands are the meta-unit, from which all other land and natural resources rights are derived. Within the community borders, a range of individual or family and other bundles of rights exist, all allocated and managed by the local land management system according to the prevailing set of customary principles. Through Articles 10 and 12, a "local community" can be a title holder over the land used and occupied by all of its members.

As such, one of the most important components of the land law is its legal definition and recognition of a "local community" as a formal legal entity. The law defines a local community as: "a grouping of families and individuals, living in a territorial area that is at the level of a locality or smaller, which seeks to safeguard their common interests" (art. 1§1). This definition is grounded in community occupation and use of land (based on the prevailing land use, kinship and internal management systems of each community) and was designed to be able to be used in the wide variety of cultural and ecological contexts of Mozambique. The definition establishes community size as being "at the level of a locality or smaller"<sup>43</sup>. The law then specifically details that community interests may include land for a wide range of uses, including "areas for habitation or agriculture, whether cultivated or lying fallow, forests, places of cultural importance, pastures, water sources and areas for expansion" (art. 1§1). Indeed, various forms and arrangements of community or group are possible under this definition of "local community". A community may be a traditional unit based on clans or chieftainships, extended families, or simply a group of neighbours (Norfolk and Tanner, 2007 at vii).

Under the law, even if a community chooses to temporarily "share" its land rights with an outside investor under leasehold, in theory it never loses the rights to its land. In principle, and interpreting the law rigorously, the only way for a community to lose its land rights is if the state must compulsorily acquire the land "in the public interest." In this instance, the community must be paid fair indemnification or compensation (art. 18§1(b)). However,

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<sup>43</sup> Personal communication, Christopher Tanner, explained that this qualification was added into the definition at the last minute to assuage governing party fears that the 'local community' was going to replace or undermine existing local government structures.

while the law only allows investors to receive 50-year "rights of use and benefit" that may be extended for a maximum of another 50 years, in practice, the creation of limited-term land rights for investors effectively serves to take the land out from under the community authorities' jurisdiction. There remains great uncertainty as to whether the local communities will ever be able to reassert their rights over these lands again.

#### 4.3.2 Community land administration

Rather than creating new local leadership structures and land administration procedures, Mozambique's land law attempts to ground local land and natural resource administration and management in pre-existing community practices.

To this end, the land law does not establish any rules by which communities should govern themselves or call for the creation of any new local land administration structures. It does however mandate that local community land claims are to be managed according to principles of "joint titling" as set out in Mozambique's Civil Code (art. 10§3 of the land law and art. 12 of the regulations). Article 1403 of the civil code defines "co-ownership" of property as when two or more people simultaneously hold property rights over the same item of either moveable or immoveable property. In the context of community title, this means that all community members - both men and women - have equal rights to community property, must participate in all decisions concerning community lands, and must have an equal say in land and natural resource management decisions.

The law and regulations do call for the selection of a community land committee to represent the community in all matters pertaining to land. The formulation is very flexible – between three and nine people chosen by the community, some of whom must be women. Beyond this gender specification, the land law does not dictate how community leaders and representatives should be selected, leaving each community to choose representatives according to its preferences. A community may choose to continue to look to chiefs and headmen to allocate and manage land, or it may choose to establish new community leaders according to its own preferences. The Delimitation Training Manual (Land Commission, 2000) emphasizes this, stating that community "management institutions and their representatives are those which the community recognizes as existing and functioning" (Norfolk and Tanner, 2007 at 25).

The land law also leaves each community free to determine *how* it will administer land. Under the law, the external boundaries of community land are protected and preserved, and all internal dealings are managed by the community. Customary norms and practices are one of various legitimate ways by which local residents may carry out natural resources management, conflict resolution, and titling (art. 24§2). This construct also allows a freer space within which "custom" can shift and change over time; what "custom" is can be redefined as needed, so as to evolve and adapt to changing local circumstances, so long as it never contravenes the constitution (arts. 12(a), 24§2). As a community, the individuals defined within have the right and responsibility to participate in land natural resources management, conflict resolution and land allocation matters within the bounds of the community (art. 24§1).

The potential vagueness of the system for intra-community governance was to be resolved by Article 30 (*Representation and action of local communities*), which sets out that "The mechanisms for representation of, and action by, local communities, with regard to the rights of land use and benefit, shall be established by law." Yet to date, no regulations or legislation clearly establishing more articulated mechanisms for community representation have been passed. However, the Government of Mozambique appears to assume that it has responded to this mandate by issuing Decree 15/2000. (Tanner makes the compelling argument that while the government believes that Decree 15/2000 fulfilled its Article 30 obligations, the decree does not in fact mention Article 30 - nor was it issued as legislation, as specified in the land law - and is therefore not a response to it (Tanner, personal communication, 2010)).

Norfolk and Tanner (2006 at 8–10) report that Decree 15/2000 recognizes "community authorities" as "people who exercise a specific form of authority over a specific community or social group" and who undertake various functions, including allocation and management of land, as well as other obligations such as: dissemination of government laws and policies among community members; collaborating with government in keeping the peace and fighting crime, including specifically the illegal exploitation of natural resources; civic education of community members; mobilization and organization of people for community development activities; mobilization and organization of people for tax payment; and other activities. According to Norfolk, Decree 12/2000 was issued in response to government officials'

assessment that it was necessary to re-instate a form of administrative control over communities at the lowest level; this definition turns "community authorities" into a kind of extension of state administration, exercising an essentially public role (Norfolk, personal communication, 2010).

Norfolk suggests that Decree 15/2000 works to define the community as a *public* group within a government-defined jurisdiction, rather than as a *private* community that is the holder of a land right over a defined spatial area. He explains how "the practical effect of these mandates is the interpretation that formal land administration may be carried out by working with community authorities when allocating new rights of use and benefits to potential investors, as opposed to following co-title rules and ensuring that *all* community members are consulted. Many conflicts then result when local people contest the subsequent occupation by the investor, and the right of the chief or other 'representative' to make decisions on their behalf over what they consider to be 'their' land" (Norfolk, personal communication, 2010).

This debate points to a larger - and serious - national disagreement about the status of the local community as a private legal entity, the right of the entire community to be consulted about the use of its co-titled lands, and the necessity of establishing clearer and more rigorous definitions and structures for community-level land administration.

#### 4.3.3 The delimitation process: identifying the local community and registering its right

While it is not mandatory to formally register community land use rights, communities may choose to register their rights and receive documentary proof of their land claims.<sup>44</sup> The regulations specify that "Areas over which a right of land use and benefit has been acquired by occupancy according to customary practices *may*, when necessary or at the request of the local communities, be identified and recorded in the National Land Cadastre (regulations, art. 9§3, emphasis added). This titling and registration process does not create the right; it only provides documentary evidence of the pre-existing right. The methodology developed for the purpose is called "community delimitation."

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<sup>44</sup> As explained above, a community need not proactively take steps to formally claim its land; communities living on land according to customary claims or in good faith for ten years or more automatically have *de jure* title to their land.

Community delimitation is deemed to be a priority when 1) there are conflicts regarding the use of the land and/or natural resources and 2) in areas where the state and/or investors intend to initiate new economic activities and/or development projects. It is also prioritized when the local community specifically requests to be delimited (technical annex, art. 7 §1). A community might choose to seek documentation in the event of a land dispute with neighbouring communities, in circumstances where a community stands to lose some of its land or natural resource claims, or when a community seeks to share some of its lands and enter into partnership with outside investors, among other reasons.

The delimitation process essentially allows each local community to proactively define itself. It "centre[s] around a participatory rural diagnosis in which local people draw upon their own knowledge of their history, land use and local socio-political organization to define their community" (Durang and Tanner, 2004). To this end, the delimitation process relies heavily on testimonial evidence provided by community members and neighbouring communities. The technical annex to the land law sets out the necessary procedures a community must complete before receiving an official delimitation certificate (technical annex, art. 5§1). These steps are as follows:

**First, an advisory "working group" must be established to coordinate and lead the community through each step of the delimitation process.**

The composition of the working group is not defined in the law or regulations, although Article 11(2) of the technical annex mandates that it should "include a technician with basic knowledge of topography and who shall have the information contained in the Cadastral Atlas." This stipulation has been interpreted to mean that a district-level SPGC official (*Servicios Provincias de Geografica e Cadastra*) must be involved in the process.<sup>45</sup> To ensure that the results of the delimitation process are equitable, just and representative of the community as a whole, the working group must "work with men and women and with different socio-economic and age groups within local communities" and ensure that they arrive at decisions through consensus" (technical annex, art. 5§2).

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<sup>45</sup> SPGC representatives are also often included as representatives of the district administrator, and therefore perform both a technical and a representative function.

**Second, the working group convenes meetings to educate the community and raise awareness** about the delimitation process, including information concerning:

- The reason for and objectives of the delimitation process;
- Relevant provisions of the law and regulations;
- The methodology of the delimitation process; and
- The advantages and implications of community delimitation (technical annex, art. 8§1).

These meetings culminate in the **election of community representatives** who will be directly involved in the delimitation process. The minutes of all delimitation-related community meetings must be signed by these representatives.

**Third, the community undertakes participatory appraisal and map-making processes.** A participatory appraisal is defined in the technical annex as "information given by a local community" regarding:

- a) Its history; culture and social organization;
- b) The use of the land and other natural resources and the mechanisms for its management;
- c) Spatial occupation;
- d) Population dynamics; and
- e) Possible conflicts and the mechanisms for their resolution. (technical annex, arts. 2§6 and 10§1).

The participatory phase of community delimitation is designed to foster community dialogue and often involves discussion of community history, social organization, and current land and natural resources use and management practices. From the appraisal and accompanying discussion, "participatory maps" of the community are drawn. At least two participatory maps must be made by separate community sub-groups (with at least one made by men and one by women, so as to create a space in which women can feel free to make their voices and opinions heard). Participatory maps are defined in the law as:

Drawings designed by an interest group of the community, namely men, women, young people, elders and others, which

shows in an initial and relative way, not to scale, the permanent natural or man-made landmarks used as boundaries, the identification and location of natural resources, reference points where conflicts regarding natural resources take place or any other boundaries or relevant features (technical annex, art. 2§8).

By allowing natural markers to help define the boundaries of community lands, the law allows for the formalization of customary markers, or what Unruh (2006) describes as "landscape-based evidence"<sup>46</sup>. Neighbouring communities must verify the accuracy of the maps and contribute to a descriptive report of neighbouring lands (technical annex, art. 5 §3).

**Fourth, the boundaries are agreed by all stakeholders, marked on the participatory maps, and defined physically on the ground.** After boundary harmonization discussions and agreements with the leaders of neighbouring communities, boundary markers are clearly set out according to naturally-occurring or customarily-valid landmarks. Customary markers are specifically considered to be valid formal evidence of land claims. Where there are no natural or man-made boundaries, communities may reference "other physical markers, such as trees or piles of stones, which indicate the boundaries of the area it occupies" (technical annex, art. 10§2). In such instances, in order to define clearer boundaries, "new hedges of trees or shrubs may be planted in the presence of neighbouring communities" (technical annex, art. 4§4).

**Fifth, the two maps are then compiled by state technical staff into one computer-generated cartogram, to which a "sketch plan" and accompanying "descriptive report" are attached.** The sketch plan is a transcribing of the community-generated maps into terms that enable it to be located on the cadastral maps, including geo-referencing points and boundary lines. The "descriptive report" is derived from the community's participatory appraisal exercises and may include the community's structure and history, specification of the community's natural resources, communal areas, sacred spaces and important community infrastructure, and

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<sup>46</sup> Research undertaken in preparation for the land law found that there was "surprising agreement between customary evidence and what local state officials view[ed] as legitimate evidence" (Unruh, 2006). In practice, Unruh (2006 at 755) writes, "such agreement appears to be continuing, and what works on the ground is currently becoming incorporated into formal law as evidence...inscriptions on the landscape are acts of formalisation which have a high degree of social visibility...[and can] signif[y] a public claim."

elaboration of any relevant community land and natural resource management practices, among other information.

**Finally, the sketch map and descriptive report are presented to the community and leaders of neighbouring communities for verification and approval** (technical annex, art. 12§1).<sup>47</sup> Once approved, the documents are entered into the national cadastre. The cadastral service must issue a Certificate of Delimitation in the name of the community within 60 days. It is up to the community to determine what it wants to name itself (art. 13§4) for the purposes of this document. This certificate provides formal evidence that a delimitation exercise was carried out in accordance with the law and certifies the existence and boundaries of a community<sup>48</sup> (Durang, and Tanner, 2004; Norfolk and Tanner, 2007 at vi, 13; Calengo *et al.*, 2007 at 26).

Once registered formally, the community holds a single right of land use and benefit, and as a title holder it also acquires legal "personhood"<sup>49</sup> and can

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<sup>47</sup> Importantly, all neighbouring communities must also be consulted and must actively verify the accuracy of the maps that the community has made, take part in drawing the sketch plan, and contribute to the descriptive report of their neighbour's lands (technical annex, art. 5§3). The verification of neighbouring communities is critical; border disputes are common in areas rich in natural resources, and often great effort must go into finding a compromise solution to complex and on-going conflicts over community boundaries.

<sup>48</sup> Communities may also go a step further and have their land formally "demarcated" by trained land surveyors. This process involves staking out markers, taking measurements, and preparing a technical file which includes the coordinates of the community land, a topographical map, a calculation of the area of the parcel and other technical measurements and data. This exercise is, however, expensive and customary boundaries take precedence over measured boundaries in the event of a discrepancy (technical annex, arts. 16§1 and 20–21; see further Norfolk and Tanner, 2007.). Importantly, Article 16 of the technical annex mandates that when there is a discrepancy between measured boundaries and customary boundaries, the customary boundaries trump. Of this process, Norfolk and Tanner write: "Legally, a demarcated land right is not 'stronger' than a delimited one... Whichever process is used to fix the spatial dimension of these rights and notwithstanding the document which results from this process, the underlying right is the same" (Norfolk and Tanner, 2007 at 7).

<sup>49</sup> Durand and Tanner (2004) explain that; "Once a community land right is proven through a delimitation, any investor is obliged by law to consult and agree terms with that community, as title-holder of the land in question." Formal delimitation is not necessary for a consultation process between investor and community. However, possession of formal title can strengthen community bargaining power. Generally, only when a community has particularly valuable and coveted natural resources within its borders, or has come into conflict with investors claiming land within its domain, will a formal community delimitation be conducted. One reason for this is that the process is incredibly time consuming, and has tended to arouse border disputes with neighbouring communities, particularly in areas rich in forests and other natural resources. Another reason for the slow process is that Mozambique does not have the

thereafter enter into contracts with investors, open bank accounts and undertake other legal actions.<sup>50</sup> The process also establishes a clear map that can guide investors and local people alike when it comes to determining where resources are available for investor use and clarify which community or communities have rights to those lands (Durang and Tanner, 2004).

According to Tanner (2006 at 11–12), the community delimitation and registration approach was adopted after extensive field trials as a way of "formalizing the informal." He explains that this process was established:

Not only because it matched the actual sociology of rural land use, but also because it offered a quick and cost-effective way of securing local land rights. One large unit could be surveyed and recorded without the need for surveying and registering hundreds of small plots and other resources with complex, communal and common land characteristics. Once a suitable land border could be identified around the villages and land resources in question, a single document could give overall protection to all those within this area, leaving the customary system to deal with the specifics of land use by its residents (Tanner, 2002 at 22).

Although the land law itself never makes this explicit, the delimitation process is designed to foster critical examination and clarification of who the community is, what its limits are, and to provoke community debate, discussion and decision about how it will choose to govern itself – through what leadership structures and according to which rules. As such, the delimitation process may be useful as a basis or starting point for community participatory land use planning and community natural resources management.

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technical resources and funding to delimit and give formal title to many more communities per year.

<sup>50</sup> Norfolk has noted that under one interpretation of the law, a local community attains legal personality merely by holding land rights, which would allow it to negotiate and enter into enforceable contracts even without having gone through the process of a delimitation. However, in practice, even delimited communities may be compelled to follow additional legal procedures to establish themselves as a formal "association" in order to be recognized by bureaucratic and judicial actors as an equal party to a contract (Norfolk, personal communication, 2010).

#### 4.3.4 Community land and natural resources management

The land law allows that in rural areas, "local communities shall participate in the management of natural resources". In exercising this competency, "the local communities shall use, among others, customary norms and practices" (art. 24). It does not define any specific or particular natural resource management practices that communities must follow; communities are free to manage the use of community land and natural resources according to whatever customary rules they consider to be valid<sup>51</sup> (unlike Tanzania's Village Land Act, the law does not mandate the formal creation of community by-laws).

These principles are re-affirmed in Mozambique's 1999 Forest and Wildlife Law (Law 10/99, of 7 July 1999). Like the land law, the forest and wildlife law also makes all natural resources the property of the state, but allocates access and use rights over these resources to Mozambicans. Lawmakers synchronized various aspects of the laws; the forest and wildlife law defines "local community" in almost exactly the same words, and establishes that any forest resources located within the boundaries of a local community are to be held and managed by the community, as under Article 24 of the land law (forest and wildlife law, art. 3(e)). The forest and wildlife law also guarantees community access and use of natural resources for subsistence, subject to conditions and restrictions such as prohibitions on the hunting of protected species, the use of certain weapons and traps, illegal burning of forest, the cutting of young trees, and other interdictions (Calengo *et al.*, 2007 at 6).

#### 4.3.5 Respecting customary rights of way

Importantly, the land law provides for public interest servitudes or "rights of way"; as under custom in Mozambique, one must allow neighbours to cross through one's land to access necessary water sources, natural resources, or infrastructure. Under the regulations, title holders must allow access through their parcel of land to neighbours - even if this means creating the servitudes necessary for access (regulations, arts. 13§1(b) and 14(b)). Furthermore,

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<sup>51</sup> Tanner (2002) explains that lawmakers, faced with data indicating that almost all of the land use in Mozambique was managed by customary structures, "decided that rather than mandate an entirely new mechanism for natural resource management, "it made sense to give [customary] systems full legitimacy under the law of Mozambique" and to treat community areas "as self-contained land management units within which the prevailing local land customs could and should apply."

rights holders must respect the servitudes that have been created and registered "in respect of public and community ways of access and access for livestock, which have been established by customary practice" (regulations, arts. 14(c) and 17§2). According to Tanner, these regulations were added as a result of research showing that in rural areas "many important footpaths and other rights of way (*servidões*) established by generations of customary use...might go unrecorded... [which] could result in communities being cut off from access to rivers, or being told that they can no longer use part of this land for traditional seasonal grazing" (Tanner, 2002). Importantly, this means that private investors cannot block community members from crossing through their lands to access long-used water sources, natural resources, or infrastructure.

#### **4.4 Individual land rights**

##### 4.4.1 Claiming individual customary land rights

As with communities, Mozambican nationals may acquire land rights either through 'customary norms and practices', or 'good faith' occupation (art. 12). This process is also automatic for individuals: no affirmative steps need to be taken; such individual and family land use rights were formalized the moment that the land law came into effect.<sup>52</sup> The absence of a legal document does not undermine the strength and validity of a family's or individual's land claim. Even if an investor arrives from outside the community with a piece of paper claiming title, the individuals or families living on this land may not be summarily displaced.

The oral testimony of one's neighbours is acceptable as proof that an individual has a legal claim to his or her land. Under the law, one's "right of land use and benefit can be proved by means of a) presentation of the respective title, b) testimonial proof presented by members, men and women of local communities or c) expert evidence and other means permitted by law" (art. 15). The regulations elaborate that "in the case of a claim to the right of land use and benefit by two parties, where both parties present

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<sup>52</sup> Lawmakers recognized that communities and individuals may not have the time, capacity, or resource to travel to government offices to formally register their rights, or the legal savvy, literacy skills or technical know-how to comply with complex land registration processes. They also acknowledged that Mozambique's civil service and administrative structures did not yet have the resources, capacity and expertise to directly register and administer all land community, family and individual rights across the country (Norfolk and Tanner, 2007).

testimonial evidence, the party who demonstrates the earlier acquisition shall prevail, except where the [subsequent] acquisition was in good faith and endured for at least ten years (regulations, art. 21§2). In other words, if an individual or family can prove through the oral testimony of neighbours and/or community leaders that they have been living or farming on a piece of land for over ten years in good faith, title is established. Such a mechanism ensures that illiterate individuals can both claim their lands and support their neighbours' claims. Proof of one's land claims may also be rooted in landscape-based evidence, as under custom. For example, the age of planted trees<sup>53</sup> is one sign of current or past ownership, as is the clearing of fields.

Should an individual choose to formally register his or her land claim, the regulations provide that "areas over which a right of land use and benefit has been acquired by occupancy in good faith may, when necessary or at the request of the interested parties, be identified and recorded in the National Land Cadastre" (regulations, art. 10§3). The application process they must follow is a simplified version of the community delimitation process, described above, but need not include a sketch of the land, a descriptive report, or a provisional authorization (regulations, art. 34).

Theoretically, the only factors that might displace an individual or family is if they were occupying land in bad faith, or for less than ten years and the land's prior claimants arrived to contest the current residents' claims. However, the law is silent on how a community might chose to terminate the land rights of an individual occupying land in bad faith or in breach of customary law. Nor does the land law establish safeguards for how a community member might contest the revocation of his or her land rights by family members or customary authorities. Theoretically, such decisions may

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<sup>53</sup> Describing the process of determining what could be considered as proof of legitimate occupancy in post-war Mozambique, Unruh (2002) explains that: The research on the spatio-evidence problem...found that a shift in landscape-based evidence subsequent to the war had the effect of selecting for forms of customary evidence that were more compatible with the formal tenure system (regarding occupation), particularly agroforestry trees... Forces associated with the war and the tenurial disconnection between customary, migrant (war displaced), and formal tenure acted to put even greater weight on older agroforestry trees compared to younger trees and other forms of evidence . This suggests that even in situations where formal and informal institutions regarding property rights are most disrupted (subsequent to war), agroforestry trees as legitimate evidence can be or can become quite strong, particularly relative to other forms of evidence" (Unruh , 2006 at 761).

be appealed through the formal court system; yet the law does not outline a clear path of appeal of village level decisions (see sec. 4.6.1 below).

#### 4.4.2 Transfer, inheritance, sale and mortgage

The "right of use and benefit" acquired by occupation by Mozambicans is a permanent land right. Yet because all land is owned by the state, land cannot be sold or transferred by rights holders. However, "all infrastructures, structures and improvements existing upon the land" may be sold or transferred (art. 16§2). The regulations caution that "The purchase and sale of infrastructure, structures and improvements located on rural tenements does not imply the automatic transfer of the right of land use and benefit" (regulations, art. 15§2). Transfers may be *inter vivos* (by sale and purchase of infrastructures or improvements) or by inheritance. Similarly, while the land itself may not be mortgaged, all improvements to the land may be mortgaged, as the holder has a legal right of ownership to these improvements, infrastructures and buildings (art. 16§5). These rules combine to obfuscate and hide a growing informal land market in Mozambique wherein trees, huts, crops and other structures are transacted at distorted prices that in actuality reflect the value of the land they sit upon. Once the sale of these assets is completed, the underlying right of land use and benefit may then be transferred (Norfolk and Tanner, 2007; Calengo *et al.*, 2007 at 5, 18 and 21).

All such transfers and sales of improvements and buildings must be formally registered; while it is not necessary to register a land use and benefit right acquired under customary law or good faith occupancy, it *is* mandatory to register any changes to or transfers of that right that the holder may seek to make (art. 14§1). This registration must be done by means of a "notarial deed" at the public property register (*Conservatórias do Registo Predial*) and only after both "authorization from the competent state entity" (art. 16§2) as well as "consent by the community members." (regulations, art. 15§4). Importantly, while the law mandates that a community must consent to all land transfers that occur within its bounds, it does not clarify what kind of approval is necessary, by whom, or establish a mechanism through which such community consent is to be achieved.

#### 4.4.3 Women's land rights

Women's equal right to hold rights of land use and benefit is a central tenet of Mozambique's land law. The Mozambican Constitution sets out that "men and women shall be equal before the law in all spheres of political, economic, social and cultural life" (constitution, art. 36). Within the text of the land law, women's right to hold land is established three times. First, Article 10 makes clear that "National individual and corporate persons, men and women, as well as local communities may be holders of the right of land use and benefit" (art. 10§1). Second, in regard to individual titles, Article 13§5 asserts that: "Individual men and women who are members of a local community may request individual titles, after the particular plot of land has been partitioned from the relevant community land." Third, Article 16§1 decrees that "The right of land use and benefit may be transferred by inheritance, without distinction by gender."

Mozambique's new family law (No 10/2004), which regulates transfers of property between spouses and their families at marriage and at death, strengthens and underlines these provisions. It recognizes not only civil marriages but also customary marriages and informal unions between men and women. It holds that all women who have lived with their partners for more than a year are entitled to inherit the property of their partners. The new family law also explicitly gives either spouse responsibility over the family as well as family decisions regarding assets and property. Included in Mozambique's new family law is the provision that immovable property, whether belonging to each spouse individually or as common property, may only be transferred to others with the express permission of both spouses. Together, Mozambique's land law and family law provide strong protections for women's land and property rights, both during marriage and in widowhood.

Furthermore, the land law is carefully and consistently explicit about women's inclusion in every component of community land-related procedures; every time that a community is defined, or community input deemed necessary, the law mandates that women and disenfranchised groups are to be included. For example, the technical annex establishes that all steps of the community delimitation process must include women's active participation, presence and input. The working group guiding the delimitation must take care to "work with men and women and with different socio-economic and age groups within local communities" in all steps of the process (technical annex, art. 5§2); women must take part in the

participatory community map drawing process – drawing their own separate "women's map" (technical annex, art. 2§8), and the forms completed during the delimitation process must be signed by no less than three and no more than nine "men and women from the communities, chosen at a public meeting" (technical annex, art. 6§3). Women's participation in these processes is further underlined on the accompanying forms in the technical annex – the participants included must be listed, and must include both women and men's names (technical annex, forms 1 and 3).

In addition, as described above, because women are "co-owners" of a joint community title, women have equal rights to community property and must be involved in land and natural resource management decisions (art. 10§3 of the land law; art. 12 of the regulations; art. 1403 of the civil code) Mozambique's land law therefore not only generally establishes women's right to hold land in their own name, but also essentially forces communities to involve women at every step of community processes. In mandating that women's voices and participation are part of all community land and natural resource management decisions and practices, it leaves no choice but for community leaders and members to create a space where women's input is a necessary and integral component.

However, community lands are to be managed under customary systems, and, as explained in Chapter 2, there is much empirical evidence that under some customary systems and within families, women do not have equal rights to hold, manage, transfer or inherit land. Mozambique's land law addresses this possible conflict between custom and women's rights by clearly establishing that land rights may be acquired only "*according to those customary rules and practices that do not contradict the constitution*" (art. 12, emphasis added). Yet because the land law provides no oversight mechanisms or formal checks on abuses of customary power, it is not clear how community members and leaders are to be held accountable to following this mandate and not acting in such a way that transgresses women's constitutional rights. Within the community, the law does not create structures or procedures to help a woman ensure that her land rights are enforced in the face of a hostile family member or customary authority. To do so, she must proactively leave her community and file an action in court. In this respect, the land law is gravely lacking in oversight and enforcement mechanisms and relies too heavily on the supposed goodwill and efficacy of customary management systems.

#### 4.5 Consultations and community-investor partnerships

As mentioned above, in addition to customary rights and good faith occupancy for ten years or more, the third way to acquire a right of land use and benefit is through "authorization [by the state] of an application submitted by an individual or corporate person in the manner established" by the land law (art. 12(c)). While Mozambican nationals may choose to acquire rights through this provision of the law, this is the *only* way foreign individuals and both national and foreign corporations can acquire a right of land use and benefit. These applications will only be awarded if they involve "an investment project that is duly approved" and if foreign applicants have met the appropriate residency requirements.

Granted rights of use and benefit are awarded for a term of 50 years, renewable for another 50 years upon application (art. 17§1, regulations, art. 18§1). This right is transferable and inheritable. To apply for a grant of land, applicants must seek the approval of the district administrator, and include a proposed "exploitation plan" detailing how they intend to use the land.<sup>54</sup> Importantly, before being granted a right of land use and benefit by the state, investors must also carry out a consultation with the community or communities in which the land to be granted is contained, "for the purpose of confirming that the area is free and has no occupants" (art. 13§3). If the land requested falls within the customary boundaries of a community (which

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<sup>54</sup> All applications for land use and benefits rights must also contain the identification document of the applicant (in the case of individuals) or the articles of association (in the case of a corporate applicant), a sketch of the location of the land, a descriptive report; a description of the nature and dimension of the undertaking that the applicant proposes to carry out, the opinion of the district administrator (determined only after consultations with the local community); proof of public notice, and proof of the payment of the provisional authorization fee. Where the land is intended for the exercise of economic activities, the application must contain a development plan and a technical opinion by relevant ministry in charge of supervising the intended economic activity (regulations, arts. 24 and 26). After an application has been submitted, a provisional authorization is issued, and this provisional authorization will be valid for a maximum of five years for Mozambican nationals and two years for foreigners (art. 25; regulations, art. 28§3). The applicant has one year to clearly demarcate the boundaries of the land he or she now has a provisional title over. If this demarcation has not been done and the applicant has not requested a 90-day extension of the time limit, the provisional authorization is immediately cancelled (regulations, art. 30). The definitive authorization of an application to acquire a right of land use and benefit is granted, and a title is issued, only "once the fulfillment of the undertaking or the exploitation plan has been ascertained" (regulations, arts. 11 and 31). These rules are designed to protect against land speculation, and have indeed been used to revoke grants of land use and benefit.

is likely, given the definition of occupation by a community in Article 1 of the land law) then "A joint operation shall be carried out, involving the Cadastre Services, the district administrator or his representative, and the local communities.<sup>55</sup> The outcome of this work shall be written up and signed by a minimum of three and a maximum of nine representatives of the local community, as well as by the owners or occupiers of neighbouring land" (regulations, art. 27§2). Thus an investor, hoping to establish an economic enterprise upon a certain plot of land, must consult the community legally holding the right of land use and benefit over this land (as acquired by custom) and proactively ask the community itself to grant the land. At the consultation, the community may agree or may refuse to cede the requested land to the investor. Applications for rights of land use and benefit will not be processed unless local community consultation has taken place (art. 13§3).

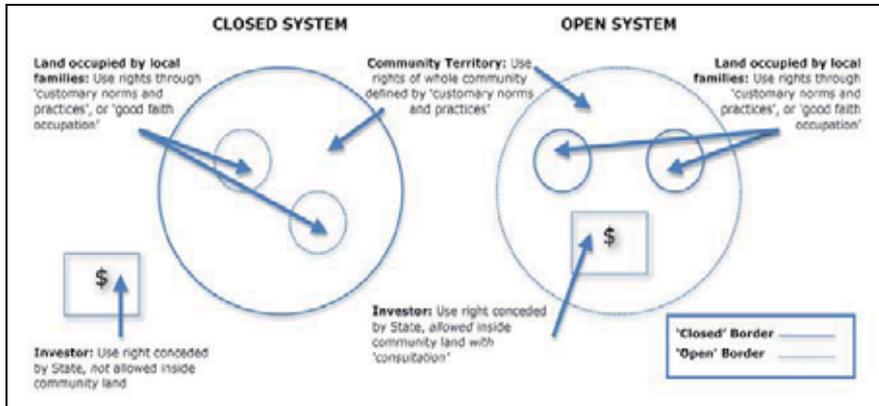
These obligatory community consultations are a central tenet of Mozambique's land law. Part of lawmakers' motivation for instituting mandatory consultations stemmed from "a concern that local people should be consulted first before any new land allocations are made... [as] they are the ones who know where rights through occupation exist...and whether a piece of land is in fact 'free' [i.e. available for allocation] or not" (Tanner, 2002 at 28). The underlying rationale behind obligatory community consultations was Mozambique's adoption of a dynamic, "open border" model of community/ investor land use and exchange. The idea behind this model was to avoid the separation of villages and investment areas. The legal drafters' vision was of an integrated countryside, where small-scale farms and enterprise development could co-exist in a mutually- beneficial manner (Tanner, 2002 at 40–41, see diagram below). Lawmakers envisioned community consultations as the mechanism through which rural communities could enter into partnerships with investors in such a way that that would increase community prosperity and development in the long term. Thus the consultation is not just about securing land for an investor – it is a time during which the community can negotiate with the investor to

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<sup>55</sup> Interestingly, the absence of the investor in this list has led some land administrators to assert that the former are not welcome at the consultation (personal communication with agro forestry investor, who reported that he was told by state officials that he was not allowed to be at the consultation, June 2009).

receive certain "benefits", amenities, or rental payments in exchange for the use of their land.<sup>56</sup>

## Diagram 2: Closed versus open land use systems



Tanner, 2002

Most importantly, community consultations are a mechanism to ensure that the land rights of local communities are not ignored by government officials and "captured" by investors. Consultations should therefore include three basic discussions: 1) a determination whether the land requested/applied for is "free and has no occupants" or is currently in use by community members (art. 13§3); 2) a negotiation over what kind of "mutual benefits" the community will receive in return for ceding its land to the investor; and 3) a full community discussion (of all co-title holders, not only community leaders) of the offered "benefits" and an agreement or refusal to cede the land. Calengo *et al.* (2007 at 4–5) describe that "a successful [consultation] results either in the land not being allocated (if it already occupied), or in an agreement over how the [right to use and benefit] will be ceded or shared through a partnership of some kind. It is essentially a contract, supported by

<sup>56</sup> *Campanba Terra's* publications explained the concept of community-investor partnerships and consultations in this way: "Partnerships Between the Family Sector and the Commercial Sector: The family sector and the commercial sector do not exist independently of each other. This inter-dependent relationship has advantages. To ensure an integrative land use system and promote maximum productivity, a community who chooses to share its land with an investor should receive "mutual benefits" in return. Communities and investors can avoid conflicts by establishing "partnerships of mutual advantage."

a record of what was discussed." If the community agrees to cede some of its land to the investor and the investor's application is approved, then the land ceases to be managed by the community for the duration of the state-issued leasehold.

After the consultation has taken place, the district administrator must issue a statement that "contain[s] the terms under which the partnership between the applicant and the holders of the right of land use and benefit acquired by occupancy shall be governed (regulations, art. 27§3). This is excellent language, in that it articulates that the agreement is indeed a partnership between the investor and the community. However, these documents do not have the force of a binding legal contract: neither the land law nor its implementing regulations specify how the community "benefits" negotiated for and promised should be recorded or enforced (including level of specificity of time frame for delivery, number of jobs promised, etc.), and there are no legal provisions or mechanisms to hold an investor accountable to the "terms of the partnership." Nor is any record of the promised mutual benefits mandated to be included in the title (art. 36). Article 36§2 of the regulations does allow for any "charges and encumbrances and other legally executed transactions" related to the land to be "noted" on the leasehold title, but this provision does not fully create an enforcement mechanism and so far has not been used to attach the "mutual benefits" to the title.

Moreover, because the state holds title to all land in Mozambique, the allocation of land is in fact a lease agreement between the state and the applicant investor; it is not clear whether the community, as a non-contracting third party, would have the power to enforce something merely "noted" on the leasehold title. The regulations and the technical annex of the Land Act do require community consultation reports to be signed by at least three and up to nine representatives (regulations, art. 27; technical annex art. 6). But this, too, does not create an accountability and enforcement mechanism that the community could use to take to court or to government administrators to enforce the terms of agreements reached at the consultation.

Finally, it is important to note that the law does not include any mechanisms to check on the fairness or inclusivity of the proceedings of a consultation, or any accountability mechanisms to ensure that the benefits promised to the community at the time of the consultation are actually delivered by the

investor. The law does not require that a community be represented by legal counsel or an NGO advocate during consultations. Nor is it clear how enforceable these "consultations" would be in court; are the consultation documents contracts, upon which a judge could order investors' specific performance? As explained below, these deficiencies have negatively affected the power and potential of community benefits agreements.

## **4.6 Dispute settlement and accountability mechanisms**

### 4.6.1 Conflict resolution

The land law very minimally addresses procedures to be undertaken in the event of a conflict over land claims and land use and benefit rights. Article 32§2 provides that "Conflicts over land shall be resolved in a Mozambican forum." In rural areas, local communities participate in "the resolution of conflicts using customary norms and practices (art. 24§1(b)). The regulations allow that "holders of rights to land use and benefit have the right to "defend their rights in accordance with the law against any encroachment by another person" (regulations, art. 13§1(a)). Article 40 of the regulations allows for an appeals process. How they do this is however not established: neither the regulations nor technical annex provide guidelines concerning how conflicts over land are to be solved. This is left entirely to customary norms and authorities, and to the vague "Mozambican fora" referred to in Article 32. Moreover, there no specific safeguards against intra-community inequities that contravene the constitution or "elite capture" other than eventual appeal in court.

However, Mozambique's Decree 15/2000 of June 20 establishes that "community authorities" – both customary leaders and local, elected political secretaries – may participate in conflict resolution at the local level. Furthermore, under the Community Courts Law (1992) (which is currently under review) community courts are authorized to address minor misdemeanours, resolve family problems and hear cases concerning land conflicts. Within this forum, customary rules of evidence apply and cases are to be resolved with reference to customary law. Disputes heard in these fora may be appealed to the civil courts, with final appeal to the Supreme Court.

#### 4.6.2 Oversight and supervision

Mozambique's *Direcção Nacional de Terras e Florestas* (National Directorate of Land and Forests or DNTF) is charged with supervising compliance with the regulations, including investigating infractions (regulations, art. 37§1). However, the land law and its regulations are vague concerning how investors, government officials, or customary authorities acting in bad faith are to be sanctioned – or in even defining what illegal, corrupt or aberrant behaviour or transactions might be.

There is rigorous supervision related to ensuring against land speculation by investors built into the land law, yet few provisions are included to address intra-community injustices. In the "infractions and penalties" listed in Article 39 of the regulations, all but one<sup>57</sup> of the possible infractions - and related oversight mechanisms listed – concern investors (and even among these, there are no penalties for investors that fail to provide promised "mutual benefits" to the host community) .<sup>58</sup> The land law and accompanying regulations do not include *any* penalties for any activities that take place within communities that may contravene the constitution or otherwise infringe on human rights, deny women equal rights to land, or create internal community conflict. These issues are left to communities to address through customary mechanisms, with appeals to higher authorities as needed (see sec. 4.6.1). Nor are there any provisions within the land law that address corruption or lack of capacity within the state agencies charged with

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<sup>57</sup> The only possible punishment listed that may be levied on community members is for "the destruction or dislocation of boundary, triangulation, cadastral and other markers which serve as points of reference or support" (regulations, art. 39§1).

<sup>58</sup> The larger the size of an area applied for, the higher the level of government that must approve it (art. 22). Then, once granted, a corporation or investor may lose the right of land use and benefit it has acquired due to "failure to fulfill the exploitation plan or investment project without justifiable reasons within the time limits established in the application, even if tax obligations are being complied with (art. 18§1(a), regulations, art. 19§1). To fill any possible loopholes that would allow for land speculation, the law mandates that when an applicant has requested a right of land use and benefit for non-economic activities, they must still prove that they have successfully carried out their plans for the land requested. If they have not done so, and have no reasonable justification, then the Cadastral Services may terminate their right. Anecdotal evidence shows that in fact very few such rights holders are formally turned off their land, especially if they are nationals (regulations, art. 19§2). Should an investor desire to extend the right to land use and benefit for a second 50 year term, he or she must "demonstrate that the economic activity for which the application was initially made is still being carried out" (regulations, art. 18§2).

administering the law (Cadastral Services); bribery or other bad faith actions are presumably to be dealt with under Mozambique's Criminal Code.

#### 4.7 Implementation challenges

Despite enormous education and sensitization efforts for both communities and state actors by civil society organizations and the Centre for Legal and Juridical Training (*Centro de Formacao Juridica e Judiciaria* or CFJJ), a legal training institution under the aegis of the Mozambican Ministry of Justice) more than a decade after it was passed, the 1997 land law is still far from being properly implemented. These implementation problems have their roots in weak political will and lack of oversight. To date, the government of Mozambique has not allocated adequate funding, training, or personnel to local, district and provincial land administration bodies, and has instead focused primarily on promoting investment. These implementation obstacles are explored briefly below.

##### 4.7.1 Lack of communities' legal knowledge and access to justice to enforce land rights

After the land law was passed, civil society undertook an immense effort to educate Mozambicans about their new rights under the 1997 land law. The NGO umbrella group *Campanha Terra* led by the late José Negrão, a prominent national academic and land commentator launched an extensive educational campaign to publicize the new law throughout the nation. Towards this end, *Campanha Terra* created and disseminated thousands of comic strips, audio-cassettes, posters, tee-shirts and low literacy manuals depicting the central themes of the law and how to solve land disputes within the law's parameters. All materials were produced both in Portuguese and in over 20 local dialects. This material was used in seminars, meetings and theatrical displays in the capital city, municipalities across the nation, and in hundreds of rural villages throughout the provinces. The audio dramatizations of the comic strips were broadcast by Radio Mozambique as well as by three regional stations of the Catholic church.

Yet despite the extensive efforts of *Campanha Terra*, it appears that people's awareness of their land rights under the land law is extremely weak. A study by Serra and Tanner (2008 at 10) found that in the rural study areas, a "huge vacuum in the perceptions of ordinary people with regard to their basic rights contributes significantly to their ability...to exercise rights acquired

through the land and other laws, and to defend them when necessary through courts and legal support." The study found that even in those instances where people know that they have land rights under law, communities have little idea of how to claim their rights in practice (Serra and Tanner, 2008 at 10).

It also appears that communities do not know how to defend and enforce their land rights in the event of land conflicts or during interactions with investors, state officials, or other powerful outside interests (Serra and Tanner, 2008 at 10). Communities and individuals are not seeking enforcement of their land rights through the judicial system. Tanner and Baleira's research on 37 case studies of land-related conflicts in Mozambique found that: "communities do not know why or how to use legal support and such support is virtually unknown or inaccessible to them," and "local people have no understanding of the role of the judiciary as an institution that can uphold their rights"<sup>59</sup> (Serra and Tanner, 2008 at 10, citing Tanner and Baleira, 2006). Neither, it seems do the state officials: Serra and Tanner report that land conflicts are almost always dealt with through administrative channels, with the judicial system rarely intervening. They found that "local public sector officers and even some of the judiciary also demonstrate a weak understanding of the use of the new laws in practice" (Serra and Tanner, 2008 at 10). According to Norfolk and Tanner, land-related "grievances are first aired with local administrators and the cadastral service, but these agencies are often ...unable or unwilling to intervene objectively on the side of injured local parties. Cases then pass up public administrative steps to the provincial governor....[as] the courts and public prosecution services are spread thin and are often a great distance away from the community itself. Only a small proportion of the 127 districts in Mozambique have resident judges and public prosecutors" (Norfolk and Tanner, 2007 at xi; Tanner and Baleira, 2006).

However, some research has shown that those communities that *have* learned about the land law and worked to manage community land and natural resource according to its precepts have been empowered by the experience.

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<sup>59</sup> This is due both to lack of access and lack of faith in the judiciary as a neutral arbiter; the formal justice system may lack legitimacy in the eyes of most Mozambicans; according to a study on corruption in Mozambique, the judicial sector is perceived as the most corrupt of public institutions (ÉTICA Mozambique, 2001).

In the process of a community delimitation exercise, community cohesion and organization is strengthened as community members learn their rights under the land law, make participatory maps, create leadership structures, determine land use plans and decide how to manage community natural resources. Research has also shown that as a result of going through a delimitation process, communities become able to engage more effectively with state officials, investors, and other elites and to successfully claim, protect, manage and defend their land and natural resource rights (Knight, 2002; Norfolk and Tanner, 2007 at 20–21). According to Norfolk and Tanner's analysis of various case studies, community delimitation "is not necessarily just about demarcating and registering DUATs and the limits to which they extend...[but about] how an informed population can participate both in the formalization of its land rights and in subsequent development activities. The overall result is a change in attitudes, increased confidence and a general ability to engage more effectively with the outside world" (Norfolk and Tanner, 2007 at ix).

#### 4.7.2 Lack of the financial and technical capacity for full and extensive implementation

A central factor in the land law's impeded implementation is the lack of resources channelled to fund the various exercises necessary to ensure its application and enforcement in rural communities. As a result of more than ten years of inadequate funding, lack of trained personnel and other necessary resources, the National Land Cadastre, overseen by the National Directorate of Land and Forests (DNLF) of the Ministry of Agriculture, has been unable to extensively delimit and record – and therefore safeguard – community landholdings across the country.

Problems of lack of capacity and funding are often a symptom of political will. In Mozambique, the state has not allocated sufficient finances to the process of community land delimitation. In 2001, the Mozambican government allocated only enough funding to complete ten community delimitation exercises. In 2003, it only allocated enough to fund three to four (Tanner, 2005; Norfolk and Tanner, 2007 at 15). The government has largely relied on private donors and NGO's to provide the funds and technical support necessary for successful delimitation exercises.

As a result, very few communities have been formally delimited and registered in the national cadastre. Norfolk and Tanner describe how, by

2003, out of an estimated 3 000 or more communities in Mozambique, "a total of 180 delimitations had been carried out; of these, only 74 had received their formal Certificates of Delimitation, with the cadastral services giving a range of spurious reasons to hold up this final step" (Norfolk and Tanner, 2007 at 14, citing CTC 2003 at 38–39). By 2007, data indicated that only 250 communities had been delimited and that only two-thirds of those that had been delimited had been formally registered in the National Cadastre (Calengo *et al.*, 2007 at 16–17). Although the costs and time involved in completing a delimitation exercise are not insignificant – they cost an estimated average of US\$6 000 per delimitation – in the 12 full years since the law's passage, it is arguable that the state could have secured funding from its own resources and from international donors to delimit all 3 000 communities at a rate of roughly 250 communities per year, spread across the ten provinces.

Aside from funding, the technical expertise necessary to support community delimitation exercises has also been lacking. In 2005, agriculture was receiving only 4 percent of the total public budget, and the land law's implementation was seeing only a small percentage of that 4 percent (Tanner, 2005 at 4–5). Norfolk and Tanner (2006 at 5) reported in 2006 that there were less than 20 public and private sector professional surveyors in the whole country, and that all public cadastre offices lacked the transport, fuel and technical tools necessary for providing adequate cadastral services at the local level.

This lack of finances and capacity has meant that, in the context of rapidly rising demand for land by private investors, land rights acquired by custom and occupation remain invisible on official maps, vulnerable to expropriation and elite capture (Norfolk and Tanner, 2007 at vi, 28).<sup>60</sup>

Part of the issue is that there is a financial incentive problem. The law does not oblige local communities to identify and register their rights in order to claim them, which also means that there is no pressure by communities on public services to record these rights. Moreover, if the state initiates a

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<sup>60</sup> Given the implication based in the community definition in the land law and the resulting 'occupation', that all land in Mozambique is already and always has been held according to custom by communities, according to the law's precepts, if communities had been delimited, cadastral maps would now show most if not all of Mozambique already occupied and with secure community-held title, leaving little if any 'free' land.

community delimitation exercise, it must pay for it. Yet if the community requests the delimitation exercise, then the costs fall on the community. This gives little incentive for a financially-strapped cadastral service to expend resources delimiting and recording community land rights – which has translated into lack of delimitation. Meanwhile, investors seeking land rights must pay for the *process* of applying for a grant of land use and benefit, which doubles under-financed administrative officials' incentive to prioritize private investors' land applications. As a result, the limited public resources available have been channelled to granting and recording those rights of land use and benefit that have been formally applied for, and which bring in both initial processing funds and subsequent taxes (Norfolk and Tanner, 2007 at vii; Calengo *et al.*, 2007 at 16–17).

#### 4.7.3 Ignorance of the law and a new decree undermine the law's intent

Research has found that state land administrators often do not fully understand the land law's central premise: that customary claims are as strong as formally-registered or granted claims. According to Calengo *et al.*'s findings, many land administrators do not perceive community land rights as private land claims or believe that community members should be paid fair and equitable compensation for the loss of their lands (Calengo *et al.*, 2007). They describe how "implementation has been undermined by the fact that....most officials are poorly trained in the innovative principles of the land law and are failing to use its full potential as a rural development instrument" (Calengo *et al.*, 2007 at ii).

One study of local land administration found that "In spite of working every day with the land and other natural resources laws, public servants commit a range of errors when they are implementing them. Sometimes they simply do not know the law, but there are also clear cases where the law is put to one side when they respond to directives from their superiors higher up the administrative and political chain" (Serra and Tanner, 2008 at 10, citing Baleira and Tanner, 2004). Moreover, when approached by communities to adjudicate or resolve conflicts with investors in their area, "administrators and politicians assume a judicial role, applying their own interpretations of laws that they do not fully understand. Public officers and civil servants in general also violate basic constitutional principles on an almost daily basis"

(Baleira and Tanner, 2004).<sup>61</sup> To remedy this situation, the Centre for Legal and Juridical Training (CFJJ), in partnership with FAO, has been providing highly innovative, interactive legal training courses to local, district and provincial administrators, judges, prosecutors, and police to train them in the land law's edicts. Project evaluations have indicated that these training courses are having an important impact and changing participant's understandings not only of the land law's mandates, but of the importance of working to strengthen the rule of law in general throughout Mozambique (see e.g. Serra and Tanner, 2008).

However, ignorance of and disregard for the law are often difficult to disentangle. The state has recently taken legislative action that has weakened the strength of community land rights: in 2007 the Council of Ministers issued a decree concerning Article 35 of the land law regulations that in effect subjects the issuance of community rights of use and benefit certificates to government decision-making authority. Although the decree applies only to the process of getting a full title document (after following the more extended process of demarcation, not delimitation), administrators have interpreted it as also applying to delimitation. Even though under the

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<sup>61</sup> There have also been political motives for the slow process of community delimitation and formal titling. Specifically, the government body formerly responsible for delimitation and cadastral mapping, The National Geographic and Cadastral Institute (DINAGECA) was not an enthusiastic supporter of either the land law or the delimitation exercises. According to Tanner, behind DINAGECA's resistance to the law was "a range of positions held by key interest groups within Mozambican society and beyond. Some simply see community consultation as an impediment to investment. Others are more aware of the radical decentralizing and democratic potential of the land law if it were fully implemented and upheld ... and fear ... it for this reason" (Tanner, 2005). The late professor Negrao (2002) also named state bureaucratic resistance to the law as one of the major impediments to community delimitation, arguing that "the huge resistance from employees in the title deeds offices to accept the new law [was] because, in a way, they would no longer have the monopoly in the decision-making regarding land adjudications." In sum, the land law is not being implemented because it would mean a drastic and radical shifting of power and control over Mozambique's lands and resources out of the hands of the state and into the hands of the people. By 2002, there was already emerging a strong voice both within government and by international agencies to overhaul the land law and move towards privatization of land in Mozambique. In 2005 there were strong indications that some kind of land rights market was being considered by government. Yet in 2006, Norfolk and Tanner (2006 at 2) report that "recent government statements clearly indicate that privatisation is not on the agenda, reflecting concerns that it would lead to the massive displacement of rural poor by stronger economic groups." However, by 2007 Calengo, *et al.* (2007 at 28) found that "certain elements within government and in the wider society think the current land law is outdated and not in line with the current development strategy of the agricultural sector."

law communities' customary land rights exist regardless of formal registration processes (as delimitations do not *create* land rights but only *document* existing ones) the 2007 changes to Article 35 have been construed by state officials as signifying that recognition of community rights claims is subject to state authorization. In essence, by issuing the Article 35 decree, state officials have given themselves the power to decide whether a community land delimitation application should be granted. As explained by Calengo *et al.* (2007 at 25–26):

In legal terms... these rights already exist and do not require any intervention by the public administration for them to be *exercised*. In the case of local communities, the titling process under Article 35 does not *give them the* [right of land use and benefit], *it merely provides an existing* [right of land use and benefit] *with a stronger form of documentary protection*. The implication is clear – "approval" of the [rights of land use and benefit], at whatever level, is not necessary... A community [right of land use and benefit] *and its accompanying spatial definition, cannot be denied*. The role of the public authority in this case is merely to confirm in the name of the state, not authorize or approve.

The decree also implicitly limits the size of community lands: provincial governors may now only authorize the allocation of community land rights up to 1 000 hectares in size, although higher-level authorities can approve larger areas. This change illustrates either a profound lack of understanding - or a clear political disagreement - with the land law's implication that most of the land in Mozambique is already claimed and held by communities, whether or not they seek a formal delimitation certificate. The government may not authorize how much land a community can claim, since the customary claim exists regardless of formal state sanction.

The Article 35 decree has resulted in general confusion about how to handle community delimitation requests; in the more than two years since the decree was issued, although various communities have submitted completed community delimitation applications, not one application has been granted.

Even more worryingly, the Government of Mozambique has now claimed the power to declare that "unused" community land is 'free' and to then claim jurisdiction over such lands. The government has publicly assured

communities that have already been delimited and registered large areas of land in the cadastre that they will not lose this land, "so long as they keep these areas under use" (*Portal do Governo de Moçambique*<sup>62</sup>). This statement contains a not-so-subtle threat: if the government considers that a community is not "keeping an area under use" – even an area that the community has officially delimited and registered its land – the state can claim the land. There are no definitions of what "under use" can be interpreted to mean. Certainly, this inhibits a community's ability to safeguard certain portions of community land for the needs of future generations, as under custom.<sup>63</sup>

Calengo *et al.* (2007 at 24–25) interpret these change as "the culmination of these misunderstandings regarding the nature of the local community [land rights] and hypothesize that "The real objective seems to be to subject the formal recognition of the local community DUAT to much higher levels of political control."

#### 4.7.4 Pro-investment policies impede quality community consultations

Many of the law's implementation problems may be said to be linked to the government's lack of support for community land rights during consultations with investors. In Mozambique, there is a prevailing state emphasis on promoting investment in the rural areas, to the detriment of community rights. Tanner (2005b at 4–5) describes how, since the end of the civil war, government actions and pronouncements have indicated a clear policy and preference for fostering rural enterprise development. In practice, this has meant prioritizing investors' applications for rights of land use and benefit at the expense of community land rights. Tanner also writes: "Practically all public sector funding [for land] in the five year plan of the last government went to fast tracking private sector requests for new land rights....many thousands of private sector land claims [have been] processed by public land

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<sup>62</sup> [www.portaldogoverno.gov.mz](http://www.portaldogoverno.gov.mz)

<sup>63</sup> Furthermore, an additional burden has been added to communities' work in their efforts to formally register their land: the SPGC (*Servicios Provincias Geographica e Cadastral*) has begun issuing decrees that community applications for delimitation certificates will not be approved unless the community also submits a "concrete development plan" that reflects the benefits that communities expect as a result of the completed delimitation process (SPGC, 3 August 2007 communication to ORAM). This may be argued to be not an entirely bad mandate, as it may be helpful for communities to thoughtfully and proactively address the question of "delimitations for what/to what end?" However, there is no legal basis for this requirement.

services since the land law came into effect" (Tanner, 2005a). The end result is now that, with the exception of a few hundred communities, by and large only investors' land claims are registered and entered on cadastral maps (Norfolk and Tanner, 2007 at vii; Calengo *et al.*, 2007 at 16–17; Tanner 2007).

Furthermore, anecdotal evidence has indicated that during community consultations - particularly for beachfront land and other areas ripe for potential tourism investment - government officials have appeared to be firmly on the side of the investors, focused more on securing the land for the intended investment than protecting community interests, promoting partnership ventures, or ensuring that communities' are appropriately compensated for the loss of their land (Norfolk and Tanner, 2006 at 24).

Positively, research seems to indicate that almost every application by an investor for a right of land use and benefit does indeed include a community consultation (Tanner and Baleira, 2006 at 5). This illustrates that at some level, government officials consider community land rights valid and enforceable, or at least that they must be taken into account. However, a review of 260 community consultations undertaken by the CFJJ and the FAO Livelihoods Programme found that at these consultations, communities were not given a real opportunity to negotiate and bargain with investors for "mutual benefits," rental payments, partnership agreements, or the provision of necessary amenities in exchange for their land (Tanner and Baleira, 2004). Part of the reason for this is that both investors and government officials seem to view consultations not as a mechanism to promote community development and poverty-reduction, but as merely one of various administrative hurdles necessary to securing a right of land use and benefit.

This misconception is borne out in practice. In the vast majority of consultations, there is only one meeting, for a few hours, with no time allowed for the community to discuss the matter among themselves. The borders of the land being requested are rarely walked or physically verified (Norfolk and Tanner, 2007; Tanner and Baleira, 2006). Durang and Tanner (2004) report that

Consultations between the investors and local communities seldom exceed half a day of dialogue...While the consultation should result in some compensatory benefit for local people, this is very much a secondary objective for the land administration

services compared with the need to secure a community 'no-objection' and give the investor his or her new [right of land use and benefit within the time limit of] less than 90 days.

Calengo *et al.* conclude that such brief community consultations are merely used to give the "whole process a veneer of legitimacy by showing that local rights are apparently respected. In many cases however, it is clear that officials see their job as helping investors get the land they need, and do not accept that local rights are 'real' in the sense that they give locals secure private tenure that cannot simply be taken away" (Tanner 2007; Calengo *et al.*, 2007 at 13–14).

Tanner (2005 at 17) suggests that because consultations "are rushed, do not allow for adequate internal consultation, and are rarely accompanied by detailed agreements that allow for systematic follow up and monitoring," communities "participate" in consultations from an inherently defensive position. As a result, communities have been losing access to their land without gaining real benefits in return.

There are various reasons for this. First, community members are not educated in advance of the consultations about the extent and strength of their rights under the land law, and may be unaware that the land is considered "theirs" and that they have rights to manage it as they choose. Moreover, they may not be informed that they have the right to say "no" and refuse to cede the land to the investor. Part of this may be due to the wording of the law itself: *communities have no explicit power under the law to deny an investor's request*. Officials seem to be interpreting the law to mean that communities do not have the right to say "No, we do not want to share our land with an investor"; the right is only to be "consulted" and to negotiate for a share of the benefits.

Second, there is a profound information asymmetry. Communities are often unprepared to receive an investor's request and respond thoughtfully; they are generally asked to make a quick decision upon very little information about something that will greatly impact their lives. They often are not told in detail about: who the investor is, what the planned investment will be; precisely what land the investor has requested<sup>64</sup>; how much money the

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<sup>64</sup> Research has found that investors often claim the "best" lands, leaving community members to survive on the community's more marginal lands containing fewer natural

investor stands to profit from the proposed venture; or how the planned investment will impact the environment and the social fabric of the community. Importantly, communities may also lack information about what their land is worth within a market context, something of particular concern when it concerns high value beachfront property (Calengo *et al.*, 2007 at 18–19). Communities may understand too late – once the land has been granted and construction on the investment venture has begun – how much they are giving up, and how profoundly their community will be impacted, and not always in positive ways. However, by then, they have "given their permission" – and so lack grounds upon which to challenge the venture.

Third, community members are easily intimidated when investors arrive flanked by various state officials to carry out a "consultation". Tanner and Baleira (2006) write that communities are "easily out manoeuvred when the talk is of 'thousands of hectares' and promises of jobs and schools." Similarly, Calengo *et al.* (2007 at 18–19) report that even when communities are aware of their rights, when confronted by the district administrator, they feel pressured to say yes, "especially when they are persuaded by authorities that all investment is good, or when told that they have little choice as 'the land belongs to the state.'

There are also concerns about who is representing the community at the consultation: under the land law, all community members hold co-title to community land and therefore must *all* be consulted when major decisions about community land are being made. Research has found that during most consultations, very few people from the community are present, and local leaders' opinions and decisions dominate community discussion. Women are rarely if ever involved. It was also discovered that the prevailing view among government administrators in charge of facilitating consultations is that only the "community authorities" needed to be conferred with. Some consultations take place only after a private meeting with the chief, and therefore are, in the minds of the community, already a "done deal" (Tanner and Baleira, 2006 at 5–6). In light of such situations, checks on the power of customary authorities to speak unilaterally for the community should be put into place.

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resources. On the land that they continue to occupy, communities are now resorting to frequent burning and shorter rotation cycles, leading to exacerbated degradation and exhaustion of resources (Tanner, 2005 at 20).

An additional indication that the law is not being implemented as legislators intended is that during consultations, the benefits communities request or are offered are absurdly low in comparison to the value of their land or the investors' projected profits. Most of the agreements reached involve one-time costs to the investor (a schoolhouse, a borehole) that will not result in partnership or a long-term business relationship with the local community (Durang and Tanner, 2004 at 4; Tanner and Baleira, 2006). Moreover, research has found that even when communities *have* effectively negotiated for amenities like schools, clinics and wells in exchange for the use of their land, investors may never actually provide or produce the promised benefit. According to Norfolk and Tanner, "The area agreed is often enlarged when actually laid out on the terrain or registered; and promises of jobs, shops, wells, schools, etc. used by investors to convince locals to sign are not kept. Minutes are imprecise and are therefore useless as documentary evidence if *either side* accuses the other of non-compliance" (Norfolk and Tanner, 2007 at 9). While there is ample anecdotal evidence of investors not keeping their side of the consultation agreement or transgressing the boundaries of the land granted to them, to date, no communities have taken investors to court for lack of fulfilment of their consultation promises, nor for transgressions of the agreed land-sharing arrangements.

The CFJJ/FAO data similarly indicate that the majority of consultation agreements are poorly recorded, with insufficient detail or no uniformity of presentation, and huge variations in the type and quality of information recorded (Tanner and Baleira, 2006 at 5–6). The meetings' minutes are generally vague and do not include sufficient detail concerning: the content of the negotiations, the "benefits" promised, the time frame in which these benefits will be delivered, or the economic gains to be realized by the communities in exchange for their land. In contrast to the multiple mandates in the land law that investors must show proof of implementation of the proposed exploitation and investment plan after a certain point, there are no mandated benchmarks or timelines for provision of any promised "community benefits."

While by 2005 no community had yet taken legal action against an investor for failure to provide the agreed "mutual benefits" the CFJJ/FAO study of land and natural resource conflicts showed definitively that "poorly carried out consultations are often a basic cause of bitter and longstanding conflicts

between local people, the state, and those who would occupy their land and use their resources" (Tanner and Baleira, 2006 at 2). Meanwhile, even if a community were to take action to demand fulfilment of the consultant agreement, it is not clear how enforceable it would be in a court of law. The agreements have so far not been taken as binding contracts, and the land law is silent on how such agreements should be interpreted and enforced by the courts.

For consultations to be fair and truly support the promise of "integrated development" set out the law, during consultations the investor's exploitation plans, the exact land requested, the projected profits, the potential environmental and social impacts of the planned investment, and all other critical details relating to the land application must be supplied in advance to the community and carefully explained by a disinterested third party. Lawyers, advocates, or mediators chosen by the community and well-versed in the land law must be present at community consultations and available to help the community articulate their interests and serve as unofficial "watchdogs" to ensure that the consultations are carried out according to the law. The consultations must be extensively documented, both in written and video-recorded form. Moreover, the negotiations should end in a legal contract that communities can use to hold investors accountable for following through on the "mutual advantages" promised, and state officials should be trained and instructed to actively support communities as they work to form and maintain partnerships with investors.

Unless the Government of Mozambique, particularly at the district level, takes such steps to ensure that community-investor consultations are "meaningful" and just, the law's intent will be eroded, and its efforts to ensure integrated rural development undermined. By failing to create the space for a community to be genuinely consulted and assertively negotiate compensation and a share of the benefits gained from use of its land, local officials have transformed these exercises into obligatory performances of consultation, wherein the community does not have a real right to deny the land grant, does not have the support necessary to be able to negotiate with the investor as an equal at the bargaining table, may never see the promised benefits materialize, and, in the instance of a breach, has no way to enforce the agreement. In practice, this has the effect of nullifying the law's efforts to formalize and strengthen customary land rights, while giving the whole process a veneer of legitimacy when government seeks to show the outside

world that local rights respected when new land rights are allocated, or as Tanner ironically calls it, "enclosures with a human face"(Tanner, 2007).

#### 4.7.5 Lack of state oversight of intra-community land administration and rights protections

Fitzpatrick (2005 at 458) describes Mozambique's land law as a "minimalist" approach, in that the law allows "broad demarcation of customary areas...leaving land issues within those areas subject to unregulated customary processes". Indeed, under Mozambique's land law, as a result of the lack of oversight provisions in the law, there are few controls to ensure that various key provisions concerning intra-community land administration and management are equitably carried out and enforced. Specifically, there are no state oversight mechanisms to ensure against intra-community injustices, no village-level supports to help women enforce their land rights, and no penalties for intra-community discriminatory practices.

Such lack of appropriate state oversight, combined with rural communities' lack of genuine access to state justice forums, has meant that women's land rights have largely not been adequately protected and enforced. Despite the many provisions in the land law that affirmatively assert and protect women's rights, various reports are finding that in the years since the law's passage, women have been largely unable to enforce or defend these rights. Research has found that conservative male attitudes and deeply rooted customary practices combine to ensure that women's land rights remain vulnerable; Calengo *et al.* (2007 at 33) report that "During a round table with NGOs in Nampula it was mentioned that although women have started to be aware of their land rights and are more interested in exercising and defending these rights, traditional cultural customs and practices in their communities still determine their rights and obstruct attempts to assert them more forcefully." Such patterns are exacerbated by the breakdown of customary safeguards for women's rights in the context of the HIV/AIDS pandemic. One report found that:

Few rural women are aware of these legal provisions, and even fewer have the resources to use them to defend their rights, even if they knew that this was possible.... Within communities and rural households the rights of women are still regulated by land management systems that are often discriminatory. Very often the 'customary norms and practices'

recognized by the land law do in fact go against constitutional principles. This is especially the case today with increasing numbers of cases where women are widowed at a younger age than usual. Traditional mechanisms to provide security for [older] widows then do not come into play. Their rights are then vulnerable to capture by male community members who use customary systems to take over land, especially in the context of premature deaths caused by the HIV-AIDS pandemic (Seuane, 2005, cited in Norfolk and Tanner, 2007 at 15–16).

Of great concern is that despite ample evidence of escalating dispossession of land from widows (Save The Children, 2009) from 1997 until 2006 there appear to have been *no known cases* of women using the land law to defend or enforce their land rights in court (Norfolk and Tanner, 2007 at 16). A study done by *Save the Children* in Mozambique found that despite the various legal protections in the land law, the family law and Mozambique's civil code (described above):

There are many cases where [women and children] are deprived of their rights. In such cases, the widow rarely lodges an official complaint for fear of retaliation by her deceased husband's family. On the rare occasions that she does take action, she would normally turn to the extended family, then to traditional leaders in her community. Traditional leaders are meant to operate according to the law but ... have a tendency to resort to traditional norms, which often disadvantage widows and orphans in disputes over inheritance" (Save the Children, 2009 at 3).

Should a woman be denied her land rights, to circumvent the inequities of customary law she would have to take the matter out of the village to locality or district officials. This is a difficult step for women and other vulnerable community members to take, particularly as many women, widows and orphans who face being dispossessed do not have either the knowledge of or the resources to challenge land grabbing within the formal legal system.<sup>65</sup> In

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<sup>65</sup> Forum Mulher, a Mozambican NGO, provides some legal support to women in rural villages who have been victims of land grabbing, and has trained a corps of paralegals to support women in these situations. FAO initiated a project in 2009, which, in collaboration

practice, therefore, the formal legal system - which is the *only* forum where customary leaders may be held accountable to complying with the land law's mandate that no customary decision may contravene the Mozambican Constitution - is essentially inaccessible to the poorest and most vulnerable members of society.

Moreover, although the law allows for sale of infrastructure, there are no rules protecting the poor from unconscionable or distress "sales"; the law does not include any checks against sales of infrastructure made by desperate families to neighbours or investors, or by one family member for his own enrichment without the knowledge of the rest of his family (as in Tanzania).

Finally, the law does not create any measures to establish downward accountability for community-level leaders. Should a community leader administrate and manage community land and natural resources in a manner that disadvantages the community or which the community does not agree with, there is no forum articulated in the law to which community members can go - and no complaints procedures set out that communities can use - to overturn the action or decision or to make that leader responsive to the community's demands and interests. This lack should be addressed by supplementary legislation that more clearly sets out models - that align with both customary and formal law and procedure - that community members can use to hold their leaders downwardly accountable.

#### **4.8 Analysis**

Mozambique's artfully succinct 1997 land law - both the process of its drafting and its final mandates - may be the epitome of the kind of creative law making that is necessary to bring customary land rights and management practices into the fold of legal land transactions. As it is written, Mozambique's land law is powerful enough to ensure tenure security to investor and peasant alike, yet flexible enough to encompass within its bounds all of the various customary land tenure systems practiced in rural communities throughout the nation. All customary systems in practice can more or less continue as they always have, now within the domain of the national legal system, with community land rights unequivocally protected by law.

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with Forum Mulher, will with community leaders to try to ensure that customary 'norms and practices' are applied in manner that protects and enforces women's land rights.

Custom is not codified, but is left to evolve and develop as flexibly as local conditions necessitate. All customary practices are considered legitimate means of community land management and administration, so long as they do not contravene the constitution. Women are explicitly given equal rights to land. Community members may define the community's composition and decide how to govern themselves, their lands and their natural resources. All individual, family and communal lands - including lands held in reserve for the needs of future generations - are protected; any and all existing customary land claims held in good faith for over ten years are formalized and given the same protections as written title. Individual land registration is not necessary; the only proof of title one needs is the oral testimony of one's neighbours, and landscape-based evidence and other customary practices are considered valid proof of land claims. For these reasons and many more, it is an excellent law.

Moreover, the land law has also had some significant successes in its 12-year implementation. Customary land rights have been integrated into the national land scheme and are to some extent recognized and respected. Consultations, though often poorly done, are carried out for all land claim applications, and government actors have been constrained from dispossessing people living in rural communities at will to make room for investment projects. This has prevented the active creation of a class of landless peasants, and effectively quelled the "wild capitalism" that could have spread throughout the country after the conclusion of the civil war in 1992 (Calengo *et al.*, 2007 at 15). In those instances where communities have been supported by NGOs in negotiations or conflicts with investors or state actors, they have become highly proactive and empowered about knowing and asserting their land and natural resource rights (Knight, 2002; Calengo *et al.*, 2007 at 15). Some investment projects are taking to heart the participation and partnership model envisioned in the land law and are creating exciting, innovative partnership models that allow local communities to claim control over their resources and be actively involved in investment projects (Norfolk and Tanner, 2006; Durang and Tanner, 2004; Calengo *et al.*, 2007 at 15).

However, the law lacks detail in critical areas: most importantly, it does not establish appropriate enforcement mechanisms or oversight structures that can ensure against unjust and inequitable acts within communities, between communities and investors, and by state actors against communities. Many of the implementation difficulties highlighted above can be traced to the

failure of the law to lay out the detailed procedures and mechanisms for rights protection and enforcement. Regulations and supplementary legislation must be passed to create appropriate enforcement mechanisms, and to help protect against intra-community discrimination and disenfranchisement. Additional state resources and financing should be allocated to support these mechanisms.

Yet, (as in Botswana) rather than pass amendments that go to the heart of the law's weaknesses – creating further protections for the land rights of vulnerable groups, establishing "mechanisms for representation of, and action by, local communities, with regard to the rights of land use and benefit" (as set out in art. 30), or taking steps to make the "community consultations" into fairly-negotiated and enforceable contracts - the Mozambican government seems to be moving in the opposite direction, working to weaken both the strength of customary land claims and the autonomy of local community land management.

Of most concern is that data on the land law's implementation overwhelmingly indicates that state officials do not have the political will to see the full enactment of the land law. Implementation difficulties have been exacerbated by various government efforts to effectively block its more progressive aspects. The changes to Article 35 that make community land rights subject to state approval, the highly flawed practical implementation of community consultation exercises, and the lack of state funding channeled to support community delimitations are just the most glaring of various indications of the state's aim of slowly eroding the legal strength of community land rights. Such lack of understanding of and regard for the strength of customary rights, combined with the paucity of delimitation certificates that have been issued to communities has combined to prevent the flourishing of genuine community-investor partnerships and the revolutionary model of integrated rural development envisioned by the law's drafters.

Furthermore, Decree 15/2000's effective re-instatement of administrative control over communities (by turning "community authorities" into a kind of extension of state administration) and the resulting conclusion that only these authorities need be consulted for approval of an investors' land claim application are further indication that state actors are seeking to more tightly control land and natural resource management, and would prefer to retract

the entire community's right, as co-title holders, to jointly and actively decide how they want to administer and manage their lands.

Most importantly (and as will also be seen to be the case in Tanzania) despite various constitutional assurances, there are currently no legal mechanisms either in the land law or in Mozambican law through which communities can protect themselves from government officials' decisions to cede vast tracts of community land to foreign or national investors, for, ultimately, the land is owned by the state, and communities hold only "rights of use and benefit". This true lack of any tenure security has only been underlined by the government's 2007 assertion that it has the power to declare "unused" community land to be 'free' and to then claim state jurisdiction over such lands. As such, it is not clear that even a successful delimitation application that results in a right of land use and benefit could stand in the way of central government decision to grant land to an investor for large scale agricultural investment.<sup>66</sup>

Finally, as this publication was going to press, in August 2010, the Government of Mozambique promulgated a new decree altering Article 27, the provision that outlines how community consultations must be carried out. Instead of conducting on-the-ground consultations with the local community that actually occupies the land, this alteration now allows investors to consult *only with the lowest level of local government*, thus potentially eliminating community participation in all consultations<sup>67</sup>. Significantly, this decree, as all the others, never went through parliamentary channels.

Mozambique's lack of an activist judiciary - and Mozambican citizens' lack of access to justice and the necessary financial and technical support to dispute actions taken by state administrators - have allowed this slow erosion to continue, relatively unchallenged. For the legislative intent and the full potential of the land law to be realized – and for the Mozambican people to have true tenure security - steps must be taken by government and civil society to ensure that community members are made aware of their rights and feel that they have a true choice – and an opportunity - to say "no" to an investor's application and to pressure by state actors.

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<sup>66</sup> Mozambique is steadily granting vast land concessions to foreign investors and other sovereign nations for large-scale agricultural investment. See e.g. Cotula, *et al.*, 2009.

<sup>67</sup> Personal communication, Chris Tanner, September, 2010.

## V

### TANZANIA'S VILLAGE LAND ACT

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## 5.1 Introduction

Tanzania's land acts - and the land policy they were based upon - are ambitious, complex, contradictory and extremely comprehensive. The land bill that lawmakers produced was so large that it was split into two separate Acts; the Land Act (No. 4 of 1999)<sup>68</sup> and the Village Land Act (No. 5 of 1999), which, in their final form, together run to 336 pages of 252 articles. The law's length was not entirely by choice; Tanzanian policy and lawmakers were charged with trying to protect the rights of the poor while creating a mechanism that would regulate what was already, by the late 1990s a flourishing land market in Tanzania; the law needed to foster investment and development while ensuring that small scale farmers and pastoralists would be able to pursue their livelihoods sustainably and profitably. Legislators were also working to elevate the customary up into statute and make the village the centre of land and natural resources management, while creating mechanisms to try to protect the more vulnerable members of a community from power imbalances and struggles within each village. As such, pastoralists, women, orphans and disabled people are all explicitly and repeatedly protected. The law is extraordinarily ambitious in its vision and objectives, and Tanzanian lawmakers did a valiant job.

The primary innovations concerning statutory recognition of customary land rights established by the Village Land Act and accompanying legislation include:

1. Customarily-held land rights are equal in weight and validity to formally-granted land rights;
2. Processes for titling, granting and registration of family and communal land within village are established, with village councils given the power and authority to administer and manage village lands according to customary rules;
3. Women gained equal rights to hold, access and derive benefits from land; importantly, the act sets out that the burden of protecting and

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<sup>68</sup> For reasons of brevity and relevance, only the Village Land Act and the sections of the Land Act most relevant to customary land rights and administration will be discussed herein. The Land Act provides the legal framework for general lands, reserved lands and urban lands and covers general, overarching principles that apply to all categories of land in Tanzania, such as mortgages of land and ownership of land between husbands and wives.

- enforcing women's, widows and orphans' land rights falls on the village council
4. Communal areas and pastoralists' land claims are formally recognized and protected;
  5. New village-level land registries were created to formally register customary land rights.
  6. Tanzania's informal land market was formally recognized, including addressing issues of market value, and rules relating to sale, rental, mortgage and transfer of land within villages, including sale and transfer of customary land rights; and
  7. The decisions of village-level, customary dispute resolution bodies are appealable directly up to the highest court of Tanzania (under the Land Disputes Settlement Act of 2002).

However, due to the Village Land Act's length and complexity, ten years after its passage it has barely begun to be implemented, and most Tanzanians are unaware of their rights under the law.

#### 5.1.1 History

Tanzania (then named Tanganyika) was first colonized in 1891 by Germany who held the territory until the end of the First World War, after which it became a British mandate. The British governed Tanzania from 1922 until Independence in 1961. Julius Nyerere led a non-violent independence movement and was elected to the presidency in 1962, after the union of Tanganyika and Zanzibar into the independent nation-state of Tanzania. Upon coming to power, Nyerere enacted the Arusha Declaration in 1967, committing Tanzania to a policy of "African Socialism" or *ujamaa* collectivism. As under colonial policy, land was declared the property of the state to hold in trust for the people. In 1963, freehold titles were converted into leaseholds under the Freehold Titles (Conversion) and Government Lease Act. Later, in 1969, these same titles were changed into Rights of Occupancy under the Conversion of Rights of Occupancy Act.

Under Nyerere's *ujamaa* strategy, Operation Vijiji was enacted. This was Nyerere's compulsory "villagization" scheme, during which chiefdoms were abolished, and rural communities were forcibly moved into planned villages organized around collective agricultural production and centralized schools, clinics and meeting places. National army and police vehicles forcibly

transported people to their new homes. All adults were required to work on the collective farms. Local government administrators decided what would be planted, how much grain each family would receive from the harvest, the price of the agricultural products, and what would be done with surplus. The promise of Operation Vijiji and the *ujamaa* strategy never came to fruition, as the program was plagued by poor administration, overpopulation and related land pressures, lack of promised service delivery, and a severe drought in the mid-1970s that led to widespread starvation. Operation Vijiji resulted in mass expropriation of land, forced resettlement, and widespread grief and confusion around loss of family land claims. The scheme ended in the 1980's, after which some families were able to gradually return to their homes and lands (Per Larsson, 2006; Tsikata, 2003; Daley, 2005; Rie Odgaard, 2006; Shivji, 1999).

Nyerere ruled over a one-party system until his retirement in the mid-1980s, when a multi-party system took hold and principles of liberalization and privatization came to the fore as a result of internal pressures, cold war politics, and the structural adjustment policies of international lending organizations. (Per Larsson, 2006; Tsikata, 2003; Daley, 2005; Rie Odgaard, 2006; Shivji, 1999).

### 5.1.2 Customary land management in Tanzania

Under colonial rule, communities had essentially been left to continue internal land allocation practices according to custom. Among non-pastoralist and non-hunter-gatherer groups within Tanzania, land tenure is often grounded in the principle of "first right"; members of the indigenous ethnic group who first settled in a particular area have claim to the land there and hold the power to welcome or reject newcomers and to decide which lands to allocate to them. Newcomers, upon arriving in an area, first approach local chiefs and headmen and request to be allocated an area to build a house, plant crops, and graze their animals. The rights of the first settlers were "locally considered to be as secure as private title deeds" (Odgaard, 2006 at 12). Daley describes how in the past, the first settlers "cleared land as they needed it, passing some on to their children, who in turn took and cleared more land for their own families..." (Daley, 2005a at 373).

Daley writes that, in the instance that a piece of family land was transferred to someone outside the family, "the means of transfer – gift, loan or sale – was influenced by the nature and strength of the social relationship between the two parties and determined the nature of the rights transferred. Loans of land (including by husbands to their wives) transferred *use* rights... [while] outright gifts (including bequests) and sales transferred *absolute disposal* rights" (Daley, 2005a at 374, emphasis added). Women generally gained access to land through marriage, and, until recently, generally inherited their deceased husbands' land to hold in trust for their sons (Yngstrom, 2002 at 29). Among some groups, both male and female children were entitled to inherit their family's land, and one's share of inheritance was predicated not on gender but on one's share of the responsibility for caring for children, sick and elderly members of the family (Tsikata, 2003 at 156, citing Odegaard)

In addition to personal property allotments, there are communal lands open to all community members to hunt, graze their animals, and gather natural resources. Under customary systems, land is theoretically allocated free of charge, but in practice a "facilitation" fee is commonly charged. Tanzanians also access land through "borrowed" or "rented" land rights, in which various kinds of payments and services are exchanged for use of the land, and renters are forbidden to make long-term investments (like tree planting) that might solidify their claim to the property (Daley, 2005 at 564) These customs are still practiced in modified form today throughout much of Tanzania; studies have found that in many rural villages, 90 percent of village land is defined and governed by customary laws (ILD, 2005, Vol. 3, at 51).

### 5.1.3 The land policy

Although the Tanzanian Government had enacted various land-related mandates since coming to power in 1961, no official national land policy had yet been drafted. As a result of growing internal and external pressures<sup>69</sup>, in

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<sup>69</sup> Tsikata (2003 at 158) describes how "Developments such as the continuing export crop bias, the growing demand for land from large-scale mining and tourist industries, the competition and conflicts between farmers and pastoralists, between locals and farmers, and between locals and government conservation agencies had contributed to problems such as land scarcity, tenure insecurities and land degradation...[which] had culminated in accusations of widespread abuses against state agencies and demands for land reforms across Tanzania in order to safeguard the interests of locals...[And] the World Bank...saw land reforms as an important component of the process of creating an enabling environment for foreign direct investment".

1991 the president identified that a "Commission of Inquiry into Land Matters" was necessary, and created what came to be known as the Shivji Commission (named after its chair, Issa Shivji). The commission's mandate was to travel throughout Tanzania, meet with a diverse array of people and record their expressed land-related needs, interests, concerns and grievances. The commission visited all twenty regions of Tanzania, holding 277 public meetings at which an estimated 83 000 people were present. In total, the commission collected 4 000 pages of evidence and public comment, and collected case studies of all major land disputes throughout the nation (Shivji,1999). Domestic and international experts were commissioned to undertake studies, and a national workshop was held, during which stakeholders were invited to voice their needs, concerns and interests.

However, only some of the recommendations made by the commission were included in the final version of the 1995 National Land Policy (Shivji, 1999). Most importantly, while the commission had suggested a system that vested land rights in the land users themselves, through village assemblies, the National Land Policy maintained state ownership - and thus considerable state control and discretionary power - of land (Shivji, 1999 and Sundet, 2005). The fundamental principles enshrined in the Land Policy are laid out directly in the first pages of both the Land Act and the Village Land Act.

**Box 3 –  
The fundamental principles of Tanzania's National Land Policy**

Both the Land Act and Village Land Act state the "fundamental principles" of the National Land Policy within the text of the legislation, as the customary law to be applied to land held under customary tenure "shall have regard to the customs, traditions and the practices of the community concerned, to the extent that they are in accordance with the principles of the National Land Policy..." (VLA, art. 20). These principles, according to Article 3, are as follows:

- a) To make sure that there is established an independent, expeditious and just system for adjudication of land disputes which will hear and determine land disputes without undue delay;

- b) To recognise that all land in Tanzania is public land vested in the president as trustee on behalf of all citizens;
- c) To ensure that existing rights in and recognized long standing occupation or use of land are clarified and secured by the law;
- d) To facilitate an equitable distribution of and access to land by all citizens;
- e) To regulate the amount of land that any one person or corporate body may occupy or use; to ensure that land is used productively and that any such use complies with the principles of sustainable development;
- f) To take into account that an interest in land has value and that value is taken into consideration in any transaction affecting that interest;
- g) To pay full, fair and prompt compensation to any person whose right of occupancy or recognized long-standing occupation or customary use of land is revoked or otherwise interfered with to their detriment by the state;
- h) To provide for an, efficient, effective, economical and transparent system of land administration;
- i) To enable all citizens to participate in decision making on matters connected with their occupation or use of land;
- j) To facilitate the operation of a market in land;
- k) To regulate the operation of a market in land so as to ensure that rural and urban small-holders and pastoralists are not disadvantaged;
- l) To set out rules of land law accessibly in a manner which can be readily understood by all citizens;
- m) To establish an independent, expeditious and just system for the adjudication of land disputes which will hear and determine cases without undue delay;
- n) To encourage the dissemination of information about land administration and land law as provided for by this act through programmes of public and adult education, using all forms of media;
- o) [And to ensure] the right of every woman to acquire, hold, use and deal with land shall to the same extent and subject to the same restriction be treated as the right of any man, is hereby declared to be law.

Before being enacted, the draft land acts were vigorously debated by a wide range of civil society and state actors.<sup>70</sup> Importantly, as a result of dynamic

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<sup>70</sup> Describing this process, Shivji (1999) writes: "The great value of the debate and NGO activism behind the Land Acts lies not so much in getting the law that they advocated but

advocacy and lobbying, women's organizations achieved significant victories in regards to the women's land interests, described below. The land acts were passed by parliament in 1999 and signed into law by the president in 2001.

## 5.2 Accommodating diverse customs under one law

The Village Land Act and the Land Act of 1999 recognize - and legalize - customary law as it applies to the assignment, transfer and definition of property rights (VLA, art. 14). Yet what is "customary law" as defined by the land acts? Over 120 different ethnic/tribal groups live in Tanzania, each made up of a system of clans. Various groups practice very different livelihoods; some are small scale farmers, some are pastoralists, and some are hunter-gatherers. To complicate matters, in those areas where *Ujamaa* villages were created in the 1970's, customary claims are more attenuated. This is also true for communities impacted by Tanzania's formerly exclusionary policies in conservation areas, (who relocated but retain strong claims to their customary lands within those areas). Tanzania was thus faced with the challenge of trying to codify myriad customary legal systems, affected by various historical circumstances, into a few basic overarching principles.

The Village Land Act's definition of exactly what constitutes "customary law" allows space for each community to freely determine its own rules and practices, provided they do not contradict Tanzania's other laws or contravene the rights of others. Article 20 explains that the customary law to be applied to land held under customary tenure "shall have regard to the customs, traditions and the practices of the community concerned, to the extent that they are in accordance with the principles of the national land policy and of any other written law." It goes on to qualify that any customary law that "denies women, children or persons with disabilities lawful access to ownership, occupation or use of any such land," will be void and inapplicable, and should not be given effect by a village council or assembly.

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rather in bringing the land question on the public agenda. In this, I believe, for the first time civil society has scored a reasonable victory...The politicians did not have a field day. At every step, they had to justify and answer...I am sure they have learnt a good lesson in good governance, to use the jargon. The activists of the civil society have also learnt a lesson on 'how to pressurise your rulers without being manipulated.' In this sense, therefore, there is a cause for celebration."

Meanwhile, the Village Land Act's definition of "custom" is slightly complicated by its acknowledgment that in trying to socialize Tanzania (through tactics like abolishing chiefdoms) Nyerere's *ujamaa* scheme introduced dramatic changes in custom. To this end, the "customary law" which is to be applied under the Village Land Act is the custom that was in operation *before* the *ujamaa* scheme was put into effect. (VLA, art. 20§4(b)). For those communities unaffected by the *ujamaa* scheme, they may continue to apply the customary law they have always applied. In other areas, for example communities living on general land, people should apply the "customary law recognized as such by the persons occupying the land" (VLA, art. 20§4 (a, c)). The customary law recognized by pastoralists is to be the customary law that continues to govern pastoralists' land (VLA, art. 20§4(d)). As such, the particulars of what will constitute customary law are left to each ethnic group, tribe or community to establish.

Alden Wily (2003 at 11) makes the point that the Village Land Act's lack of definition of what exactly customary law is - and its various mandates for how different communities should determine which rules to apply based on their particular history or the state classification of the land they are living on - may "throw some communities into confusion." She postulates: "What is our custom? they might ask. How do we now know what is customary? What if our community norms conflict with what the elders say is customary? Who shall decide?" She notes that this leaves "plenty of scope for a disgruntled sector in the village to use customary practice to dictate a land claim, against the more general or more modern decision-making of the community as a whole."

### 5.3 Village land claims, rights and governance

Three basic underpinnings of the land acts and the basic governance structure of villages must be explained at the outset. First, under the land acts, land is divided into three categories: reserved land, village land and general land (Land Act, art. 4§4).

- **Reserved land** is defined in the acts as all land set aside for special purposes, including forest reserves, game parks, game reserves<sup>71</sup>, land

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<sup>71</sup> Nineteen percent of Tanzania's surface area is devoted to wildlife in protected areas. No human settlement was allowed in these areas prior to 1999. Another 9 percent of the mainland's surface area is comprised of protected areas where wildlife and humans co-exist.

reserved for public utilities and highways, hazardous land<sup>72</sup> and land designated under the Town and Country Planning Ordinance. Approximately 58 million acres - or 25 percent of Tanzania - is reserved lands (Shivji, 1999).

- **Village land** is the land falling under the jurisdiction and management of a registered village. The land determined to be "village land" in Tanzania is comprised of 12 000 villages (10 500 of them registered) that are in turn divided amongst 55 066 sub-villages (Shivji, 1999 at 4; Alden Wily, 2003 at 16; SPILL, at 12). Village land includes:
  - Lands within the boundaries of the village established by demarcation or designated under previous laws (art. 7§1(a–d));
  - All lands that are part of a registered village (under the Local Government (District Authorities) Act;
  - Land designated as village land under the Land Tenure (Village Settlements) Act of 1965;
  - Land that has been demarcated as village land under any law or administrative procedure – whether formally approved or not;
  - Land that has been agreed to be village land by relevant stakeholders; and
  - Land that villagers have been regularly using in the 12 years before the Village Land Act was passed, including lands lying fallow, lands used for pasturing cattle, and land used for passage to pasture lands (art. 7§1(e)).
  
- **General land** denotes all land that is neither reserved land nor village land; all urban areas fall under this category.

The acts establish pre-existing customary tenure rights as the basic means of holding property rights in all areas zoned as village land, as well as any areas

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The forestry sector has also increased the coverage of protected areas within Tanzania. About 570 forest reserves cover around 15 percent of Tanzania's surface area, of which 3 percent overlaps with protected areas devoted to wildlife conservation (ILD, 2005, Vol. 3).

<sup>72</sup> Any area of land may be declared by the minister to be "hazardous land." Hazardous land is described in the acts as land that is being protected for environmental reasons or to keep people from danger, including: mangrove swamps, coral reefs, wetlands, offshore islands, land on which hazardous wastes are dumped, and steep slopes or river banks that are vulnerable to erosion if not protected (art. 6 § 3(a–g)).

within general lands that were occupied according to a customarily-deemed right of occupancy before the act was passed.

Second, in Tanzania all land is held by the state, and land rights are therefore not rights of private ownership but rather rights of occupancy. Under the land acts, there are two ways of gaining title to land: customary rights of occupancy and granted rights of occupancy. (The processes for attaining these rights are explained in section 5.4). The following chart compares the two rights.

<b>Customary Rights of Occupancy</b>	<b>Granted Rights of Occupancy</b>
<ol style="list-style-type: none"> <li>1. Apply, with some exceptions, to village lands. Stem from customary law and pre-existing land holdings.</li> <li>2. May or may not be backed by a certificate or written document.</li> <li>3. Carry the same weight and validity as granted rights of occupancy.</li> </ol>	<ol style="list-style-type: none"> <li>1. Apply to general lands and reserved lands. Are awarded by the state after formal application.</li> <li>2. Always have formal written documentation.</li> <li>3. Carry the same weight and validity as customary rights of occupancy.</li> </ol>

(Land Act sec. 4§3)

The Village Land Act makes explicitly clear that "a customary right of occupancy is in every respect of equal occupancy status and effect to a granted right of occupancy" (VLA, art. 18§1). Moreover, if the government aims to compulsorily acquire land belonging to a villager or a village as a whole, it must pay the same levels of compensation for the land it would have to pay if the land were under a granted right of occupancy or the person had a title deed; Article 18(i) promises that "A customary right of occupancy ... [shall be] subject to the prompt payment of full and fair compensation to acquisition by the state for public purposes." However, it is yet to be seen if this promise/provision will be fully honored. A close reading of the law does not make it clear if this extends to village lands that are re-zoned as general land on the grounds of being "unused."

Third, the Village Land Act is rooted in and builds upon Tanzania's pre-existing system of village administration institutions, the village councils, who are responsible for administration and management of village land. Articles 145§1 and 146§1 of Tanzania's Constitution establish local

government authorities in each region, district, urban area and village, whose purpose is to "transfer authority to the people" (constitution, art. 146§1).

The basic units of governance at the village level are the 1) **village assembly**, which includes every man and woman above the age of 18 living in the village, as set out in the Local Government (District Authorities) Act of 1982 and 2) an elected **village council**, which governs on behalf of and is answerable and accountable to the village assembly. Village councils were first created in 1975, under the Village and *Ujamaa* Village (Registration, Designation and Administration) Act of 1975. They were then transformed into local government bodies in the 1990's.

The village council is "the supreme authority on all matters of general policy making in relation to the affairs of the village" (District Authorities Act, art. 141). The council meets monthly, and must convene and report to the village assembly on a quarterly basis. At least one quarter of the council members must be women.<sup>73</sup> Under the terms set forth in the Local Government (District Authorities) Act, village councils may propose village by-laws (whose enactment must be approved by the consensus of the entire village assembly as well as by the district council of the area) and take steps to ensure that these laws are implemented and adhered to (Alden Wily, 2003). Village councils are autonomous of both the central government and the next higher tier of local government authority, the district council.

### 5.3.1 Claiming community land rights: the village registration process

Central to the Village Land Act's recognition of customary land rights is the establishment of the village as the central unit of land holding. From this, all land and natural resources management as well as all individual land rights flow. In order to fulfil the provisions of the acts and be able to grant formal land rights to individuals and families within the community, a village must first be formally registered as a village and then acquire a certificate of village

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<sup>73</sup>Alden Wily (2003) reports that in the 1970's and 1980's, village assemblies often elected traditional leaders to the village councils, with chiefs being appointed the village council chairmen. More recently, however, election data has shown communities increasingly electing younger, more highly educated individuals to the village councils, though elders are still well represented.

land (Local Government (District Authorities) Act, 1982 sec. 22),<sup>74</sup> However, under the act, a village is considered to have a formal claim to its land regardless of whether it completes this process.

The village registration procedure set out in the Village Land Act begins with boundary harmonization. Representatives of neighbouring villages must take part in describing a village's boundary, come to consensus on their shared boundaries, and jointly sign written "minutes" of their boundary harmonization meetings that include the boundaries' descriptions.<sup>75</sup> Importantly, when defining and mapping the bounds of village land, the law does not require the perimeter boundary or village area to be surveyed or mapped; rather, "general boundaries" may be used to describe the area, such as permanent features like paths, rivers, gullies, rocky outcrops and other boundary markers (VLA regulations, art. 37§1). As such, customary landmarks and manners of establishing community limits are elevated up into formal registration and mapping exercises.

Second, villages are required to demarcate which land within the village is communal land (to be used by the whole community according to custom and need), individual/family land, and reserved land (to be held for future generations and needs)<sup>76</sup> (VLA, art. 12§1). This process is designed to foster community consultation, discussion, and to facilitate a common understanding among community members of what exists within the

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<sup>74</sup> The registrar of villages may register an area as a village where he is satisfied that "a prescribed number of households have settled and made their homes within an area of mainland Tanzania, and that the boundaries of that area can be particularly defined..." When the registrar of villages is satisfied that "not less than 250 *Kayas* [households or family units] have settled and made their homes within any are of Tanganyika and that the boundaries of such area can be particularly defined" then he can register the area as a village<sup>74</sup> (Nangoro and Tenga, 2008) .

<sup>75</sup> In the event of a conflict, the minister (or the district land officer acting in this capacity) may appoint a mediator. If the mediator is unable to get the two villages to agree, then the minister may appoint an official inquiry and he will make a decision based upon its recommendations (art. 7§2(3)).

<sup>76</sup> Interestingly, in some government documents, this third category is referred to as "vacant" land. ("On the basis of the provisions of section 12 of the VLA, village land is divided into three classes, namely; *individual, communal and vacant* lands (GoT, 1999b). Vacant land is land, which may be available for communal or individual occupation and use through allocation by the village council by way of customary right of occupancy or derivative rights such as leases, licenses, etc. It was intended that this category of land should be available for allocation...The village council appears to have been granted exclusive jurisdiction with regard to the *vacant land* category and villagers as such have no voice on its allocation"(Sundet, 2005).

community's domain, as well as how they would like to manage it. Furthermore, the Village Land Act mandates that when defining the bounds of the village, these bounds must provide for the land rights of pastoralists, the need for commonage, and the land needs of future generations of Tanzanians (VLA, art. 23§2),

Third, after any disputes over village boundaries have been resolved and all village lands have been formally demarcated and mapped, the village council then starts the administrative process of applying for a certificate of village land. A village's application for a certificate of village land is made to the district land officer, who then prepares the certificate. Finally, after the village council has reviewed, approved and signed the certificate prepared by the district land officer, the district land officer forwards it to the Commissioner for Lands, who signs it on behalf of the President of Tanzania and enters it into the national registry (VLA, art. 7§7).

A certificate of village land grants the village council administrative management powers over the land and affirms the occupation and use of the lands in accordance with the applicable customary law (VLA, art. 7§6–7). At the end of this village certification process, the village (through the village council) becomes a corporate legal body, able to transact and negotiate with outsiders.

Once a village has been registered and has received a certificate of village land, villages may generate their own by-laws to regulate a variety of economic activities as well land and natural resource management (art. 65§2). As such, the Village Land Act creates a space for communities to proactively decide how to govern themselves and to freely incorporate – and therefore formalize – local customary rules and rights into their land use and management plans."<sup>77</sup>

However, it is not clear that this village registration process actually protects a community's customary land rights, as there is a massive loophole in the law: the Village Land Act specifically reserves the right of the President of Tanzania to transfer land from the village sector, transforming it legally into general or reserved land. The president may "transfer any area of village land to general or reserved land" as long as it is in the "public interest", which for

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<sup>77</sup> The procedure for creating village bylaws is described by the provisions of Part VI of the Local Government (District Authorities) Act of 1982.

these purposes includes "investments of national interest" (VLA, art. 4§1,2). Thus, while a village may work to define and demarcate its boundaries and successfully attain a certificate of village land, the president may at any time deem that a village's land is necessary for an "investment of national interest" and reclassify the land as outside the administrative jurisdiction of the village council.

As explained further below, the Tanzanian Government has recently been doing exactly this: granting thousands of hectares of what is legally village land to private investors for large-scale agricultural investments, oftentimes without consulting or notifying the affected villages (see e.g. Cotula *et al.*, 2009). While the law gives village assemblies the power to approve or reject removal of village land by the state "in the public interest" for areas of less than 250 hectares, it does not provide for any village check on land removal for areas larger than 250 hectares (VLA, art. 4§6 (a)(b)).

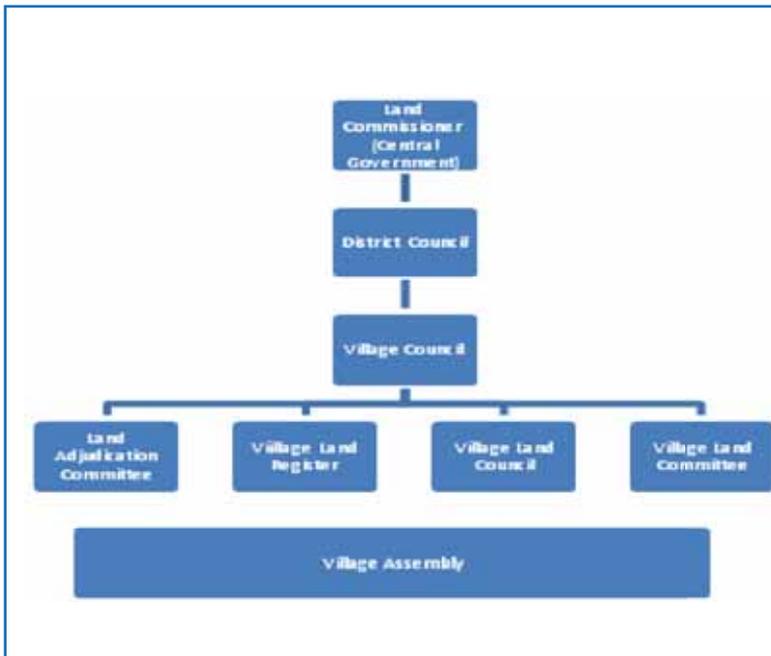
More troubling are the varying definitions of general land in the two acts, which have created a legal loophole through which village land can be taken out of the village and vested under the control of the Commissioner of Lands. While the Village Land Act defines general land as "all public land which is not reserved land or village land" (VLA, art. 2), the Land Act defines general land as "all public and which is not reserved land or village land *and includes unoccupied or unused village land*" (Land Act, art. 2, emphasis added). Thus, while Article 23§2 quite excellently allows that village boundaries should provide for the land rights of pastoralists, the need for commonage, and the land needs of future generations of Tanzanians, it is as yet unclear whether those needs will trump the government's desire to promote "investments of national interest" on land that, having being set aside for such purposes, appears to be unused.

### 5.3.2 Village land administration and management

The village council is responsible for managing village land and must do so in "accordance with the principles applicable to a trustee managing property on behalf of a beneficiary." Interestingly the law does not say that the council *is* the trustee, or the villagers *are* the beneficiaries, but rather that the village council must manage the property "*as if* the council were a trustee of, and the villagers and other persons resident in the village were beneficiaries...."

(VLA, art. 8§1, 2, emphasis added). The simile here is necessary because the state is the ultimate owner of the land.

**Diagram 3 - Organizational chart of village-level administration bodies as established by the Village Land Act**



Alden Wily (2003 at 23) explains that while in the past, village councils could be recognized as owners of village land through the issue of village title deeds, the Village Land Act changed this situation, making village council managers of village land only. She writes: "Village councils may no longer consider themselves the owners of village land, even communal land...the law makes it quite clear that village councils operate as trustees on behalf of village members and are fully accountable to these beneficiaries". However, it is arguable that the village councils are also managing the land on behalf of the Tanzanian state as well.<sup>78</sup>

<sup>78</sup> This responsibility is further underlined by Tanzania's Constitution, which obligates all people to "protect the natural resources of the United Republic, the property of the state authority, all property collectively owned by the people, and also to respect another person's

The village council is responsible for receiving and ruling on applications for land, allocating village land (after approval from the full village assembly) and granting Certificates of Occupancy (described below). It is also responsible for village land use planning. This includes identifying and zoning village lands (as residential areas, grazing areas, farming areas, forests, etc.) and then demarcating and managing them as such. The councils are also responsible for categorizing land within village boundaries as either:

- 1) Land that is communally/publicly used and occupied;
- 2) Land that is being occupied on a individual or family basis under customary law, or
- 3) Land which may in the future be made available for communal or individual occupation (art. 12§1).

The village council must categorize land that has been traditionally used by the whole community as "communal village land" to which all villages have rights of occupation and use (VLA, art. 57§1(h)) and specify these areas in the land use and zoning plan. Under Article 13§7, areas that must be zoned as communal land automatically include:

Any land which has been set aside by a village council or village assembly for community or public occupation and use or any land which is and has been, since the formation of the village, habitually used whether as a matter of practice or under customary law or regarded by village residents as available for use as community or public land before the enactment of this act, shall be deemed by this act to be communal village land approved as such by the village assembly and shall be registered by the village council.

The village council must also prepare management plans for the use of communal lands (VLA, art. 13§1, 2). In the event that communal lands have been customarily shared by neighbouring villages, village councils may enter into "joint village land use agreements" that allow them to share the management of these lands (VLA, art. 11).

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property...All persons shall be required by law to safeguard the property of the state authority and all property collectively owned by the people, to combat all forms of waste and squander, and to manage the national economy assiduously with the attitude of people who are masters of the destiny of their nation" (constitution, art. 27 §1,2).

In making these decisions, the village council must consider principles of sustainable development, natural resource management, and the surrounding environment (VLA, art. 8§3(a)) and must consult with local public authorities (VLA, art. 8§3(b, c)).

Other matters that must be taken into account by the village council during village land use planning include sensitivity to a range of customary land rights and practices and livelihood strategies, such as:

- Existing tenure arrangements, land uses and development patterns;
- Proposals for multiple land use systems to accommodate different land use practices;
- Participation of local committees and villages in managing their resources;
- Patterns of rural settlements;
- Proposed implementation of existing traditional technologies;
- Potential role of wildlife in local community and village development; and
- Potential role of forests in local community development, among other factors.<sup>79</sup>

Once complete, the village council must submit its land use and zoning plan to the village assembly, which has the power to approve it, reject it, amend and approve it, or refer it back to the village council for further consideration (VLA, art. 13§5). This makes the village council downwardly accountable to the entire community in its creation of a land use and zoning plan.

The village council is also charged with maintaining and updating a village land registry in accordance with rules set by the minister (VLA, art. 21§1). The village land registry is supposed to be a simple record of intra-village customary ownership, as well as all internal land transactions and dispositions. The village land registry is meant to be the lowest branch of a larger district land registry, subject to supervision by the district registrar (VLA, art. 21§3).

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<sup>79</sup> As set out in Article 22 of the Tanzania's *Land Use Planning Act of 2007* (Act No. 6 of 2007). The 2008 Land Use Planning Act also provides that the village council make determination of land for uses including land for rangelands (art. 28§1(a)), and the promotion or regulation of the scope of pastoral activity (art. 28§1(k)).

### 5.3.3 Village land registration and pastoralists' rights

The land rights and livelihood of pastoralists in Tanzania (and throughout Africa) are increasingly at risk as growing land scarcity and large-scale concessions to investors threaten the vast tracts of land necessary for herding livestock. Pastoralists' inclusive notion of land use and ownership has often been exploited by non-pastoralist users who assert that this 'open access' land is free and unclaimed; pastures that pastoralists depend upon for their livelihoods are often identified by government officials as "idle" land suitable for allocation to investors for commercial and small-scale farming, wildlife conservation, human settlements, and infrastructure development. As a result, pastoralists' land rights, water rights and natural resource entitlements have been and continue to be hemmed in and eroded. Land conflicts with farmers have flared as pastoralists increasingly move through village lands or cross farms that have been built on their customary lands. Furthermore, dispossession of large tracts of their land is causing pastoralists to intensify the use of remaining lands, and this new, year-round overgrazing is causing degradation of land, a decline in livestock nutrition, and lowered livestock production (Tenga and Nangoro, 2008; Cotula *et al.*, 2004, 2006)

To protect pastoralists land claims, Article 7§1 of Village Land Act (which establishes the definition and bounds of village territory) clearly provides that village land may encompass fallow land, land "used for depasturing cattle" or land allocated "to persons using that land with the agreement of the villagers, or in accordance with customary law"; and "land customarily used for passage or land used for depasturing cattle" (VLA, art. 7§1(e)(i–iii)). This section is meant to: safeguard the untilled pasture lands near pastoralists' settlements which may appear to be vacant; make sure that such areas are mapped as village land; and ensure that pastoralists retain their customary rights to pass through other (agriculturalist) villages' land along their customary grazing routes.

To pre-emptively address conflicts between sedentary small-scale farmers and pastoralists and protect the land rights of pastoralists, the Village Land Act establishes a novel and ingenious mechanism: if, in the course of an adjudication process (described below), an adjudication officer finds that the land applied for is used both by "groups of persons using the land for pastoral purposes and groups of persons using the land for agricultural purposes" and both groups claim to be "using that land in accordance with

customary law applicable to their respective uses" he or she must "determine and record the nature, extent and incidents of each use and so far as it is possible to do so, [and] the length of time that each group has used or claimed the use of that land for their respective uses." An arrangement for continued dual use is then prepared, which records: "the rights to the use and occupation of the land by each group as recognised by each group; and the arrangements for resolving any disputes between the dual uses adopted and used by those groups" is then prepared (VLA, art. 58§1(a, b).

These arrangements are to be called "land sharing arrangements." This provision is excellent and important; as land scarcity increases, sedentary farming communities have been seeking to exclude pastoralists (whose animals at times destroy their crops) from lands that have traditionally been subject to shared and overlapping use rights. The Village Land Act therefore provides a structure to both ensure that all shared use rights are recorded and that conflicts are resolved in a way that establishes their continue shared use.<sup>80</sup>

## **5.4 Individual rights**

### 5.4.1 Formalizing customary land rights

As described above, there are two different ways to hold land in Tanzania: a granted right of occupancy and a customary right of occupancy. The Land Act's full prescription for granted rights of occupancy is outside the scope of this publication; they are discussed below only as they relate to customary land holding practices.<sup>81</sup>

Village councils may grant customary rights of occupancy to a citizen of Tanzania, a family of citizens, a group of two or more citizens, or any partnership or corporation of which the majority of its members or

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<sup>80</sup> The "joint village land use agreements" established under VLA, Article 11 may also be useful for clarifying the rules of shared lands.

<sup>81</sup> Granted rights of occupancy are covered in the Land Act. A granted right of occupancy is made after application to the Commissioner for Lands, along with the required paperwork, fees, and processes set out in the Land Act (Land Act, arts. 25–29). Anyone – national citizens and foreigners, individuals, corporations or groups – can apply for a granted right of occupancy on general lands, although non-citizens can only apply for granted rights of occupancy for investment purposes as per the Tanzania Investment Act (Land Act, art. 20). Granted rights of occupancy are granted by the president for up to 99 years, for a premium and at an annual rent.

shareholders are citizens of Tanzania (VLA, art. 18§1(a,b,c)).<sup>82</sup> Customary rights of occupancy are permanent, and are governed by local/village customary law. Despite being rights of "occupancy", customary rights of occupancy may be held more or less as if they were private property; they:

- May be granted subject to a premium and an annual rent;
- May be assigned to other citizens by the holder of the right;
- Are inheritable and transferable by will; and
- Are claimable by state expropriation processes if necessary for public purposes (VLA, art. 18§1 (f, g, h, i)).

Customary laws that do not contravene the principles of the National Land Policy or other laws of Tanzania apply to all dealings or transfers regarding land held under customary rights of occupancy, including intestate succession. Customary rights of occupancy may be leased or subleased (to be called "customary leases" and "customary subleases"), and those leases are also to be governed by customary law (VLA, art. 19).

**It is important to note that under the Village Land Act, it is not mandatory that customary land rights be registered and a customary right of occupancy issued for them to have weight.** However, the law

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<sup>82</sup> Because of Tanzania's complex history (particularly given Operation *Vijiji* and the vast expanses of formerly village lands were made into national parks/conservation areas), it was necessary to spell out in the text of the law the various specific groups that may be granted customary rights of occupancy. These include:

- People holding land held over time immemorial, according to customary rights;
- People who received land under *ujamaa* schemes,
- All people who have occupied urban or peri-urban land as a principle place of residence for ten out of twelve years or more (as a primary holder, not as a tenant)(VLA art. 14, §§1–3);
- All people who hold land according to custom within forest reserves (VLA art. 14 §§5–8);
- All people holding land under customary allocation within the bounds of national parks - particularly the Ngorongoro Conservation Area (with permission of the Director of National Parks) (VLA art. 14 §§5–8);
- All people remaining living within village lands that they were forcibly removed to between 1970 and 1977 by the government (but were not granted according to custom) (VLA art. 15), and
- People who have applied for and been given a customary land right by the village council.

itself does not make this explicitly clear; it is so concerned with the various processes of registration and adjudication that it appears that they are compulsory. The Village Land Act does not say directly that whether formally registered or not, a customary right of occupancy is a strong, enforceable land right. However, read carefully, Article 14§2 (entitled "Land which is or may be held for customary rights of occupancy") asserts that:

It is hereby affirmed that...a person who occupies land [under various contexts]... occupies that land under a customary right of occupancy and shall [in the event of compulsory acquisition]...be entitled to receive, full, fair and prompt compensation for the loss or diminution of value and that land... (VLA, art. 14§2(b) emphasis added).

While this section is fairly complex and primarily concerns the kinds of land besides village land that can be held according to a customary right of occupancy (see footnote 79), what matters is the *present tense* of the word "occupies" – there is no "may" - the land is already occupied according to a customary right of occupancy.

Furthermore, Article 4§3 of the Land Act, states that: "Every person lawfully occupying land, whether under a right of occupancy wherever that right of occupancy was granted or deemed to have been granted, or under customary tenure ....such land shall be deemed to be property ..." The Village Land Act defines "deemed rights of occupancy" as "the title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using or occupying land under and in accordance with customary law" (VLA, art. 2) and as "customary rights of occupancy on general lands" (VLA, art. 14§1 (b)). The definition of a 'deemed right of occupancy' makes clear that these rights are the "title". Taken together, Articles 4 and 14 establish that various kinds of land are already held under "customary right of occupancy", whether formally registered as so or not.

However, this is a very nuanced and careful reading of the text; the existing right, never clearly stated outright, may be easily overlooked within the laws' hundreds of pages.

For those individuals, families or groups who do choose to seek a formal customary right of occupancy certificate, there is a complex process to

follow. To be apply for a customary right of occupancy, a person, a family, or "a group of persons recognized as such under customary law," as well as "a married person who has been divorced from, or has left for not less than two years, his or her spouse, [who] was, prior to the marriage, a villager" (as well as non-villager Tanzanian citizens) must fill out the prescribed form and submit it to the village council (VLA, art. 22§1, this provision explicitly helps to protect the land claims of "outsiders" – divorced/separated women and others who married or moved into the village).

The form must be signed by the applicant, and, if s/he is applying within a family unit, at least two people from the family must also sign the form. If a group of people banded together under customary structures are making an application, then the application must be signed by "two persons who are recognized by that law as leaders or elders of that group" (VLA, art. 22§3(b)(iii)). In addition to the form, applicants must submit other relevant documentation and pay accompanying fees.

Importantly, the Village Land Act does not require that the applicant(s) have the land at issue formally surveyed, measured or mapped; description of tangible, local boundaries and sketches of the area are sufficient. This is in accordance with customary practice, and ensures that the process is affordable and accessible to rural community members.

The village council then reviews the application, taking into consideration various factors such as the equality of all people and the avoidance of "discriminatory practices and attitudes towards any woman who has applied for a customary right of occupancy" (VLA, art. 22§1,2(a,c)). In evaluating applications, the village council is required to consider the planned use of this land applied for, as well as the land already held by the applicant(s) (would it exceed the limit of what one is allowed to hold?); their potential capacity to manage the land applied for (can the applicant access the necessary skills and knowledge to productively use the land?); and the applicant(s)' intent to use the land to provide for any dependents they have or will have. After an analysis of these factors, the village council can then grant the application in part or in full or deny the application (VLA, art. 23§3).<sup>83</sup> Importantly, the village council may not allocate land or grant a

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<sup>83</sup> The determination and offer of a grant of customary law must be in writing. The applicant(s) then have 90 days to accept or refuse the offer, and this also must be in written form (art. 24). Once a "contract for a grant of customary right of occupancy" has been

customary right of occupancy without prior approval of the village assembly (VLA, art. 8§5, 6). After a grant has been made, a copy of the grant is then entered into village land register (VLA, art. 25).

#### 5.4.2 The adjudication process

Should the land being applied for be contested or subject to a dispute, or when there is not enough information about the land at issue, the Village Land Act sets out a procedure called "adjudication" to resolve the dispute and clarify the application. When all people with an interest in the land at issue (including neighbours and other relevant stakeholders) are in full agreement about the boundaries and interests in the land, the identity of the current landholder (if any), and other critical issues, then adjudication may not be necessary (VLA, art. 48). (In most cases, a simple form of adjudication that checks the boundaries of the property with all relevant stakeholders and neighbours and then describes the property may satisfy the application requirements.)

When the village council deems a more extended adjudication process to be necessary, a *village adjudication committee*<sup>84</sup> specially elected by the village assembly then: walks around the land; marks the land's boundaries; talks to all interested stakeholders; and undertakes other investigatory methods as may be necessary to determine the matter.<sup>85</sup> The adjudication committee then:

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concluded, a written certificate of the right is issued (art. 25). It is important to note that no certificate of customary right of occupancy may be issued by a village council without it being also signed, sealed and registered by the district land officer (art. 25 § 2).

<sup>84</sup> The adjudication committee is headed by a "village adjudication advisor" approved by the village assembly. The adjudication advisor could be either a villager "known and respected for his knowledge of and impartial judgment about land matters in the village," a government official with knowledge of land matters, or a magistrate appointed by the judicial service commissioner at the request of the village council (art. 52§1).

<sup>85</sup> On the day of the meeting, the village adjudication committee hears and determines all claims. To do this the committee walks around the land, ascertaining, verifying and determining and marking the boundary... [by using] markers commonly used in the area (tracks, ditches, fences, sisal, stones, etc)...[and paying] special attention to turning points, corners and other changes in direction. Then, the committee, the applicant and at least two other village residents certify and witness the boundaries by signing a form. The area is measured, and three different sketch maps are made of the land at issue, indicating the names of occupiers of all adjacent parcels and marking prominent reference features such as paths, roads, rivers, buildings, rocks, trees. Then the committee prepares a provisional adjudication record signed by all the stakeholders which includes the names of claimants, the nature of interests in land, amount of land, length of time claimant/s have had land, the location and

- Determines the boundaries of and interests in land at issue;
- Sets aside, reserves, or demarcates necessary rights of way and other easements on the land;
- Hears and rules on any questions or conflicts referred to it by any person with an interest in the land at issue in accordance with customary law;
- Advises the village adjudication adviser on question of customary law;
- Makes sure to safeguard the interests of women, absent persons, minors and disabled persons; and
- Takes into account any interests in or claims to the land at issue that have been made (VLA, art. 53§1,3).

The committee is directed to do its best to reconcile all conflicting claims to the land at issue. In doing so, it may hold a hearing on the land at issue, during which it may "hear evidence which would not be admissible in a court of law", call evidence, and generally determine its own procedures (VLA, art. 53§9).

In making its determinations, the adjudication committee is explicitly directed to take care to protect the rights of women, pastoralists and other minority groups. The act mandates that the "adjudication officer shall have regard [for] and treat the rights of women and the rights of pastoralists to occupy or use or have interest...in land not less favourably than the rights of men or agriculturalists to occupy or use or have interests in land" (VLA, art. 57§2). Moreover, a village adjudication committee "may record that two or more persons or groups of persons are co-occupiers and users of land, whether those persons or groups of persons have claimed to be co-occupiers or are disputing occupation or use of that land." The committee must "determine and record the nature, incidents and extent of that occupation and whether those persons and group of persons are joint occupiers or occupiers in common" (VLA, art. 57§5). Such provisions are an excellent example of how laws may include provisions establishing protections for the land rights of vulnerable populations.

The final decision of the adjudication committee is recorded and posted in a prominent place in the village (VLA, art. 54§2). Anyone aggrieved by the determination of the village adjudication committee may appeal the matter to

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boundaries of plot, any existing rights of way or other way leaves in the land, and the determination of the committee (VLA, regulations, arts. 54 and 61–74; Alden Wily, 2003).

another new village body, the *village land council* (VLA, art. 15). If a grant of a customary right of occupancy is shown to have been carried out in a corrupt manner, it will be voided (VLA, art. 24).

Once a grant of customary occupancy has been made, it is unlimited in duration. The holder of a customary right of occupancy must pay taxes, seek building permits before beginning construction, maintain the land in good condition and either "farm the land in accordance with the practice of good husbandry customarily used in the area" (should it be used for farming) or "use the land in a sustainable manner in accordance with the highest and best customary principles of pastoralism practiced in the area" (should it be used for pastoral purposes) (VLA, art. 29§1, 2). As such, the obligations expected of rights holders blend modern state responsibilities (paying taxes, seeking permits) and customary obligations (complying with all customary rules, using the land sustainably).

Land is considered "abandoned" if an occupier has not occupied or used the land (not including purposefully letting it lie fallow) for five years or more or has left the country without making any arrangements regarding supervision of the land. However, in considering whether land has been abandoned, the village council must consider: the age and physical condition of the occupier, the weather conditions in the area during the preceding three years (such as drought), any customary practices "particularly practices amongst pastoralists which may have contributed to the non-use of the land during the preceding three years," and other advice given by the commissioner (VLA, art. 45§2). Holders of customary rights may surrender their rights only as long as the intent behind the surrender is not to deprive women of their rights to occupy the land (VLA, art. 35§6).<sup>86</sup> If it is "reasonable to deduce [that the surrender has the]...purpose or...effect [of] the depriving, or the placing of impediments in the way of, a woman from occupying land which she would, but for that surrender of land, be entitled to occupy under customary law," then the surrender is void, and may not occur (VLA, art. 35§2). In the event that a man has surrendered his land, the village council must offer that right first to the individual's spouse(s) and then to all dependants (VLA, art. 36).

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<sup>86</sup> When a land holder surrenders a customary right of occupancy "for reasons of age, infirmity, disability, poverty or other similar grounds," the village council may take over from that villager the responsibility for paying any debts on that property (VLA art. 35§6).

### 5.4.3 Transfer, inheritance, sale and mortgage

As explained above, although all land is held in trust by the president for the people, customary rights of occupancy are like ownership in that they include the full bundle of rights of freehold title: citizens may freely sell, gift, bequeath, rent and mortgage their right of occupancy to others. (VLA, art. 30§1, 2). Holders of grants of customary rights may also assign derivative rights to their land, including leases, licenses, usufruct rights and other similar interests. They may also assign their rights for mortgage purposes.<sup>87</sup> A villager does not need permission for these activities if the lease, licence or usufruct right is for a year or less and leased to another villager, or if the mortgage is a "small mortgage" (VLA, art. 31§4(a, b)). In addition, a sale or pledge "in accordance with customary law" between villagers for a sum less than that which might be obtained by mortgage also does not need to be approved by the council. Derivative rights are personal to the recipient/grantee of the derivative right, and may not be further assigned (VLA, art. 31§8). However, it is not entirely clear from the text of the law if one must formally apply for a customary right of occupancy to have the right to transfer, sell, bequeath or mortgage one's lands. Presumably, formal registration is not a prerequisite, as the rights exist regardless of registration. However, the law never explicitly states this.

In these provisions, the Village Land Act is creating a legal space for "sales" of use rights, which have been occurring with increasing frequency over the past three decades in Tanzania. In some respects, Tanzanian legislators had no choice but to acknowledge the growing informal market for land, and to take steps to regulate and record it. In her research on land transactions in Tanzania in the 1980's and 1990's, Daley (2005 at 549) found ample evidence of land being bought and sold in Tanzanian villages:

By 2000 almost all the land in Kinyanambo was individually owned and there was very little remaining for the village government to allocate. Land was therefore mostly available only through private transfers, with private market transactions

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<sup>87</sup> The act defines a derivative right as "a right to occupy and use land created out of a right of occupancy", including any form of lease or sub-lease (art. 2). According to Sundet, "It appears from the act that as soon as you "do" anything to the land, i.e. sell it or lease it, it becomes a derivative right. Meaning that customary rights of occupancy can't be sold or leased, except as rights derived from the "original" customary right."

now an integral part of local land tenure...All sorts of people ... were engaging in market transactions in land...By 2000, there was a firmly entrenched, active and flourishing land market ... now driven as much by villagers themselves as by the rich outsiders.

As an important check on intra-familial discrimination and unjust action, the village council must be notified of a proposed sale or transfer before it is to happen, and can refuse to allow a sale or transfer that would have the effect of dispossessing women and children from their land, or which would render the assignor unable to make a livelihood for themselves and their family in the future (VLA, art. 30§4). Sales to outsiders must be approved by the village council (VLA, art. 30§2) and all land sales must be recorded in the village registry.

Furthermore, the act obligates purchasers, mortgagors, lessees of land to ensure that the seller's/assigner's spouse has consented to the transfer of land rights. If she has not, the transaction will be rendered void. This is an excellent provision; it puts an affirmative obligation on the purchaser/lessee to ensure that women have been consulted (Land Act, art. 85). In so doing these provisions shift the burden off of women, who may not be aware of their land rights or have the power, resources or time to fight for their land claims. These are excellent safeguards against intra-familial land dispossession.

It remains to be seen whether the Village Land Act's protections will properly regulate Tanzania's growing land market to ensure that the poor do not lose their lands in distress sales, or to ensure that women and children do not lose out. The constraints built into the law are to be overseen by the village council, and it is not fully clear what the remedy might be for a woman or child who has lost land in a land sale once it has been approved/not been disallowed. The sections on "breach" may apply (VLA arts. 39–41), but in order for these remedies to be made available, the woman or family who has lost out in the land sale or transfer must 1) know her/their right to oppose, 2) bear the burden of proof that there has been an injustice in this land sale and 3) may perhaps have to be able to return the money exchanged for the land. The law is not clear on this last point.

Importantly, the Village Land Act establishes penalties for fraudulent actions such as knowingly making false statements, giving false information, suppressing or concealing information, or fraudulently altering or destroying documents or evidence related land transactions (VLA, art. 63§1).

#### 5.4.4 The land rights of vulnerable groups

As described in Chapter 2, in the context of growing land scarcity and growing land markets, the land claims of more vulnerable groups are weakening as the customary protections and prohibitions against dispossessing women and children from their lands are breaking down. In an effort to respond to this phenomenon, Tanzania's Village Land Act more than aptly provides for the protection of the rights of more vulnerable community members. It is in this area of the law that one can see the drafter of Tanzania's Land Act's point that revolutionary lawmaking may actually result in a highly-detailed, lengthy administrative code (McAuslan, 1998 at 533, quoted in full below in section 6.1, point 7). The Village Land Act repeatedly establishes safety mechanisms, checks on power, and other measures to ensure that while customary law is allowed to govern the substance of land allocations, the rights of vulnerable populations are protected. In this regard, it is the most radical land law among those analysed in this study.

Women's right to property is protected by Tanzanian law. Tanzania's Constitution recognizes that "every person is entitled to own property," and under Tanzania's Law of Marriage Act, men and women are granted the same rights to "acquire, hold and dispose of property" (Law of Marriage, Act of 1971 §56). Moreover, the Land and Village Land Acts, passed in 1999, have identical provisions protecting "The right of every woman to acquire, hold, use and deal with land, to the same extent and subject to the same restrictions... as the right of any man" (Land Act, art. 3§2; VLA, art. 3§2). The law underscores this by often using the phrase "he or she" whenever referring to an individual applicant for a right of occupancy.

The Village Land Act then goes on to establish protections for women's land rights and the land rights of other vulnerable groups in no less than 14 provisions. First, it declares void any customary law that discriminates against women, children or people with disabilities and denies them "lawful access to ownership, occupation or use of any such land" (VLA, art. 20§2).

Applicants are encouraged to apply for a customary right of occupancy not as individuals, but as families, with at least two family members signing the application form, a provision that creates a higher probability (or at least allowance) for the names of both the male and female heads of household to be included on the application form (VLA, art. 22§1). Moreover, when determining whether to grant or deny an application for a customary right of occupancy, a village council shall "have special regard respect of the equality of in all persons...[and as such must] treat an application from a woman, or a group of women no less favourably than an equivalent application from a man, a group of men or a mixed group of men and women and adopt or apply no adverse discriminatory practices or attitudes towards any woman who has applied for a customary right of occupancy" (VLA, art. 23§2(c) (i–ii)).

Similarly, the adjudication council is charged with safeguarding the interests of women, absent persons, minors and disabled persons (VLA, art. 53§3) and treating the rights of women and the rights of pastoralists no less favourably than the rights of men or agriculturalists (VLA, art. 57§2,3). When recording existing land rights, the committee ""may record that two or more persons or groups of persons are co-occupiers and users of land," a provision that can serve to protect spousal rights over property (as well as neighbours' or co-users' rights) (VLA, art. 57§5).

Interestingly, the Village Land Act places responsibility on the village council to protect the customary land rights of vulnerable groups; the village council is to be the intra-village check against intra-familial discrimination. As described above, the village council must disallow any assignment or surrender of rights which would "defeat the right of any woman to occupy land under a customary right of occupancy", leave the assignor's dependents without the land necessary for their economic survival, "or "depriv[e]... a woman from occupying land which she would, but for that surrender of land, be entitled to occupy under customary law" (art. 30§4(b, c), art. 35§2). As described above, in the event that a man has surrendered his land, the village council must offer that right first to the individual's spouse(s) and then to all dependants (VLA, art. 36). Similarly, purchasers, mortgagors, lessees of land are obligated to ensure that the seller's/assigner's spouse has consented to the transfer of land rights (Land Act, art. 85). By shifting the burden off of women and onto local administration bodies and purchasers/lessors, etc., transactions, Tanzania's land acts are unique – and indeed quite radical.

The council has a further obligation to protect vulnerable groups; when determining an application for the grant of a derivative right of customary occupancy, the village council must take into account "the need to ensure that the special needs of women for land within the village is and will continue to be adequately met" as well as "the need to ensure that the special needs of landless people and the disabled within the village will continue to be adequately met" (art. 33§1(d, e)). This provision implicitly provides an obligation for the village council to protect the future land needs of these populations

Finally, the act provides for gender balance on land administration and management bodies: the village adjudication committees must include at least four women among its nine members, (VLA, art. 53§2), while at least three of the seven members of any village land council (a village-level dispute-resolution body, described below) must also be women (VLA, art. 60§2).

However, there is some conflict of law which may prove challenging when applied in practice by judges: while the Village Land Act sets out that customary rights of occupancy are inheritable and transmissible at will (VLA, art. 18§1(h)) and mandates that customary practices must align with the land policy and the laws of Tanzania, under the (codified) customary law of Tanzania, which was largely based upon the practices of the Bantu tribes, widows do not have direct inheritance rights.<sup>88</sup> A widow's (male) children inherit the land and property, and adopt the responsibility for taking care of her. She may remain in the family home as long as she does not remarry. Alternatively, the widow can agree to be "inherited" by a male relative of her deceased husband, which usually results in her continued residence on the land and in her home. As such, Tanzania's customary but codified inheritance laws directly contravene the land acts. Considering the strength of customary inheritance patterns as actually practiced on the ground in rural villages, it is arguable that the Village Land Act should have directly addressed widows' inheritance rights in greater detail.

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<sup>88</sup> Customary law is codified in two government notices: GN 279 and GN 436. Judicature and Application of Laws Act, TANZ. LAWS Subsidiary Legis. [CAP 358, R.E. 2002]. This codification covers Tanzania's patrilineal communities. Law Reform Commission of Tanzania, *The Law of Succession/ Inheritance* (1994) at 21, available at [www.lrc-tz.org](http://www.lrc-tz.org), as cited by Ezer, *Inheritance Law in Tanzania: The Impoverishment of Windows and Daughters*, 7 *Geo. J. Gender and L.* 599, 2006.

#### 5.4.5 Granting customary rights of occupancy to non-villagers

While investors are most often granted land on general lands (and therefore usually follow extensive application procedures overseen by state agencies, as prescribed in the Land Act)<sup>89</sup>, the Village Land Act includes provisions for what must occur in those instances where outsiders or investors seek to establish a home or business within the bounds of village land. It is in this domain – the interactions of outside investors, villagers, and state administrators, that the true tenor of the poor's land tenure security under the new land acts is revealed.

When a person or group of persons is not resident in the village but would like to acquire rights to a piece of village land, they may apply for a customary land right, but must have the written and signed support of at least five villagers to whom they are not related (VLA, art. 22§3). They also have to put in writing that they intend to make the village their principal residence and will begin building their residence(s) within three months. Alternatively, they may promise that within six months of the assignment, they will begin to construct an industrial, commercial or other building likely to provide benefits for villagers or the village or begin an agricultural, mining, tourist or other development likely to provide benefits to villagers or the village" (VLA, art. 30§2). They then apply to the village council for the land, which makes a recommendation to the commissioner as to whether the application should be granted or denied (VLA, art. 17§5).<sup>90</sup>

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<sup>89</sup> Of note is that the Land Act specifies that, where a granted right of occupancy (outside village land) includes land which is occupied by people under customary law, one of the conditions for the granted right of occupancy in that area is that those customary rights must be recognized and that the people living under deemed customary rights of occupancy should be relocated or moved *only* if their removal is necessary to enable the purpose for which the right of occupancy was granted to be carried out, and only in accordance with due process, fair administration, proper notice of 180 days, the opportunity to reap all crops that were already in the ground before notice was given, and [prompt payment of full and fair compensation (Land Act, art. 34§3). Yet one commentator has described how "participants to various seminars on land administration have witnessed cases where land rights have not only not been ascertained but, land has been taken away from customary and other uses without due compensation in the post- [National Land Policy] era" and that in these anecdotal accounts, "Often, the occupier or owner of land does not have a choice and objections are ignored" (Lugoe, 2007 at 5).

<sup>90</sup> Non-village organizations – including corporations (both public, private, and parastatal) and government departments who have been occupying village land under a granted right of occupancy (from the state) before the act was passed may continue to do so, and the

When making this recommendation, the village council must consider:

- Guidance from the commissioner;
- Advice given by the district council regarding the potential contribution or benefit the applicant(s) has/have already provided or will provide in the future;
- The "contribution to the national economy and well-being" that the development is likely to make; and
- Whether the land being requested is so extensive or in such an area that granting the right will "impede the present and future occupation and use of village land by persons ordinarily resident in the village" (emphasis added, VLA, art 23§2 (b, d)).

It is unclear how these otherwise adequate safeguards are weighted. Will the "guidance of the commissioner" or a possible "contribution to the national economy" trump any impediment to "the present and future occupation and use of village land by persons ordinarily resident in the village?"

Village councils may also assign derivative land rights to outside investors (VLA, art. 32). The Village Land Act divides lease grants by the village council into three categories:

- 1) Grants of five hectares or less for five years or less, which may be determined by the village council on its own;
- 2) Grants of more than five but less than thirty hectares and for more than five but less than ten years, which must be approved by the village assembly; and
- 3) Grants of more than thirty hectares or for more than ten years, which are subject to approval by the village assembly and the advice of the (national) Commissioner of Lands (VLA, art. 32§5).

These provisions nicely provide that the larger the piece of land, the greater the degree of the village council's downward and upward accountability.

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commissioner will either manage their granted land use rights or delegate this authority to the village council (VLA, art. 17§1–4).

In determining whether to give its initial approval to these grants of derivative rights, the village council must look at the use plan prepared by the applicant and consider:

- The likely benefits to be derived by the village as a whole by the grant of the derivative right;
- The need to ensure the reserve of land for occupation and use by villagers and for community and public use by those persons;
- The need to ensure that the special needs of women for land within the village is and will continue to be adequately met;
- The need to ensure that the special needs of landless people and the disabled within the village will continue to be adequately met;
- Any advice received from any person or organization which has been consulted on the application; [and]
- Any advice or information given by any department of government on the application... (VLA, art. 33§1).

These provisions are highly protectionist in scope, but again - it is unclear how they will work in practice. Should a powerful state administrator in "any department of government" decide that the investment must be located within the village, how will the balance of interests be decided – which factors in this analysis will trump?

Furthermore, in the case of compulsory purchase (through which land can be expropriated from villages as a whole as well as from individual owners of customary rights) the Land Act defines "in the public interest" as including government promotion of "investments of national interest" (Land Act, art. 4§2). In so doing, the land acts set up the easily-argued premise that an investor's plans to develop the land for his or her own personal profit (albeit also potentially creating local development, paying state taxes and strengthening the GDP) is valid cause to trump a village's decision concerning what investments may be made within its bounds.

Importantly, when making a grant or "derivative grant" of customary land rights to a non-village organization, the village council may require the payment of a "premium" for the land grant, and may consult with the national land commissioner as to exactly how much should be charged (VLA, art. 26§1,2). It is worth underlining that the term "premium" means

price, usually market price. The village council may also charge the non-village organization or corporation yearly rent (VLA, art. 28). The non-village organization can reject or accept the offer made and the price and rent asked by the village council. Unlike Mozambique's law, the Village Land Act establishes that villages also have an explicit right to deny an application and reject an applicant's offer. Should the offer be accepted, the certificate of customary land grant may be withheld until the payment has been made in full or an instalment payment plan has been agreed to. This is an excellent check to ensure that the investors follow through and fulfil their side of the agreed transaction.

Failure to make these payments is "deemed to be a failure to comply with a condition of the right of occupancy" and "shall give rise to revocation" of the grant of customary land rights (VLA, art. 26§4,5). Also, non-villagers who owe unpaid rent or taxes on the land for more than two years are considered to have abandoned the land (VLA, art. 45§1). However, the power inherent in this clause - that villages have the right to evict non-compliant investors - is largely erased by the fact that only the president (with the commissioner acting on his behalf) may revoke a customary right of occupancy granted to a non-village organization for failure to pay the required rent or for a breach of the conditions of the occupancy, etc. (art. 44). Such provisions may be taken as a further illustration that under the current legal framework, villagers lack ultimate authority over their lands.<sup>91</sup>

## **5.5 Dispute settlement and governance**

### 5.5.1 Conflict resolution

The Village Land Act is clear that village disputes are to be adjudicated according to customary law (as long as that customary law does not contravene the written laws of Tanzania). Any rule of customary law in these cases "shall have regard to the customs, traditions, and practices of the community concerned to the extent that they are in accordance with....any

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<sup>91</sup> In terms of accountability for investors, the Land Act sets out the various reasons for which the holder of a granted right of occupancy may be declared by the minister to be in breach of his or her granted right of occupancy. Should the holder of a granted right of occupancy fail to pay the premium of the land, fail to pay the agreed yearly rent, fail to do something that was a condition of the grant, leave a significant percentage of the land unused, or do something that was forbidden by the grant, he or she will face a penalty if good cause cannot be found (arts. 31§5, 44§1). Penalties include revocations of the right, or fines (arts. 45–46).

other written law." If they are not, the decision "shall be void and inoperative and shall not be given effect..." (art. 20§20). In particular, inheritance and succession cases must be settled according to customary law (art. 20§1).

The Village Land Act creates a mechanism by which internal land disputes are adjudicated directly within the village by a group that includes customary authorities. Under the law, villages must appoint a village land council whose function is to mediate between parties to a land conflict until the parties arrive at an acceptable solution to the matter. The village council nominates – and the village assembly approves – seven individuals (three of whom must be women) whom they deem to be fair arbiters of internal disputes; the land council is to be composed of adults who have "standing and reputation ... in the village as a person of integrity and with knowledge of customary land law" (art. 60§1–2, 4–5). In this way, the Village Land Act nicely creates the possibility of customary authorities continuing to address internal land conflicts while also ensuring that women have a seat – and hopefully the power to safeguard women's land rights - at the decision table.

The village land council is charged with exercising its functions in accordance with "any customary principles of mediation [and/or] natural justice" (art. 62§4). Importantly, however, the land councils' only function is as mediator; the village land council has no formal legal power to rule on a case and have its decision enforced. Although there is no formal evidence at this time of the kinds of cases land councils are arbitrating, the (quite specific) legislative mandate was that land councils would hear and determine cases regarding all agreements made under Article 11 (joint land use agreements made between villages) and Article 58 (land sharing arrangements between pastoralists and agriculturalists, art. 60§1). It is not clear, then, if the land council's jurisdiction also extends to intra-family land disputes.

The land councils' functions are to: receive complaints from parties in respect of land; convene meetings for hearing of disputes from parties, and mediate between and assist parties to arrive at a mutually acceptable settlement of the disputes on any matter concerning land within its area of jurisdiction (Land Disputes Settlement Act, art. 7). In the instance of a land dispute, any villager, or person or non-village organization residing in the village engaged in a land-related disagreement may call in the village land council (VLA, art. 61§1). An elected "convener" of the village land council meets with the parties and decides whether to convene a full meeting of the

village land council or else to appoint one or more members of the village land council to act as mediators between the parties to the dispute (VLA, art. 62§2). Alternatively, when the "convener" or any other members of the village council becomes aware of a land dispute, they have an affirmative obligation to use their "best endeavours" to convince the parties to enter into mediation, led by the village land council (VLA, art. 62§3). If the mediation cannot resolve the issue, the matter may be appealed to the courts.

Originally, the law did not allow that the outcomes of village land councils' mediation sessions were appealable, or at all linked to the formal court system. It established that villagers could choose to take their disputes directly out of the villages to the Ward Tribunal for their area, and then, onward to first the District Land and Housing Tribunal and finally to the Land Division of the High Court (VLA, art. 61). This system essentially reinforced the system of multiple judicial fora and continued to ensure that unjust decisions made at the village level would be difficult to appeal or address outside of the village. Sundet's analysis of the village land council system is that in setting up the system this way, the legislators failed to "bring the judicial system within the reach of the common villager" (Sundet, 2005). He writes: "It seems surprising that while going to the pains of creating a potentially useful body as the village land council, the government should choose to delimit its powers to the extent of stripping it of any legal judicial standing" (Sundet, 2005). To improve upon this system and create better mechanisms for land disputes to be reviewable by higher tiers of the judicial system, the Tanzanian legislature passed "The Courts (Land Disputes Settlement) Act of 2002".

The Courts (Land Disputes Settlement) Act of 2002 sets out that the decisions of village land councils are appealable to the ward tribunals (Land Disputes Settlement Act, art. 9). Ward tribunals are directed to base their functions in customary principles of mediation, natural justice, or principles of formal mediation (Land Disputes Settlement Act, art. 11). They are to "apply the customary law prevailing within its local jurisdiction, or if there is more than one such law, the law applicable in the area in which the act, transaction or matter occurred or arose" or some other applicable customary law prevailing in the area of its jurisdiction (Land Disputes Settlement Act, art. 50§1).

A party aggrieved by the decision of a Ward Tribunal may appeal the matter to the District Land and Housing Tribunal (Land Disputes Settlement Act, art. 19). At the district level, advocates (as well as relatives) may appear on behalf of the parties, and proceedings are held in public (Land Disputes Settlement Act, art. 30). Interestingly, Article 50 mandates that the District Land and Housing Tribunals "shall not refuse to recognize any rule of customary law on the grounds that it has not been established by evidence" and "may accept any statement [concerning customary law] which appears to it to be worth of belief which is contained in the record of proceedings or from any other source which appears to be credible or may take judicial notice thereof" (Land Disputes Settlement Act, art. 50§2). As such, customary evidence is to be validated and considered in the resolution and decision of land matters, regardless of the formality of the forum.

From the District Land and Housing Tribunals, land disputes may be appealed to the High Court (Land Division) which has original jurisdiction (VLA, art. 38). Like the district courts below them, the High Court may not dismiss any rule of customary law on the grounds that it has not been established by evidence and must take judicial notice of apparently credible statements and evidence concerning customary law (art. 50§2). If an appeal to the High Court (Land Division) revolves around one or more question(s) of customary law, the court may refer those questions rooted in customary law to an expert or panel of experts on customary law, but is not bound by their opinions in determining the outcome of the case (VLA, art. 39§2). Finally, the Tanzanian Court of Appeal then has jurisdiction to hear and determine appeals from the High Court (VLA, art. 48§1).

In the instance where there is any dispute or uncertainty as to any customary law whether by reason of anything contained in the record of the proceedings, magistrates and judges of both the District Land and Housing Tribunals and the High Court do not have to take as binding any evidence in the record, but are authorized to themselves "determine the customary law applicable, and give judgment thereon, in accordance with what [they] conceive... to be the best and most credible opinion or statement" consistent with "undisputed" provisions of customary law (VLA, art. 50§3). This mandate is slightly confusing as to its effect on customary law and its judicial interpretation; on the one hand, it forces justices of the High Court to be conversant in customary law, and to take it as seriously as they would statutory law. On the other hand, by allowing justices to ignore the record

and themselves determine the customary law applicable, it creates a loophole through which judges may reinterpret customary laws according to their own preconceptions.

### 5.5.2 Accountability, supervision and control

The Village Land Act is replete with administrative checks on village power. Downwardly, the Village Land Act creates a formal mechanism to allow for villagers to enforce their leaders' accountability to their needs and interests. Should the village assembly feel that the village council is acting against the community's best interests or in *ultra vires* of its powers, it may appeal the village council's decisions by lodging a complaint with the district council (art. 8§8). The village assembly may do this on the grounds that "that the village council is not exercising the function of managing village land in accordance with this act ... or with due regard to the principles applicable to the duties of a trustee" (art. 8§8).

For a village assembly's complaint to be actionable, it must be lodged by at least 100 villagers. The district council may try to solve the dispute or it may request the commissioner to issue a directive to the village council or appoint an inquiry. Such an inquiry might result in the village council losing its jurisdiction, with control passing temporarily to either the district council or the land commissioner (art. 8§9). In addition, any villager may sue the village council directly concerning its (mis)management of village land (art. 8§12).

There are also some checks on the village council's power concerning grants of customary occupancy and the adjudication process. If a group of 20 or more people with an interest in the land make a complaint to the district council, it will investigate the complaints and issue a directive to the village council mandating that it cease exercising powers under village adjudication, send all related records and information to the district council for review, and/or cooperate fully with external officers authorized to intervene by the district council. At this point, village-level adjudication will cease and district-level adjudication will begin (VLA, art. 50§4, 56).<sup>92</sup> This creates a check on

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<sup>92</sup> In Sundet's analysis, while the structure of the village adjudication process is participatory, transparent, and likely to result in a legitimate outcome, this secondary process of district adjudication is highly problematic. He writes, "It would seem that the district council's role in this situation is seen as that of an impartial umpire, who is brought in if the village adjudication committee is not performing competently. To expect the district authorities to act in such a disinterested capacity in determining the ownership of a commodity as valuable

poorly-done or bad faith granting of customary rights of occupancy and allows a mechanism for villagers to seek redress for what they feel to be an injustice.

The Village Land Act also establishes mechanisms that allow for upward accountability to the state. The ward or district council - and in some instances the commissioner - may review the village council or village adjudication committee's decisions and weigh in and give advice about a decision to be made by the village council. Most of all, a district land officer must review *each and every grant of customary right of occupancy*.<sup>93</sup>

For example, if the village council has rejected a request to go forward with an adjudication process, the district council can override that determination and carry out the adjudication on its own. The law does not define what would be the motivation for this override, it only allows that the district council may do this when it "considers that spot adjudication ought to be applied to land for which it has been requested" (art. 49§6). Shivji argues that such mechanisms will allow adjudication processes to be co-opted by elites well positioned to negotiate these overlaps of power to their advantage to gain lands against the will of villagers (Shivji, 1999). However, the law provides some checks on this: it holds that any land transaction that is induced or obtained by "any corrupt action" on the part of any government or public official is automatically deemed to be an illegal and void transaction that has no legal effect, and any person occupying land obtained as a consequence of a corrupt action will be liable to forfeit the land (art. 64§1–3). If ever enforced, this is an excellent check on state powers.

Of most concern, however, is that, as described above in Section 5.3.1, the land acts allow central government officials to appropriate, manage and decide the fate of vast swaths of village lands, over and above any local

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as land is naïve." Sundet questions why a challenge to the adjudication committee's findings is simply not put to majority vote at the village assembly (Sundet, 2005).

<sup>93</sup> Sundet (2005) argues that there is far too much supervision set out in the law, or at least the *wrong kind* of supervision: "The role accorded the district commission as an impartial arbitrator is not appropriate. The decision of the village assembly should be binding, and the only recourse to appeal should be to the courts." Rather than constant checks and oversight by the district, Sundet suggest that "much more imaginative use could be made of public hearings and public posting of information. A requirement of the sanction of the village assembly for the first time registration of land would resolve most concerns of ensuring transparency, justice and legitimacy" (Sundet, 2005).

bodies or the articulated interests of villagers and without any downward accountability.

### **5.6 Implementation challenges**

The 1999 land acts did not come into force until their translation into Swahili and the promulgation of their accompanying regulations in May 2001<sup>94</sup>. In the years that followed, the Tanzanian Government and an array of NGOs undertook wide-ranging education and implementation initiatives. However, to date there is very little publicly-available information detailing how the implementation of the Village Land Act has been progressing. Unlike in Mozambique and Botswana, where researchers have since the first been studying and documenting implementation, does not appear to be the case in Tanzania.

However, some information is available. At a 2005 symposium on the implementation of the land acts, Tanzania's Permanent Secretary of the Ministry of Lands and Human Settlement Development reported that the Government of Tanzania had completed formulation of the more than 50 prescribed forms relevant to new village-related land administration procedures. It had also distributed copies of the acts and all relevant forms to all 21 regions, some districts and villages, and to members of parliament. He reported that in 2002 the ministry had produced a training manual on the Village Land Act, as well as a "Citizens' Guide for Implementation" and a publication on "Guidelines for Participatory Village Land Use Planning" and used them to train village, ward, and district officers. According to his remarks, by 2005, 23 district land and housing tribunals had been established, and land-related data was actively being entered into a newly-created computerized management information system (Symposium 2005, opening address, Sijaona).

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<sup>94</sup> The regulations address: procedures for village hearings; compensation to be aid in exchange for village land; the procedures for joint management of land between two or more villages or between a village and a district council or urban authority; the creation of village land registries; and establish the minster's right to set ceilings for land holdings, among other provisions.

### 5.6.1 Challenges identified by stakeholders

Despite the efforts of the ministry, the general consensus at this symposium was that the progress of implementation was slow, and subject to a range of formidable obstacles. Symposium participants asserted that, six years after the land acts had been passed, the majority of Tanzanians simply did not know or else could not understand how the Village Land Act has impacted their land rights and strengthened their land tenure security. Symposium participants suggested the use of radio, television, films and dramas to reach villagers and teach them about their new rights (Symposium 2005, paper 4, Kipobota and Mafoe).

The Gender Land Task Force and the Tanzanian Women Lawyers' Association reported that many Tanzanians did not know about the new land acts, and that even paralegals trained in the laws "complained that they did not fully understand it" (Symposium 2005, Paper 6, Rweybangira). There was extensive discussion about how the laws' impenetrability made it difficult for villagers to learn and understand the Village Land Act enough to even try to use it to claim land rights or enforce its edicts. (Symposium 2005, paper 4, Kipobota and Mafoe). For example, it was not clear to many that titling was optional, and that lands were protected regardless of documentation: at the symposium, it was necessary for the Commissioner for Land to "[take] the opportunity to clarify ...[that] land titling was not a compulsory exercise, but was optional for individuals willing to acquire certificates for their lands."<sup>95</sup>

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<sup>95</sup> The summary of one session of the symposium explained that: "The Commissioner for Lands ... explained that the land privatization policy was arrived at after a very wide consultation process. Land would be allocated to investors for specified development activities and limited time periods. Failure of investors to fulfill agreements would lead to withdrawal of the certificate of occupancy to give way for other investors to occupy the land. Essentially therefore it was the use that was being privatized and not the land. The land remained the property of the village council. Fear of alienation should not exist since customary laws had to be followed. Under the customary law, any plot of land on sale would be advertised to all members of the community first so that any interested member would get first priority. If none were ready to buy the land, it would be sold to others who would be given the land for a specified period of time. If the outsider failed to abide by the conditions then the land would be withdrawn from him/her. When the agreed period of occupancy expired, the land would be returned to the village council. The objective of empowering people was to make use of their land either through sole ownership or in partnership with other investor/s whereby land would be one of the valuable shares. Land value provided opportunity for a common man to reduce poverty as it enabled them to have access to capital" (Symposium 2005, plenary).

(Symposium 2005, plenary) The fact that the Commissioner for Lands had to clarify this may be seen as evidence that even the NGOs actively involved in training Tanzanians about the Village Land Act did not grasp one of its central principles (although, as explained above, this idea is never made explicitly clear in the text of the law.).

Conference participants also reported disconnect and confusion at every level of government about the new procedures to be followed, as well as the mandate and finances to fulfil these processes. One legal advocacy organization explained that in its work publicizing the Village Land Act and training paralegals on its mandates, its staff had observed that "in most villages ... village authorities were not aware of the need for [the creation of new land administration bodies at the village level] nor of their responsibility for establishing them." The legal organization found that village leaders were awaiting clear instructions and financial support for implementation from the districts, while the districts had reported that they were awaiting clear instructions and financial support from the central government (Symposium 2005, paper 4, Kipobota and Mafoe). Moreover, the wards were not clear on their place in the hierarchy of land administration and were also awaiting training and funding from the central government.

Moreover, the lack of finances and actual administrative capacity necessary to implement the Village Land Act have so far been an almost insurmountable obstacle; at the 2005 symposium, the permanent secretary described that "The cost of full implementation nationwide is staggering" and explained that difficulties in implementation stemmed from shortages of resources, especially the lack of village level maps for land use planning (Symposium 2005, opening address, Sijaona). Participants expressed concern at the lack of capacity at the district level to implement the acts, the lack of central support for implementation-related tasks, and the lack of funding for adjudicative processes and tribunals.

A range of suggested steps for improved and expanded implementation were recommended by symposium participants, including:

- Clarification of the land laws, so as to make their language simpler for a lay person to understand and apply;

- Raising public awareness of the acts through training and education programs and dissemination of brochures and other materials, by both the state and NGOs;
- Mainstreaming the land acts into the laws of the local governments to ensure application;
- Simplification and shortening of procedures to facilitate villagers' use of forms and administrative processes;
- Increased focus on the issuance of village land certificates to relieve land-related conflicts between neighbouring villages;
- Increased funds available to decentralized bodies to facilitate implementation and issuance of certificates;
- Improved training and increased resources for adjudication bodies at the village/ward level, so as to facilitate dispute resolution and bring it closer to villagers for easier access (Symposium 2005, group 1, paper 6).

It is not at all clear whether these or other steps have been taken to enhance capacity and awareness.<sup>96</sup>

#### 5.6.2 Challenges identified by the Ministry of Land and Human Settlements

In 2005, seven years after the land acts were passed, the Ministry of Lands and Human Settlements published its "Strategic Plan for the Implementation of the Land Laws" (SPILL). SPILL was created after a national workshop and consultation with over 2 700 stakeholders throughout Tanzania. SPILL's articulated aim is to provide a broad framework for the implementation of the Land Acts, enabling all that "needs to be done by the land administration machinery to frame and safeguard customary and granted land rights for users so as to...facilitate the alleviation of poverty through enhanced incomes arising from investments in land" (SPILL at v.).

SPILL outlines the various challenges to successful implementation of the Land Acts. Its list is overwhelming in scope and breadth; challenges identified include:

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<sup>96</sup> Personal communications with a range of land-related NGOs in Dar es Salaam, October 2008.

- Lack of capacity and technical skills of land administration professionals;
- Lack of government initiative and effort to resolve land-based conflicts;
- "Inefficient and ineffective land administration";
- Shortage of planned, surveyed and serviced land available for investment; massive growth of irregular settlements;
- Poor enforcement of rules and planning regulations;
- Unregulated land markets;
- Poor provision of urban services and infrastructure;
- Absence of mortgage facilities;
- Lack of dispute settlement institutions and machinery;
- "Non-optimal institutional framework for land administration and development";
- Absence of maps for land administration and planning;
- "Paucity and inconsistency of data" for geo-referencing of land;
- Suspension of key survey and mapping activities;
- Incomplete boundary surveys of registered villages;
- A "dual centralized" land administration system far "detached from land users";
- Lack of harmonization of all laws related to land administration;
- Under-funding for maintaining the information critical to land administration, including lack of computerization of records, digital mapping and GIS surveys;
- Concentration of land administration services in certain areas of the country, with a lack of services in other areas;
- An "old mindset on modern land dispensation"; and, perhaps most importantly,
- "Lack of will to enforce the law," among other factors (SPILL at x–xi, 9, 94–98).

In relation to the settlement of land disputes, during consultations with stakeholders in preparation for the drafting of the SPILL, it was noted that the settling up of village councils and land tribunals has been so delayed that there was a feeling that "the delay of justice was tantamount to the denial of justice." Moreover, rural consultations undertaken in preparation for the drafting of SPILL revealed that ward tribunals were generally located so far

from many villages that it was difficult for villagers to reach them, creating an inability to appeal land conflicts or land decisions above the village level (SPILL at 21).

The Ministry of Lands' long list of highly self-critical obstacles, impediments and hindrances indicates that the task of implementing the land acts is immense in scope. The cost of full implementation is estimated to be in the hundreds of millions, and it is as yet unclear where this funding will come from (Sundet, 2005 at 63).

### 5.6.3 The "Strategic Plan for the Implementation of the Land Laws" (SPILL)

The SPILL's plan of action relative to villages centres on certain main interventions. These are: making efforts to curb explosive land conflicts; instituting limits on household landholding to ensure that more families can access land; increasing the number of registered villages; creating and delivering certificates of customary rights of occupancy throughout Tanzania; setting up village land councils; and creating formal links between NGOs, CBOs and district land offices to facilitate implementation (SPILL at xii). SPILL also identifies capacity-building and "re-orientation" of land administration staff as a central need to ensure effective and just implementation of the land acts, as well as greater inter-ministerial cooperation (SPILL at 26 and 29).

Other work identified in the SPILL plans plan of action as critical to effective implementation of the land acts includes:

1. Strengthening, expanding and decentralizing land administration offices and staff;
2. Devolving responsibilities for physical planning, surveying, registration and valuation to the district land offices;
3. Facilitating the delivery of justice in safeguarding land rights (in particular enforcing the sanctity of certificates of occupancy);
4. Involving the private sector's expertise in the execution and delivery of technical/professional services;
5. the creation of a regulated land market; and
6. Resources for land-related finance, investment and adjudication (SPILL at 38).

SPILL's final assessment of the major work that needs to be accomplished for the medium to long term is:

- Ending discrimination against vulnerable groups in land access and administration through affirmative action at all levels;
- Developing land information systems and geographical information systems in district land offices to enhance data manipulation information and record keeping;
- Expanding and empowering the national council of professional land surveyors;
- Educating the public (including community leaders) on fundamental principles of land law and policy;
- Enforcing land development conditions for land held under a granted right of land occupancy;
- Providing national mapping infrastructure;
- Produce participatory land use plans at all levels to guide physical planning and land use processes;
- Developing a modern land administration infrastructure;
- Establishing district land boards;
- Creating training programs in universities to create the next generation of trained land administration professionals;
- Decentralizing all land administration support services to the district level;
- Amending legislation to harmonize all relevant laws with the land acts;
- Forming a national land advisory council; and
- Establishing district compensation funds to manage all taxes collected and costs of decentralize land administration, among other solutions (SPILL at 48).

In essence, therefore, SPILL calls for the total and complete overhaul of every component the national land administration system. Indeed, the Village Land Act, in and of itself, calls for the total and complete overhaul of every component the national land administration system. The changes that both the act and SPILL outline go to the heart of local and national governance and call for structural changes to existing state bodies at every level of government.

Four years after its formulation and publication, there is little information publicly available about SPILL's progress. One study, undertaken in Mvomero district and published in 2009, found generally, that:

[The] decentralized land administration bodies have been established, [but] with villagers and officials having minimal knowledge of the role and functions of the bodies [they serve on]. Women are represented on such bodies but their participation has not resulted in equal access and ownership of land by both men and women...The study has also found out that awareness creation, orientation, and training on the implementation of the land laws is yet to commence, a decade after their enactment (Kassim 2009 at 33).

Of particular interest is the study's finding, verified in an interview with the District Land Office, that: "the issuance of certificates of customary rights of occupancy is yet to commence" both in the study district "and in most parts of Tanzania" (Kassim 2009 at 27, 33).

#### 5.6.4 The President's Property and Business Formalization Programme (MKURABITA)

The Property and Business Formalization Programme (MKURABITA is the Kiswahili acronym) is a plan of action housed in the President's Office. MKURABITA's goals and objectives are based upon the work and theories of the Peruvian economist Hernando de Soto<sup>97</sup> and supported by the UN Commission on the Legal Empowerment of the Poor, centre on opening up Tanzania's land and entrepreneurial resources to greater economic profitability by deregulating and simplifying administrative procedures. Its

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<sup>97</sup> Hernando de Soto generally promotes a land privatization agenda, so as to "unlock" the "dead capital" that keep the poor "trapped in the grubby basement of the pre-capitalist world" (De Soto, 2000 at 56). De Soto's remedy for this is to craft legal systems that legitimize customary and informal land holdings and give citizens of developing nations formal legal title to their lands, homes and businesses. As MKURABITA illustrates, de Soto's theories continue to impact and influence the tenure security debate. As such, they deserve a brief explanation. *The Mystery of Capital* has two main points: 1) that formal legal systems must be usable, navigable, and must reflect the lived realities of the poor and accommodate their needs and interests (de Soto, 2000); and 2) that the way to do this is to formalize and privatize all property claims. A full debate on the limits of De Soto's theories is outside the scope of this paper.

stated objective is "to build legal and institutional frameworks for property (real estate) and business that will bring together, standardize and modernize the prevailing local customary arrangements and property matter, so as to create unified national property and business legal system that incorporates all sectors of the society".<sup>98</sup>

MKURABITA is not a policy or an implementation programme but a process of researching and designing legal reforms and government practices to "open up the formal economy to those who are presently excluded from it."<sup>99</sup> Arguing that "even though the poor owners and small entrepreneurs collectively have substantial wealth in terms of property and businesses informally held and operated, their assets are 'dead capital' which cannot be used to generate more wealth," the policy brief explains that "the Government of the United Republic of Tanzania has initiated [MKURABITA] to enable it to address these economic and legal imbalances, and develop a property and capital formation system that is tailored to the circumstances of the disadvantaged".<sup>100</sup> As such, MKURABITA aims to "standardise and modernise prevailing customary arrangements into one national property and business legal system"; "enable the government to govern market activities more effectively"; "standardise recording of poor people's assets so that they are widely accepted as a basis for raising money"; and "enable overall economic policies and supporting mechanisms such as monetary and fiscal stimuli to work once most people are inside the legal market economy".

Of MKURABITA's ten planned final outputs, two are of note. First, MKURABITA plans to overhaul existing land laws in Tanzania; it will work with central and local government to "streamline and decentralize procedures for issuing title [and] chang[ing] applicable laws and regulations." Under this objective is the recommendation that "community-level customary land management practices reflect local cultures but should be harmonized into a unified system that works for the whole country." Second, MKURABITA plans a "revision of the legal framework governing property rights." This will involve "conducting studies and preparing draft bills for a new, unified legal system that incorporates useful aspects of current 'extralegal' practices and will be more friendly to the majority of

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<sup>98</sup> See [www.mkurabita.go.tz](http://www.mkurabita.go.tz)

<sup>99</sup> See [groups.google.com/group/mkurabita\\_debate](https://groups.google.com/group/mkurabita_debate).

<sup>100</sup> See [www.mkurabita.go.tz](http://www.mkurabita.go.tz).

people...[and creating] one unified legal system governing properties and businesses created for Tanzania and Zanzibar." To do this, the MURABITA team will "prepare a regulatory framework for the informal sector." In doing so, it will "review existing laws governing property rights and business," as "current customary practices are a rational response to a hostile legal framework."

While Tanzania's Village Land Act indeed need to be simplified and the administrative procedures it mandates need to be reduced (along with the 50 necessary forms that accompany the Village Land Act) the MKURABITA' plan to overhaul the land acts appears to be a perpendicular, rather than parallel path to SPILL. It is of some concern that Tanzania is currently undertaking two separate large-scale interventions, one of which is designed to implement the acts, and the other to overhaul them. Palmer cites Alden Wily as explaining that the land acts are meant to be under constant review and subject to frequent amendments (Palmer, 1999 at 1). Yet the complex relationship between the President's Office's MKURABITA program and the ministry's SPILL initiatives indicate a deeper conflict than review and amendment.

Adams and Palmer report that the outcomes of MKURABITA "remain somehow vague" and that the relationship between MKURABITA and SPILL "remains unclear." Yet they find that MKURABITA has strongly influenced the official language around land tenure in Tanzania; they report that "the debate is increasingly being framed in terms of 'making dead capital come alive', and emphasising the importance of formalisation as a basis for accessing credit" (Adams and Palmer, 2007 at 50–53).

#### 5.6.5 SPILL and MKURABITA implementation limited to pilot projects

Over the past few years, both SPILL and MKURABITA have implemented pilot projects to try to effectively implement the Land Acts. The (mostly unintended) results of these pilot projects sound a note of caution, and are worth analysing in consideration of how the Village Land Act may best be implemented.

MKURABITA ran a pilot project in seven villages in the district of Handeni, to test the land use planning, registration and formalization processes set out

in the Village Land Act. Langford explains how the NGOs contracted to run the pilot project described how many elements of the processes of land registration had gone well, including: demarcation of village boundaries; issuing of land certificates in five villages; a participatory rural appraisal process; development of land use plans and by-laws; zoning of farms; and processing of certificates of customary right of occupancy (Langford, 2007).

Yet Langford describes how during the pilot program, the NGOs ran into a number of unanticipated problems and consequences, including: conflicts between farmers and pastoralists that arose from registering land under a single owner and "leaving communal usage to the mercy of regulatory by-laws"; "minimal genuine participation" in the process, with most participants only becoming aware of the purpose of the project in its final stage, as they filled out applications for certificates of rights of customary occupancy; and the fact that the process raised awareness of land ownership to "near-hysterical proportion", paving the way for unanticipated land grabbing." Langford (2007, citing Kosyando, 2007) cites the NGOs as concluding that "all in all, the titling process created new landlords and formalized landlessness." These NGOs also observed that "pastoralists were among the 'main casualties' and that future processes needed to embrace 'both individual and communal ownership'." Their reports describe how joint registration by women and men was the exception rather than the norm, and how "men, often in polygamous marriages, usually registered all property under their name."

Meanwhile, the Ministry of Lands, Housing and Human Settlements Development was simultaneously implementing its own "residential licenses" project in Dar es Salaam, the aim of which was to register all land in informal settlements in the city, providing residents of these areas 33-year Granted Rights of Occupancy Certificates. Langford reports how from 2004 until 2006, the project surveyed roughly 400 000 properties with satellite and aerial photography and compiled the information into a public property register. Residents of informal settlements were then encouraged to complete the formal application process for a granted right of occupancy, which cost the equivalent of US\$5.00 plus an annual rent of less than US\$3.00. Langford describes how "occupiers were reticent about payment of costs" and that by the end of the pilot project in 2006, less than 255 of the surveyed properties had been registered. Langford (2007) suggests that this may indicate that in

the minds of the informal residents, "that the benefits of informality outweighed the costs of the formalisation that was offered."

Furthermore, it appeared that two-thirds of the informal residents were tenants who had been excluded from the project. According to one analyst, the entire project was "conceived and planned without much consultation" and sensitisation was only carried out "after the project planners had laid down elaborate implementation procedures" (Langford, 2007, citing Midheme, 2007). Adams and Palmer (2007 at 50–53) suggest that these low registration figures were due to "a lack of interest among those eligible," possibly caused by: "the short-term character of the licences; local government branches using the occasion to collect other taxes and fees when people come to pick up the licences; wealthier landlords not wanting their properties (and the related incomes) documented; and generally a lack of visible advantages for rights-holders." They note that due to the costs of registration, the program has encountered criticism for benefiting mainly relatively wealthier informal residents.

The Ministry of Lands and Human Settlement Development also undertook pilot programs establishing land registers at the village and district level in the district of Mbozi. Adams and Palmer (2007 at 50–53) cite Kironde (2007) as explaining that a team from the Ministry of Lands' "Land Act Implementation Task Force" spent four weeks holding seminars and training and educating both district and ward officials and administrators and villagers about the Village Land Act. In partnership with their neighbours, villages then demarcated their boundaries, and surveyors were called in to prepare cadastral survey plans based both on participatory village maps and photo interpretations. A computer database was created, with individual surveyed parcels numbered and linked to the names of the families on the land. The project was considered to be a success, yet its high costs raised concerns that such efforts would not be widely replicable.<sup>101</sup>

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<sup>101</sup>Although not a disinterested party, The ILD, De Soto's research institute, who carried out the research component of MKURABITA, reported that "approximately 45 percent of villages have yet to be officially demarcated, or at least with general boundaries recognized by the Minister of Lands. It is estimated that only 38 percent of the mainland villages have been surveyed and only 167(1.6 percent) of the same have obtained an official certificate of village land from the Minister of Lands" (ILD, 2005 at 26–27).

### 5.6.6 Increased marginalization of pastoralists despite legal protections

As mentioned above, the Village Land Act contains numerous provisions for the protection of the land rights of pastoralists. However, Odgaard reports that various pastoral organizations are afraid that as a large percentage of the land areas used for pastures fall under the category of general land, which is under the exclusive control of central government, these pastures may be looked at as "idle" or "bare" land and be identified by officials as suitable for allocation for investment purposes. Alternatively, they fear that the government will argue that it is "in the public interest" that their pasturelands be allocated for commercial production. According to Odgaard, the pastoralists' fears are well-grounded. He cites one SPILL document as asserting that:

Pastoral production has very low productivity levels (meaning it marginally addresses poverty reduction policy)... Pastoralism degrades large masses of land (meaning is not environmentally friendly)...Pastoralism invades established farms (meaning it violates security of tenure)...At the moment it is impossible to control livestock diseases, thus making it difficult to export meat, milk and livestock due to international demands on livestock, health and products free of infectious agents (meaning has marginal support only to economic development)... Pastoralists have to be given land and told to settle (meaning nomadic tradition has to stop) (SPILL, URT 2005d, p. 14, cited in Odgaard, 2006).

Odgaard (2006 at 23) reports that although a number of pastoral organizations have been actively working to influence the policy processes, their concerns and interests have not been afforded much weight. He argues that despite the Village Land Act's numerous protectionary provisions, pastoralists may not be able to harness or leverage these protections to protect their land claims. In particular, under the Village Land Act, for a land claim application to be successful, an applicant must be able to illustrate visible proof of use of and investment in his or her land – such as planted trees, stranding crops, or residential structures, etc. Because pastoralists range over wide areas and so not erect permanent structures, they generally cannot provide this proof; as such, there has "therefore been a continuous

marginalizing process, which has forced pastoral peoples ... to leave their home areas because their lands have been taken and used for other purposes" (Odgaard, 2006 at 33).

#### 5.6.7 International investment in Tanzania

A 2009 report by IIED and FAO relates how Tanzania has been converting vast swaths of village land into general land to transfer that land to investors. The report explains that the national-level Tanzania Investment Centre (TIC), the agency that coordinates and facilitates large-scale national investments, has to date allocated about 640 000 hectares for biofuel production in Tanzania (out of a total of 4 million hectares requested by companies). According to one case study, "a Swedish company is in the process of securing 400 000 hectares for sugarcane production in the Wami River basin in Bagamoyo District. Evidence suggests that about 1 000 small-scale rice farmers on these lands will need to move, and are not eligible for compensation as the land is 'general' not 'village' land" (Cotula *et al.*, 2009 citing Sulle, 2009 at 73).

The study found that in this case, while investors negotiated directly with village councils for payment and compensation for the lands, "there are no formal documents to bind either party to these agreements." Moreover, the report finds that rather than paying for the land, "given the lack of an active land market in Tanzania, market-based per hectare rates have little meaning... [s]ome companies compensate for the value of the resources on the land, such as trees and grazing, rather than the land per se." Meanwhile, the state does not appear to always pay the compensation mandated for compulsory purchase processes (Cotula *et al.*, 2009 citing Sulle, 2009 at 73).

Importantly, access to water resources after the transfer of this land has so far proven to be a source of conflict, difficult to resolve in the absence of clear regulations or guidelines from government on sustainable levels of water abstraction (Cotula *et al.*, 2009 citing Sulle, 2009 at 73). Finally, the report finds that

There is little sign that efforts are made specifically to include [in the interactions surrounding the large-scale land concessions] significant social groups such as women, or user groups such as pastoralists. Indirectly affected communities,

for example those affected by migration out of project areas, have not been included to date. Consultation tends to be a one-off event rather than an ongoing interaction through the project cycle. An underlying problem is not so much reluctance on the part of local government and companies to "do the right thing" but rather a lack of experience and guidance to shape better practice (Cotula *et al.*, 2009, at 74).

As such, despite the Village Land Act's protections and mandates, the fair, equitable, and inclusionary aspects of village-investor partnerships envisioned in the law (described in section 5.4.5) are not being realized. However, it is heartening that the issue may be less of trying to avoid payments or partnerships but more of inexperience and lack of guidance. There is therefore potential for these negotiations and transactions to be improved by training and supports for state officials.

Finally, there is anecdotal evidence that suggests that large areas of land are being removed from village jurisdiction and transferred to investors, using the loophole providing for a wider classification of "general lands" in the Land Act. This evidence suggests that such transfers are occurring without villagers' knowledge or approval.<sup>102</sup>

## **5.7 Analysis**

Reaction to the Village Land Act has been very mixed. For proponents of the law, the challenges are merely ones relating to training, capacity-building, and oversight to ensure compliance with the extensive procedures laid out in the act. Alden Wily has argued that the land acts are "basically sound", and at the time of its passage called the Village Land Act, "The best land law passed in Africa in terms of 'vesting authority and control over land at the local level'" (Palmer, 1999, citing Alden Wily).

Like Mozambique's law, Tanzania's Village Land Act devolves land administration and management to the village level. Yet the Village Land Act seems to have been written with each of the questions left unaddressed in Mozambique's law at the forefront of lawmakers' minds: How to allow communities the freedom to govern themselves according to their own rules, yet guard against intra-community discrimination? How to ensure that

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<sup>102</sup> Personal communication with Haki Ardhi, November 2008.

women's land rights are enforced by local customary authorities? How to ensure that the poor cannot sell their land in times of desperation through unconscionable land deals? How to make district officials downwardly accountable to the people? How to create systems of checks and balances to protect against local-level corruption and manipulation by elites? How to ensure that agreements made with outsiders are enforceable, and that abuses by outsiders are subject to penalties? In this respect, Tanzania's Village Land Act does a superb job of addressing both the potential injustices inherent in an unregulated customary system and the possible abuses of power and influence that often emerge when villagers negotiate with outsiders over land and natural resources.

The law does many other things exceptionally well: all existing and valid customary land claims were instantaneously transformed into formal and defensible land rights at the moment of the law's enactment, thus ensuring protection of the poor's land claims. Pastoralists' land uses and land claims are protected right alongside the claims of small scale farmers, including allowance for dual and joint use and management of certain lands by different communities. Women's land rights are protected not only in processes of application for land, divorce and widowhood, but also in the event of a land sale, transfer or surrender; every assignment must be reviewed by the village council and will be nullified if found to undermine a woman's right to land. Mechanisms to protect the poor against bad faith market transactions are included. Both upwards and downwards accountability mechanisms have been put in place: the village council cannot assign a grant of customary land right without approval from both the village assembly (composed of every adult village member) and review by the district commissioner, and must report on its land management efforts both to the village assembly and to the ward. Unconscionable, corrupt or fraudulent land sales will be voided, and penalties enforced. There is a right to appeal village-level dispute resolution outcomes all the way to the highest court of Tanzania.

For those inherently opposed to the Village Land Act, the law's inscrutability promises to allow only for elite capture and increased tenure insecurity for the poor. For the Village Land Act so extensively prescribes these myriad protections, in impenetrable legal language, that they are often lost in the sea of caveats, clauses and exceptions. Article 3§1(m) of the Village Land Act mandates that "Rules and law about land have to be laid out in such a way

that every citizen may easily understand them." This assertion is ironic at best: the Village Land Act is extraordinarily complex and confusing. Every protection is there, for every possible vulnerable group, yet it is unlikely that anyone but a very determined advocate or Justice of the High Court will ever read the law with enough concentration to adequately distil the legislative intent. It appears that because of its complexity and impenetrability, very few Tanzanians are aware of either their new land rights under the act or how to go about implementing and enforcing them. Even the Kiswahili version is "not very accessible" writes Alden Wily (2003). How then, will villagers and pastoralists be able to learn the law fully enough to use it as a tool to protect and defend their land claims? <sup>103</sup>

Patrick McAuslan, the British consultant hired to help draft Tanzania's land acts, argues for a "painstakingly detailed" approach to legislative drafting, in which considerable procedural detail is included in the land law itself rather than in regulations under the land law. He writes:

[O]fficials armed with powers and subject to few or no restraints cannot be relied upon to behave reasonably ...but at least where there are rules and procedures which have to be followed, a challenge can be mounted to unreasonable behaviour. In much of Africa, the allodial title to land is vested in the state ... this means that the citizen has to obtain land from the state and its organs, with state officials managing the land as landlords or trustees. In such cases as these, land law ceases to be a private matter, but becomes part of public law; it is in fact, administrative law. Administrative law or administrative justice requires that official power be bounded by legal rules, be exercised in accordance with certain principles of fairness, allow for hearings and appeals, and be subject to review. [A further] reason for supporting an

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<sup>103</sup> However, this may say more about the state of the legal profession in Tanzania than about the Land Act *per se*. It is noteworthy that with the exception of the original guides made by the state, some Swahili-language guides made by NGO's, and Alden Wily's 2003 manual, entitled *Community-Based Land Tenure Management: Questions and Answers about Tanzania's New Village Land Act, 1999*, it is arguable that not enough has been done to ensure that Tanzanians know and understand their rights under the Village Land Act. In particular, Tanzanian lawyers and the national bar association have not taken steps to ensure that the state administrative and justice systems are well versed in the law, or to file cases to demand its proper implementation.

approach of "more" rather than "less" law is, paradoxically perhaps, the existence of the market. [O]nce the land law recognizes and protects private rights, and facilitates dealing with those rights in the market place, the law has to be much more specific, detailed and clear (McAuslan, 2003 at 255–58).

McAuslan is perfectly correct. Indeed, when land is owned by the state, land law does become a form of administrative law, which is best tightly bound by clear procedures and specific mandates.<sup>104</sup> Yet extensive regulations work well when there are advocates, attorneys and watchdog groups making sure that administrators follow every regulation. McAuslan's argument is an optimistic one, for it rests on a faith in the rule of law and the accessibility of courts and judicial proceedings. But when there is a dearth of such advocates and the law is so detailed that few have read and comprehended it, the opposite is more likely the case: a long, detailed law will go unread and un-understood by administrators, and thus unheeded. Ten years after its passage, local and regional administrative officials are waiting for instruction on how to implement the law, and many of the important structures for administering and enforcing the law are not yet in place. McAuslan's argument about procedural fairness falls flat if the law is inaccessible to local communities and state administrators alike.

The law's complexity and frustrated implementation may stem from the difficulty of creating a fully customary-formal hybrid system: Botswana kept all the customary rules in place, and simply shifted the responsibility of carrying them out from the customary leaders to the land boards. Mozambique left all existing customary practices and local leadership in place, creating only a few new procedures for those specific moments when the outside world and the community intersect. Yet Tanzania attempted to do something much harder: it kept some of the existing customary/local administration structures, but created many new ones. It kept some of the customary laws, but created multiple new ones. For example, the Village Land Act allows that village councils may go on administering village lands according to local custom – yet then sets out extensive, exhaustive new procedures and rules, albeit designed to protect the rights of vulnerable groups and provide a systems of checks and balances on customary powers

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<sup>104</sup> As Botswana has learned over the years, land administrators *should* be proscribed by detailed regulations - in its amendments to the Tribal Land Act, Botswana more than doubled the rules and regulations concerning land board officials and their fulfilment of their duties.

and practices. Parts of custom are preserved, such as customary rules of evidence, customary dispute resolution procedures, customary practices like the pointing out of land boundaries, and customary livelihood and land-use systems. However, the act's rigorous prescriptions for every step of all land-related procedures have the effect of transforming custom's practical application; local leaders must now consult an extensive set of statutes to implement alongside their customs. Similarly, the Village Land Act required the creation of over 50 separate forms to be used in its implementation. Such a proliferation of paperwork automatically takes the process to a new level of administrative formalization; custom, being primarily unwritten, is forever changed. Moreover, Alden Wily (2003 at 23) points out that there is no clarity as to the legitimacy of any records that are somehow are not recorded in the format prescribed. What room is there left for the flexibility inherent in custom among the multiple forms?<sup>105</sup>

Of greatest concern, however, is that Tanzania's Village Land Act ultimately fails to provide true land tenure security to villages. Because the land is held by the state, and because villagers have very weak rights under the act to oppose a state decision to allocate some of their land to investors, in the final analysis the Village Land Act's multiple protections for the land rights of communities are secure and good only until the state decides otherwise. This is best exemplified by the varying definitions of general land in the two acts, which have created a legal loophole through which village land can be taken out of the village and vested under the control of the Commissioner of Lands. The Land Act's definition of general land as "all public land which is not reserved land or village land *and includes unoccupied or unused village land*" (Land Act, art. 2, emphasis added) means that the state has the right to at any moment rezone what it feels to be "unused" village land (even lands zoned as communal areas and areas zoned for future village expansion) as general

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<sup>105</sup> These forms are also impractical; considering the general dearth of supplies at the village level, it is not clear how village officials will manage to acquire and maintain the full range forms necessary to each process (Sundet, 2005). Moreover, the Village Land Act requires an extensive exchange of documents between the village and the district, as well as sometimes between the village and the central government. Such processes allow opportunity for administrative power struggles and corruption, and hinder the prompt processing of applications and certificates. Larsson notes that as "most villages lack both electricity and telephone, it is questionable whether the flow of documents for permits, approvals and signatures, will ever come to work in a smooth and efficient manner (Larsson, 2006). While these procedures were undoubtedly included as a check against local corruption, it may grind processes to a halt, or a slow crawl.

land, and therefore remove it from village jurisdiction entirely. Also, under Article 4§1–2, the state may compulsorily acquire even clearly *used* village land for "investments of national interest" and rezone it as general land. Sundet (2005 at 12) notes that "the procedures outlined for transfer of village land to general land provide no strong guarantee that most villagers are informed and does not give the village the final say in whether the land may be transferred or not." There are no clear mechanisms in the Village Land Act through which communities can appeal or block such reclassifications of their lands. This opens the door to large-scale land concessions to international investors – and means that the villages whose lands are being seized have very weak legal grounds upon which to contest these grants. These provisions seriously undermine authentic tenure security; for national-level decisions, there are no checks on authority and control.

For this reason, various commentators have concluded that the village assembly and village council are merely consultative, land management bodies whose decisions can be easily overturned by the central government. Shivji (1999) has vehemently argued that by not vesting full control over village land in the village assemblies, the village council administrates village land as an agent for the commissioner, rather than as an agent for the village.<sup>106</sup> He writes: "The best managers of land are those who own it and use it. Let people be given back their land. Let land be vested in their own organs such as village assemblies ... Public administration should do what it is meant to do: advise and give technical assistance to the people as 'obedient servants', not control, manage and lord over people's lands" (Shivji, 1999).

In the balance, the Village Land Act is arguably one of the best in Africa in its careful, solid, and repeated protections of the land rights of vulnerable groups in the context of both customary and statutory law. However, at root the question of implementation may decide the end results; the complexity and length of the law may mean that the poorest of the poor never learn about their rights, new administrative structures are never set up or funded, and only certain sections are fully implemented. Or, as we see in the current struggles of SPILL and MKURABITA, a very good law may be tossed aside because of shifts in political and economic ideology without ever being fully implemented.

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<sup>106</sup> Shivji (1999) has long argued for placing the full use rights, management and control over village land in the village council, with the district council and other state officials taking on support and technical advisory roles.

## VI

### ANALYSIS OF THE CASE STUDIES

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At root is the question of whether what is necessary, are better laws, or rather improved implementation. Obviously, the answer is both. A law may set out excellent procedures and practices but fail to be implemented, as in Tanzania, or, as in Botswana, be changed over time so that the original legislative intent is gradually lost. Alternatively, as in Mozambique, the law may fail to include protections necessary to ensuring that its mandates are fulfilled, thus leaving room for elites to exploit information and power asymmetries.

This chapter first looks at the case studies together as a group and identifies each law's strengths and weaknesses. It reviews and summarizes the basic tasks of laws that seek to recognize customary land rights, and analyses how well each piece of legislation, as written, did in these respects. It then turns to an analysis of the factors that have impacted the laws' implementation and identifies general trends that can help to explain where the implementation of these laws has broken down.

## 6.1 Key strengths and weaknesses of the text of the legislation

Chapter 1 outlined the multiple, oftentimes conflicting concerns lawmakers confront when crafting land legislation and asked the question: *How to best write a land law that merges the practices of the people with the objectives of the central government and arrives at solutions that will simultaneously: be used, adopted and successfully implemented on the ground; advance state interests; advance community interests; and advance individual interests?*

The above analysis of the case studies has revealed that to accomplish this, a law that devolves power down to the local level and allows a space for the free-flow of customary land administration and management must do seven equally-important things well within its text:

1. Flexibly allow for the full range of customs within a nation to be expressed and practiced while implementing restrictions that impose basic human rights standards on customary practices, protect against intra-community discrimination, and ensure alignment with the national constitution.
2. Create local land administration and management structures that: come out of – and look much like – existing local and customary land management structures; are easily established; are low cost both to the

- state and for users; are highly accessible; and leverage local individuals' intimate knowledge of local conditions.
3. Establish administrative processes that are simple, clear, streamlined, local, and easy for rural communities to use to claim and defend their land rights.
  4. Establish appropriate checks and balances between customary/local leadership and state officials, create new, supervisory roles for land administrators, and ensure direct democracy and downward accountability to the people.
  5. Include accessible, pragmatic and appropriate mechanisms to safeguard against intra-community discrimination against women, widows and minority groups.
  6. Protect community land claims and create real tenure security while allowing for investment in rural areas, ensuring that all development will be sustainable, integrated, and beneficial for local communities.
  7. Establish good governance in land administration by: creating appropriate mechanisms to ensure the law's enforcement; penalizing state officials who are contravening the law's mandates; and setting up dispute resolution mechanisms that allow for appeal of community-level decisions.

It is therefore useful to analyse the strengths and weaknesses of Botswana, Mozambique and Tanzania's legislation – as written – within the framework of these precepts.

#### 6.1.1 Recognizing customary law within the limits of human rights

*Flexibly allow for the full range of customs within a nation to be expressed and practiced while implementing restrictions that impose basic human rights standards on customary practices, protect against intra-community discrimination, and ensure alignment with the national constitution.*

Mozambique and Tanzania's laws do an excellent job of allowing for flexibility and the continued flourishing of a broad range of "custom". In both Mozambique and Tanzania, the laws do not attempt to define what customary practices and principles are. They simply establish communities' customary rights to their lands as equal in strength and validity to state-granted land claims and create mechanisms through which communities can formally define the boundaries of their lands. The moment the laws were

passed, all the customary land-holding systems practiced throughout Mozambique and Tanzania became a part of the national legal system, enforceable in a court of law, and all existing customary land claims were instantaneously transformed into formal and defendable land rights at the moment of the law's enactment, thus ensuring protection of the poor's land claims. Custom is not codified, but may evolve and develop as flexibly as local conditions necessitate.

In Mozambique, community members are left to define the community's composition and decide how to govern themselves, their lands and their natural resources; they may choose to adopt local customs, or to elect new leaders and draft new laws. The only rules imposed upon customary practices of land administration and management are for women's equal right to land to be respected, and that no customary practice should contravene the Constitution of Mozambique. However, there are no mechanisms in the law to ensure that these mandates are complied with. In this respect, important protections for groups with more vulnerable land claims remain unprotected. A restriction that community laws must align with the national constitution becomes meaningless if 1) communities are never informed about the content of the national constitution, and supported to make necessary revisions to ensure compliance and 2) communities are not asked to subject their internal rules and procedures to some kind of review or oversight to certify that this mandate is abided by.

In Tanzania, the Village Land Act does an excellent job of both allowing communities the freedom to govern their land according to *some* local customary rules and practices while also providing myriad safeguards to ensure against intra- and inter-community discrimination and disenfranchisement. The customary law being practiced in villages may continue to govern land administration and management practices, but the land claims of groups with different livelihood strategies are specifically protected; pastoralists' land uses and land claims are protected alongside the claims of small scale farmers, including allowance for dual and joint use and management of certain lands by different communities. However, in setting out so many safeguards, Tanzania's law inexorably changes how custom is to be practiced; under the law, local leaders must now administer a customary/statutory hybrid, in which basic customary practices remain, but must be balanced with new legal procedures, a very difficult mandate to carry out without rigorous training, capacity building and state support efforts.

In contrast, Botswana's Tribal Land Act codified only Tswana customs, leaving little allowance for the customary practices of non-Tswana tribes that do not practice the same livelihood strategies as the Tswana. Because rights of hunting and gathering are not recognized under either Botswana's statutory law or in the dominant customary law of the Tswana, a strict interpretation of the law leaves the land claims of non-sedentary, hunter-gatherer groups like the Basarwa (San) people unprotected. The Government of Botswana has taken few steps to adopt less discriminatory policies and practices or to widen the definition of "customary" land rights to include provisions that could apply to the practices of non-Tswana tribes. Meanwhile, various government officials have used the law's narrow definition of custom to legitimize actions and policies that have served to alienate and dispossess non-Tswana groups, converting their lands into national parks and granting them to private cattle ranchers without payment of the proper compensation set out in the Tribal Land Act. In more than 40 years, no action has been taken to amend the act to include provisions that protect the livelihood practices of non-Tswana tribes or allow for hunter-gatherer groups' secondary use and access rights, so critical to their survival and way of life. The long-term evidence of Botswana's denial of the land rights of the Basarwa (San) people arguably amounts to institutional racism; even as late as 2006 the state was forcibly removing the San from their customary lands.

### 6.1.2 Building on existing local structures

*Create local land administration and management structures that: come out of – and look much like – existing local and customary management structures; are easily established; are low cost both to the state and for users; are highly accessible; and leverage local individuals' intimate knowledge of local conditions.*

A law must be written so that it can be easily explained to officials, customary leaders and lay people and easily integrated into rural villagers' daily lives. Like custom, the law's mandates should be logical, practical and workable, as well as tangible and grounded in the landscape of the local. If a land law that integrates customary practices up into statute has been properly researched and written, it should look very much like the custom that communities are already practicing.<sup>107</sup> The procedures set out should mirror

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<sup>107</sup> In fieldwork in Mozambique, the author found that because the land law does not rigidly define custom but allows the flexibility for the law to look very much like traditional, local

the customary practices people have been following all along. Furthermore, the processes and rules set down by the law should be clear and unambiguous, as should be the rights and responsibilities it establishes for all actors. All three local land administration and management systems examined herein appear to do this well, but miss the mark in very different ways.

Botswana's Tribal Land Act simply shifts customary land management out of village and community structures and into regional land boards; it elevates the exact tasks and roles of customary leaders into the functions of the land boards and establishes systems of land claims formalization that mirror customary practices. This was an elegant and simple transfer of existing powers and functions to new state structures. In theory, all that was supposed to change was that in place of customary leaders, state-run land boards were to implement customary laws and practices. However, as time has shown, the boards' distance from the communities whose lands they administer has served to erode some of the most important and useful aspects of "custom" – namely: accessibility and an intimate familiarity with both the terrain and the people living upon it. Positively, the land boards' distance from and lack of knowledge about local conditions has created the need for continued reliance upon the ward heads, which has grounded the system more strongly in local practices. However, the land boards did not fully adopt the "land and natural resource management" component of chiefs' functions – which has led to policies, propagated by the central government, that have contributed to degradation and the unsustainable use of local natural resources in rural areas.

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conservation and land-apportionment practices, communities were *assuming* that their practices were contained within the law. Interestingly, although the law does not outline concrete land management rules, rural communities working with NGOs to delimit their communities were using the law as a jumping off point to reinstate customary land and natural resource management rules. For example, one sub-chief, in response to the question, "Has the new land law changed things in your community?" replied:

The new land law hasn't changed anything, only it has strengthened things. Traditionally, we used to avoid people cutting trees unnecessarily, or starting veldt fires, or burning the cemetery grounds - the land law also recommends these things. The land law itself has also avoided people to cultivate in or open our traditional forests where we practice our spiritual ceremonies. Definitely the land law has strengthened our rules that were existing in the past. With the introduction of the land law, things are seeming to resemble the past... (Knight, 2002 at 8).

In both Tanzania and Mozambique, existing, community-level structures have been left intact. In both nations, local-level knowledge, expertise, and practice are harnessed. For example: the customary rules of landscape-based evidence of all ethnic groups within the nation are valid proof of land claims; as under custom, streams, mountains, rock formations and other markers are considered adequate descriptors of community boundaries. Most land administration procedures take place at the community level, according to local procedures, and with a heavy emphasis on oral testimony and community participation in or validation of major land-related decisions.<sup>108</sup> As such, they are easily accessed: in Tanzania, village-level bodies deal with almost all aspects of land administration and management, while in Mozambique, state officials must come to the communities to carry out delimitation exercises and community consultations.

The fact that the Village Land Act is grounded in and based upon existing land administration bodies and is to be applied to pre-existing community units should have greatly facilitated implementation and allowed for the simple and easy devolution of land management and control to villages. Under the Village Land Act, the "customary unit" is a "predefined legal entity, endowed with predefined institutions and processes and a governing entity already in place" (Cotula, 2005). However, the Village Land Act mandates the creation of various new administrative bodies – a village-level land registry, a land adjudication committee, and a land council to mediate local land disputes. Both the central government and the villages themselves are having trouble establishing these bodies and securing the funding and support necessary to ensure their technical capacity - the costs and efforts to do so, are, in the words of one Tanzanian official, "staggering." Again, this may be attributed to the very difficult task of creating a customary-formal hybrid land administration system; The Village Land Act's frustrated implementation may stem from the difficulty of keeping some of the existing customary/local administration structures intact while creating many new structures that must function alongside and in tandem with them.

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<sup>108</sup> One thing of note that Tanzania does excellently in this regard is to charge the village council with maintaining and updating a village-level register of village lands and all allocations made, in accordance with rules set by the minister (VLA, art. 21§1). The village land registry is supposed to be a simple record of customary ownership and all land dispositions in the village, the lowest branch of a larger district register, subject to supervision by the district registrar (VLA, art. 21§3). Research into the efficacy of these village-level registries is needed; Tanzania's system could serve as a model for other nations seeking to localize land cadastres.

Mozambique's land law creates the opposite problem by being exceptionally vague on all matters of village-level land administration: communities have been left to administer community lands as they see best, but with no suggested management structures. Although Article 30 establishes that rules and guidelines concerning community land administration are to be promulgated, in the 13 years since the law's passage this has not yet been done. Because the law has mandated almost no changes to intra-community practices, there are no cost, inaccessibility, or no "new system to learn" impeding factors. As a result, communities have continued to manage land as they always have, which in many instances has been quite a good and successful tactic. Local knowledge and expertise continue to be leveraged. Yet without safeguards to ensure that community land-management structures are equitable, fair and just, some communities may suffer from poor internal land administration or local elite capture, without checks or balances to ensure that such decisions reflect the needs and interests of the whole community (described further below).

### 6.1.3 Establishing simple, clear and easy administrative procedures

*Establish administrative processes that are simple, clear, streamlined, local and easy for rural communities to use to claim and defend their land rights*

A land law that merges customary and statutory systems should be exceedingly clear on the procedures to be followed in formally claiming and enforcing one's land rights. The administrative procedures that people must follow should not be overly technical or complex, yet should ensure adequate protections and oversight mechanisms. All three laws examined herein establish relatively simple and transparent procedures for land claims registration and documentation. In all three nations, customary land rights were implicitly or explicitly formalized at the laws' passage, and all processes of registration, titling or delimitation were made optional; community and individual customary land rights exist and are enforceable regardless of paper documentation. Yet, if a community, family or individual does seek to title and register land rights, the procedures set out by law are aligned with existing customary practices. In all three nations, most of the procedural steps take place on the ground, within the community. All three laws are quite successful in this manner.

Relatedly, laws should not require an impossible amount of documentation to prove one's customary land claims, as such demands will only

disenfranchise individuals who cannot read and write, and will serve to strengthen the land claims of the relatively wealthier, who are literate and can spend time collecting and accumulating the necessary written documentation. Mozambique's land law – in its establishment of oral testimony of one's neighbours as adequate proof – is a good model in this, as is Botswana's provision that applicants can verbally furnish necessary information, and that land board officials must help applicants to successfully complete the administrative procedures. Allowing for verbal provision of this information and mandating assistance both allows illiterate applicants equal opportunity to seek land grants and aligns with customary practice.

In Mozambique, community lands are the focus of land claims formalization; although the law is clear that individuals may follow a similar, simplified process if they wish to seek a delimitation certificate for family lands. The community delimitation process set out in the law is relatively clear, community-based, and relies heavily on testimonial evidence provided by community members and the leaders of neighbouring communities. Community land claims are to be mapped and entered into the modern state cadastre after participatory community self-definition exercises that include: legal education and consciousness raising; a participatory appraisal and map-making processes; the generation of a descriptive report that may centre on landscape-based evidence to articulate the boundaries of the community; and the physical marking of the boundaries on the ground with customary boundary markers or by planting trees. The community must sit together and decide upon a land use plan. The community-generated documents and maps are then sent to state technocrats, who create computer-generated cartograms and other official documents, which are only entered into the national land cadastre after community review and approval. Similarly, in Tanzania, for a village to seek a formal certificate of village land, it must confer with all neighbouring villages, resolve any boundary disputes, determine village boundaries using landscape-based and customary forms of evidence, and create land and natural resources management and zoning plans. Excellently, in both nations, all of the procedures (with the exception of the technical file creation) are done at the village level, in the local language.

Applications for individual land claims in Botswana centre around approval from and verification by the local ward head, whose job it is to ensure that

the land requested is free and available for allocation, and to point out the boundaries of the land. Tanzania's Village Land Act also establishes an excellent, local process for family, group or individual land registration. As in Botswana, in accordance with customary practice and to keep costs extremely low and ensure that the process is affordable and accessible to rural community members, the Village Land Act does not require that the applicant(s) have the land at issue formally surveyed, measured or mapped; a description of tangible, local boundaries and sketches of the area are sufficient. In Tanzania, applications are submitted locally to the village council, which reviews the application, seeks the approval of the village assembly, and if there are no objections or inconsistencies, grants the application. If there are objections or potential problems, an adjudication process occurs, including a walking and marking of the boundaries, a public hearing, and resolution of existing conflicts. The resulting documents are entered into the village registry.

In all three nations, the processes nicely provide for state oversight, the involvement of local customary officials, the space for public contribution, comment or objection, and then inclusion of customary or non-written forms of claims proof. Yet while all three procedures are relatively simple, in practice they have proved to be more expensive (Mozambique) than local capacity and resources can support, dependent on a back-and-forth of papers/forms with bureaucrats located oftentimes far away from an applicant's community (Botswana), or unusable, due to the lack of the local structures necessary for their implementation (Tanzania). For example, while Mozambique's process is local and easy to follow, the processes' reliance upon (relatively unfunded) state technicians and administrators has impeded its wide-scale use and implementation; in the absence of state funding, communities must wait for an NGO to lead them through the process and pay associated costs. Meanwhile, Tanzania's individual/family/group application process has barely been implemented, which, along with the lack of necessary local structures, may also be due to the fact that the instructions set out in the law are not clear and do not follow in order in the legislation, making a very easy process seem much more complicated than it is.

#### 6.1.4 Roles of officials, local leaders and the people

*Establish appropriate checks and balances between customary/local leadership and state officials, create new, supervisory roles for land administrators, and ensure direct democracy and downward accountability to the people.*

Tanzania and Botswana's laws (as written) do this very well, in different ways – and as such provide good examples for future laws in other nations. As first configured, Botswana's land boards were carefully balanced between customary authorities, the central government, and the people: third of members were affiliated with the chief and his authority, one third were locally elected, and one third were appointed by the Minister of Lands. This was designed to ensure a system of checks and balances between the state, customary leaders and the people. Had the boards' configuration remained this way, they might have been a model – or at least an excellent case study - of how customary leaders, state officials, and community members may best work together and share power. However, Botswana amended its law and regulations to remove chiefs and customary authorities from the land boards and replace them with representatives of the central government. Meanwhile, the election process for those elected board members became notably less democratic, which has meant that the Botswana's land boards currently have little accountability to the people whose land they are managing. Indeed, their only accountability – including reporting obligations – is upward, to the central government, not downward to the people.

Tanzania's law also does a very good job of creating new supervisory roles and oversight mechanisms for state officials. Rather than create one body with a range of actors, as in Botswana, the Village Land Act establishes a locally-elected village body and then creates both upwards and downwards accountability mechanisms: the village council cannot assign a grant of customary land right without approval from the village assembly (composed of every adult village member) and review by the district commissioner, and must report on its land management efforts both downward to the village assembly and upwards to the ward. Should a village council carry out an adjudication process in a corrupt manner, villagers have the right to go to the district and request that the matter be re-investigated by higher level officials. The law also does an excellent job of giving existing state land administrators and officials new supervisory and oversight roles to replace the and management functions that have been decentralized to the village.

Mozambique's law fails to adequately address these issues. State actors only interact with communities when 1) an investor has applied for land located within a community and a consultation is required, and 2) if a community has requested to be delimited, at which point technical officials arrive to support the community to carry out the requisite procedural steps. Other than these discrete events, there are no clear oversight structures or procedures set out in the law; appropriate supervision and oversight structures that can ensure against unjust acts within communities or between communities and investors are completely lacking. The law fails to establish a role or responsibility for state officials to ensure that communities are treated fairly and justly by outside investors, or that community leaders are acting in good faith and in their communities' interests.

#### 6.1.5 Safeguard mechanisms against intra-community discrimination

*Include accessible, pragmatic and appropriate mechanisms to safeguard against intra-community discrimination against women, widows and minority groups.*

Tanzania's law excels in legal safeguards against intra-community discrimination and is a model in this regard; Mozambique and Botswana's laws fully fail to do this. The general lesson is that unless such protections are extensively and explicitly written out in the law, the land rights of vulnerable or minority groups will not be protected in practice.

Mozambique's law is completely lacking in mechanisms to ensure against intra-community injustices: there are no village-level supports to help women enforce their land rights, no penalties for intra-community discriminatory practices, and no checks on unjust or inequitable intra-family actions. All of these matters are left up to the community to decide how to adjudicate or address on its own; the law only mandates that their customary practices may not contravene the constitution. In the event that local leaders condone and perpetuate customary practices serve to deprive women, widows, orphans and other groups of their land rights, then there is little for the vulnerable individual to do to enforce her rights other than eventual appeal in court, outside her community, which may be difficult for her to access. The burden of enforcement falls on the widow herself; the vulnerable person is left with the responsibility of ensuring that their own rights are protected. This is highly inadequate protection for vulnerable groups whose land rights have been transgressed within their communities.

Botswana's Tribal Land Act is similarly devoid of provisions or legal mechanisms that protect against both official and intra-community discrimination. The Tribal Land Act provides no affirmative protections for women's and ethnic minorities' customary land rights. Such lack of explicit mention of women's land rights has borne out the warning that gender- or ethnicity- neutral language is akin to lack of protection. Rural women's land claims are generally undermined by the law's gender-neutrality: applications for customary land grants may be put in the name of the male head of household only (although the *Deeds Registry Act* may serve to remedy this); the law does not include provisions that allow family members joint or derivative rights in the land; and land boards have reportedly made little effort to ensure or enforce women's land rights.

In contrast, Tanzania's Village Land Act does a superb job of addressing both the potential injustices inherent in an unregulated customary system and the possible abuses of power and influence that often emerge in the course of land and natural resources transactions. It is a model in this respect. Women's land rights are protected not only in processes of application for land, divorce and widowhood, but also in the event of a land sale, transfer or surrender. Importantly, the burden is not on the woman, widow or orphan to raise an objection in the event of a transgression against her land claim, but on the village council (and, in the event of a land sale or transfer, the burden is on the purchaser/lessor to check that the seller's/assigner's family has consented to the transfer of land rights, or else the transaction may be voided). In the event that a man has surrendered his land, the village council must offer that right first to the individual's spouse(s) and then to all dependants. Finally, to ensure against intra-community discrimination in land administration, management, and dispute resolution, the act provides for gender balance on land administration and management bodies, and allows the village assembly to seek the support of district officials when they feel that the village council is acting unjustly. Such protections are extraordinary, and should be replicated in contexts where rural women have relatively little bargaining power within their households, limited access to advocacy supports and judicial fora, lack awareness of their land rights, or do not have the power, resources or time to defend their land claims.

### 6.1.6 Community tenure security and integrated rural development

*Protect community land claims and create real tenure security while allowing for investment in rural areas, ensuring that all development will be sustainable, integrated, and beneficial for local communities.*

This component has two inter-related parts: a) tenure security in reference to the state, and b) integrated rural development and investment that benefits communities.

In reference to community land rights *vis-à-vis* the state, in the final analysis, it not clear that any of these laws actually strengthen the tenure security of rural communities' customary land rights. Despite all the provisions establishing ways to formalize customary claims, none of these laws actually root land ownership in the community itself, leaving the community's lands as vulnerable as ever. While these laws seem intended to promote tenure security for customary land claims, all three laws grant the state the power to simply claim, at will, shared common-pool resources held according to custom on the grounds that they appear to outsiders to be "unused." Meanwhile, if deemed "unused," it remains to be seen if these nations' legal protections around compulsory acquisition extend beyond individual homesteads to apply to state takings of common-pool resources which rural villages depend on for their livelihood and survival.

Under Tanzania's Village Land Act, because all land is ultimately held by the state, villagers have very weak rights under the act to oppose a state decision to allocate large areas of village land to an investor, and no right to oppose state re-zoning (under the Land Act) of what state officials feel to be "unused" village land into general land, removing it from village jurisdiction entirely. For this reason, various commentators have concluded that the village assembly and village council are merely consultative, land management bodies whose decisions can be easily overturned by the central government. In other words, the Village Land Act's multiple protections for the land rights of communities are secure and good only until the state decides otherwise. It appears that investors may simply request whatever apparently unused lands interest them, at which point the government can then declare these lands to be unused, convert them to general lands, and grant them to investors, as has reportedly been the case in some of the recent large-scale concessions. It is yet to be seen if Article 18(i)'s promise that "A customary right of occupancy is in every respect of equal status and

effect to a granted right of occupancy and shall [be]...subject to the prompt payment of full and fair compensation for acquisition by the state for public purposes" will be honored when a village's land is re-zoned as general land.

Similarly, under Botswana's Tribal Land Act, while each family's residential lands may be well protected under the act, rural communities' claims to critical common areas and water sources have been severely weakened in the past few decades. Land boards have adopted and enacted policies driven more by the central government's interest in promoting private investment in rural areas than by local needs, dispossessing rural communities of their communal pastures.<sup>109</sup> The land boards' practice of allocating vast tracts of communal grazing land to private cattle ranchers has left the remaining communal lands degraded by overuse and contributed to the impoverishment of rural communities dependent on those lands for their livelihood. It is not clear that communities were ever consulted about the transfer of their customary lands into the hands of investors, or given an opportunity to challenge what could be argued to be a massive expropriation of common property. Certainly, they were not paid compensation for the state acquisition of their lands, as mandated by Sections 32 and 33 of the Tribal Land Act.

Now that Mozambique has decreed that the issuance of community rights of use and benefit certificates is subject to government decision-making authority (rather than being only documentation of a pre-existing right, and therefore not up to the government to determine), and issued the mandate that the state can claim "unused lands" for its own purposes, it appears that Mozambique's community lands are today just as insecure as those in Botswana and Tanzania. It remains to be seen how these changes will add to rural land insecurity. Furthermore, as in Tanzania, it seems unlikely that the land law's regulations, Article 19§3 - "The procedure for termination of the right of land use and benefit in the public interest shall follow the procedures for expropriation and shall be preceded by the payment of fair

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<sup>109</sup> Furthermore, the 1993 amendment to the Tribal Land Act that allows the land boards to cancel privately-held lands if they have not been cultivated, used or developed "to the satisfaction of the land board...in accordance with the purpose for which the grant was made" (art. 15) is worrying. While this clause was undoubtedly added to help protect against land speculation, its vagueness, and reliance upon the subjective opinion of the land board, could be cause for concern and should be challenged.

indemnification and/or compensation" - will apply to community lands deemed by the state to be "unused."

In reference to community land rights *vis-à-vis* investors, between Mozambique's mandated consultations and Tanzania's explicit protections for communities ceding village lands to an investor, all of the right ingredients for true integrated and beneficial rural development are there; lawmakers may do well to borrow components of each.

In Mozambique, before being granted a right of land use and benefit by the state, all investors must personally consult with the community or communities in which the land to be granted is located, "for the purpose of confirming that the area is free and has no occupants" (art. 13§3). This provision was designed to ensure that community land claims are respected, and to allow for a process of integrated development and community prosperity in which investors acknowledge that they are using community's customary lands and agree to provide certain negotiated mutual benefits in exchange. The intention was that the communities themselves would point out the land free for concession, and then ask for a percentage of the profits generated, a monthly rent, or amenities like jobs and the construction and maintenance of necessary infrastructure.

However, because the law does not expressly say "consultation includes the right to say yes or no", government officials have been interpreting the law to mean that communities have no explicit power under the law to deny an investor's request for a piece of their lands; the right is only to be "consulted" about whether the land is free and available for concession. Once again, it becomes clear that implicit protections may be lost, and that important protections must be spelled out and made explicit. Furthermore, Mozambique's land law does not: establish appropriate safeguards to ensure that consultations are attended by the entire community; mandate that the community be told of the market value of their lands and the specific details of the planned investment, including projected annual profits; allow time for private intra-community discussion; ensure that communities have adequate legal representation during these consultations; or direct that these negotiations are recorded in detail and transformed into contracts enforceable in a court of law. In addition, there are no enforcement mechanisms or penalties established to ensure that investors fulfil the benefits-sharing agreements they create with communities during these obligatory

consultations. As a result of these gaps in the legislation, communities have been losing key lands to investors and receiving very little in return.

Interestingly, Tanzania's law sets out excellent provisions for partnership agreements between villages and investors (including safeguards to ensure that investors follow through on their negotiated agreements) to be followed for ventures located fully within villages. Unlike Mozambique's law, the Village Land Act establishes that villages have an explicit right to deny an application and reject an offer. When lodging an application for a grant of derivative rights within a community, a potential investor must prepare a land use plan proposal and present it to the village council, which must then consider how the village will benefit and whether the requested concession will impact the land and livelihood needs of community members, among other factors. The village council may then grant or deny the application. The law specifically states that village councils may require the payment of rent or a "premium" for the land grant, and may consult with the national land commissioner as to exactly how much should be charged. This provision may help to ensure that the village asks a fair and equitable price. Should it be accepted, the certificate of customary land grant may be withheld until the payment has been made in full or an instalment payment plan has been agreed to. Failure to make these payments is "deemed to be a failure to comply with a condition of the right of occupancy" and "shall give rise to revocation" of the grant of customary land rights. This is an excellent check to ensure that the investors follow through and fulfil their side of the agreed transaction, although, tellingly, the village council does not have the authority to cancel the land grant of an investor who has failed to make the contracted payments; only Tanzania's president has this power.

#### 6.1.7 Ensuring good governance

*Establishes good governance in land administration by: creating appropriate mechanisms to ensure the law's enforcement; penalizing state officials who are contravening the law's mandates; and setting up dispute resolution mechanisms that allow for appeal of local-level decisions.*

A good law may be ignored or simply not enacted because it does not reflect the desires and interest of state officials and other power holders. Or, as the case studies show, state actors may implement only those parts of the law that suit their purposes, or twist the law to achieve such ends. As such, a law

must contain within its text provisions to ensure that the law is carried out according to legislative intent. Tanzania's Village Land Act is perhaps best understood as lawmakers' attempt to create a law so extensive and detailed that it could be a road map for good governance in land administration and management. Reflecting on the length of the Tanzanian land acts and the appropriate role for law to play in restructuring land relations, Patrick McAuslan, the legal consultant hired to draft the land acts, wrote:

The real revolutionaries, therefore, might turn out not to be those who propose radical policies but those who...propose a radical legal methodology for implementing policies, namely a detailed and inevitably lengthy new land code in which legal rules and checks and balances replace reliance on administrative and political action based on goodwill and common sense – which according to the evidence, are in short supply where land relations are concerned (McAuslan, 1998 at 533).

It is arguable that McAuslan is quite correct in this. Mozambique's land law and regulations are clear and artfully brief, but contain almost no safeguards to ensure that the law is implemented faithfully by either government officials or customary leaders. In deference to custom, the law allows communities to select their own leaders and establish their own rules for how such leaders will govern. Such a model functions well when the leaders are valid, and their management decisions reflect the needs of their people. But when community leaders act in a way that is detrimental to the interests of their community, Mozambique's land law does not contain any procedural mechanisms for the community to weigh in on or dispute its leaders' actions. There are no rules protecting community members from their leaders' improper land and natural resources management practices or related unjust and unilateral decisions.

Furthermore, there are no incentives or penalties laid out in Mozambique's law to ensure that government administrators work to actively protect community land claims. Data on the land law's implementation indicates that state officials often take the side of investors rather than helping to safeguard communities' land rights. In addition, rather than pass amendments that go to the heart of the law's weaknesses – creating further protections for the land rights of vulnerable groups or taking steps to ensure that community consultations result in fairly-negotiated and enforceable contracts – the state is moving in the opposite direction, issuing decrees and making statements

that serve to weaken the strength of community land claims. The law does not include any protection mechanisms - other than legal action - to ensure good governance.

In contrast, Tanzania's Village Land Act provides the full range of protections for the rights of the poor and vulnerable and establishes various accountability mechanisms to ensure good governance in land administration and management at the local and district level. In this regard, it is exemplary. However, all the local-level protections set out in the law are not particularly useful in the event of central government decisions to re-classify unused village lands into general lands (where it seems the most egregious violations of customary land claims are occurring). In this instance, again, the only remedy is legal action.

In Botswana, the extensive 1993 amendments to Article 11 of the Tribal Land Act that served to professionalize the land boards are a good example of how lawmakers can integrate new mechanisms to ensure good governance by land administrators. Also, although the Tribal Land Act provides very few procedural safeguards, an activist judiciary and strong rule of law in Botswana has in at least certain instances helped to ensure the law's appropriate fulfilment; in the 2006 case of *Sesana, Setlhobogwa and Others v. Attorney General*, the High Court of Botswana ruled that government policies that discriminated against the Basarwa (San) were illegal according to the Tribal Land Act and the constitution. Such judicial protections are to date lacking in Mozambique and Tanzania; as in Botswana, the burden is now on national lawyers to bring class action cases to challenge those government actions and policies that contravene the legislative intent of each nation's land law or that serve to weaken communities' customary land rights.

Obviously, the actual text and the practical implementation of a law are interrelated: a law that lacks appropriate enforcement mechanisms and systems of checks and balances will not be well implemented. The roots of implementation challenges are explored below.

## 6.2 Implementation challenges

The case studies illustrate how the actual practice of integrating statutory and customary land rights is an extraordinarily complex endeavour. Despite lawmakers' best intentions, in practice none of these laws are protecting

customary land rights to the degree to which they were designed. While this is due in part to the construction and content of the laws (as described above), most of the blame should be placed on lack of appropriate or effective implementation.

At root, these laws are not being implemented in a manner that protects the land rights of the poor simply because of lack of political will. The laws analysed here create important legal frameworks that in many ways do an excellent job of integrating formal and customary legal systems and strengthening the customary land rights of the poor. But as the data on their implementation has shown, even if a land law grants powerful new rights to local communities, the weight and strength of those rights may be reconfigured and renegotiated during implementation, shifting power and authority over lands into the hands of elites. These are questions of governance; for these laws to be successful, the full participation and support of state officials at all levels of government is necessary.

#### 6.2.1 Funding and capacity constraints linked to political will

As shown by the case studies, a central – and very important – challenge to effective implementation of laws that strengthen and protect customary land rights is lack of funding, technical capacity, training, adequate salary or incentives, legal knowledge (on the part of both state actors and local communities), and other essential resources. State officials may not have been trained in the new laws, or may not be allocated the funding and technical capacity to implement them correctly. Critical information and maps may be missing; government offices may not have necessary information and data-management systems, or incomplete land registers may leave officials with only a partial picture of community and customary land rights. In many situations, district- and local-level bureaucrats do not have the vehicles, petrol, or other resources to visit the lands they govern. Low-paid officials may extort bribes or act corruptly to supplement their income and better provide for their families, actions whose end result may make formal land documentation processes too expensive for rural communities to follow. Such capacity constraints raise the very difficult question of whether attempts to formalize customary systems on a national basis by operation of law seriously overreach the capacity of governments, even when they rely heavily on local communities' existing practices, structures and resources.

It is arguable that this is not so. Rather, lack of necessary funding and resources to support the state infrastructure critical to proper implementation of a law is often a policy choice; the state simply did not allocate an appropriate degree of funding to properly carry out the law's mandates. As exemplified by implementation of delimitation exercises in Mozambique, community-by-community land documentation is neither particularly expensive nor time-intensive. Had sufficient funding been allocated, the country could have slowly accomplished the complete delimitation of all communities over a ten year period. The same could be said for village land registration in Tanzania.

### 6.2.2 Government emphasis on investment

Despite the intentions of extremely progressive, visionary lawmakers, the case studies illustrate that state officials – often more focused on fostering investment and national economic growth – tend to selectively enforce and implement only those sections of the law that advance this agenda. Yet while government leaders and state administrators should indeed promote investment, such investment should not – and need not – be pursued to the detriment of community, family and individual rights.

However, the pursuit of national economic development does at times undermine tenure security and foster injustice. In Mozambique, state officials often rush communities through investor consultations, so intent on getting the necessary "community approval" for the investment project that they pay little heed to ensuring that the communities' rights have been protected and that local people will benefit from the commercial venture. In Botswana, government policies designed to foster commercial cattle ranching have contributed to communities' loss of grazing lands and access to important water sources, leaving the remaining communal areas degraded and rural pastoralists more deeply impoverished. In Tanzania, the state is circumventing the Village Land Act - through the provision that the state may unilaterally convert huge tracts of village land into general land - and granting tens of thousands of hectares of land to investors with very little regard to the customary land claims of the villages living and making their livelihood upon those lands. In all three countries, many of these investment projects benefit

the national elite.<sup>110</sup> The enrichment of a few, and the growth of private industry and commercial farming, is happening at the expense of the many.

The irony is that these laws are designed to enable customary land claims to be profitable for investors, the state, and the communities themselves. There does not have to be a dichotomy between community rights and "investment;" it is possible for both to be realized, in such a way that all parties involved prosper and benefit. Under Mozambique and Tanzania's laws, investors are encouraged to locate their ventures within communities and make profit-sharing deals with community members; in Tanzania, the investors are directed to negotiate with village councils over the price or periodic rent of the land to be granted them, while in Mozambique "mutual benefits" are to be negotiated. In Botswana, CBNRM has this potential to create benefits-sharing agreements between communities and investors over the natural resources located on community lands.

These would be win-win-win situations, most especially because - having been consulted, given their permission, negotiated for community benefits, and begun receiving the products of these negotiations - the communities would be pleased by an investor's presence. As such, they would be less inclined, as has been the case when communities feel that they have unjustly lost their lands, to fight for their lost land, engaging in acts of what James Scott (1985) has called "passive resistance" like sabotage and quiet property destruction, and/or resorting to outright violence and open hostilities. Under the provisions allowed for in these laws, investments – welcomed by communities, and therefore not having to expend resources to fight legal and extralegal battles – would be more profitable, and both the investors and the central state would gain.

### 6.2.3 Official resistance to devolution of power and control over land and natural resources

Funding or capacity constraints and state emphasis on national economic growth are insufficient explanations for the implementation challenges

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<sup>110</sup> Bruce makes the point that, "Oftentimes, a lot of what passes for investment is ... simple land grabbing for speculative purposes... in which elites have captured vast areas of land and are holding it waiting for genuine investors to show up" (personal communication, John Bruce, 2010).

described in the case studies. It is useful at this point to remember McAuslan's warning that the creation, passage and implementation of a new land law is a "major exercise in institutional reform, and such exercises generate a whole host of problems, challenges and opposition that need to be addressed if reform is to have any chance of being successful" (McAuslan, 2003 at 21).

By definition, the creation, implementation and enforcement of land laws that seek to merge customary and formal land management systems by decentralizing land administration and management functions to the community level necessarily take power away from central and mid-level officials. Through their new land laws, Mozambique and Tanzania have created processes that devolve power over land management to the communities themselves, out of the hands of district and regional or provincial officials. These officials were accustomed to managing local lands and holding the full array of powers that such land management entails. They have no impetus to let go of this power, and in fact have a strong incentive to find opportunities within the laws to continue to exert such influence. In contrast, Botswana's Tribal Land Act centralizes local powers, and so despite a long record of mismanagement, is going on its fortieth year. All of the mandates in the 1968 version of the act's law that stood in the way of greater state control – in particular land board composition – have been amended and eliminated over time. Mozambique is currently in the process of similarly re-shaping its 1997 Land Law.

In other words, and this may be the crux of it: Botswana's law has been widely embraced and implemented by government because it elevates the customary upwards, clarifying it, formalizing it, and to some extent making it legible or transparent to outsiders. In contrast, Mozambique and Tanzania bring the state apparatus downward, which both allows for the continued "concealment" or "privacy" of community-level land administration practices and a decrease in central state control over national land and resources.

Scott describes how, during Enlightenment-era government administrators in Europe, eighteenth century state planners envisioned, "in place of a welter of incommensurable small communities, familiar to their inhabitants but mystifying to outsiders," a "single national society perfectly legible from the center." Scott (1998 at 32, 33) writes: "The centralizing state succeeded in imposing a novel and... legible property system which... not only radically abridged the practices that the system described but at the same time

transformed those practices to align more closely with their shorthand, schematic reading." This is a good approximation of what Botswana has accomplished through its land boards. Today, modern government similarly work to assert their power to manage national investment, state and private natural resource extraction and regional economic development in even the remotest regions of the state..

Custom – under Mozambique and Tanzania's laws – is not made legible to outsiders. It is left open and undefined, and can thus largely remain unknown and un-controlled by state officials. Conversely, in Botswana, the government codified a specific set of customs and transferred chiefs' functions out of their hands and into the hands of state officials. The general brushstrokes of the "customary" therefore became both known and practiced by bureaucrats. Customary land administration and management became the purview of the state.<sup>111</sup>

Furthermore, a related, second dynamic is at work: officials' desire to retain power and control over land and natural resources. Describing some of the pitfalls of a project designed to help implement Uganda's new land law, McAuslan explains how the project was undermined by professional and technical officials in the central government. He argues that they did this because they felt "sidelined"; Uganda's Land Act makes local bodies at the community level the primary managers of land, and mandates that these bodies are "not [to] be subject to the direction or control of any person or authority". Government officials, whose primary job before the new law was to manage land, felt as if they had lost all of their powers. As a result, McAuslan (2003) writes, the central government officials essentially hindered and hampered all effective implementation efforts. Reflecting on the implementation of Uganda's 1998 Land Act, McAuslan (2003 at 17) makes an important point, worth quoting at length:

Overnight, [central] officials were stripped of their powers of land management, which were [now] vested in district land boards. Even worse, the inherent powers of land management

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<sup>111</sup> Today, you can see government officials in Mozambique struggling to shift the land law to allow for just this; Decree 15/2000 was an effort to re-instate a form of administrative control over communities at a lower level than the existing localities by turning "community authorities" into a kind of extension of state administration, exercising an essentially public role.

that are inseparable from land ownership also disappeared from the public domain and became vested in millions of peasants and urban dwellers. Perhaps most shattering of all was that the loss of powers was accompanied by loss of control over resources — funds hitherto available to the centre were to be allocated to the districts. What, then, was to be the future role of the officials, and what access would they have to public and donor funds? ...

[Previously], most land in the country was public land, and the central government was the primary manager of that land...Within the ministry, officials with technical and professional qualifications relating to land — surveyors, valuers, lawyers, physical planners — managed the land. This had gone on for so long that it had become an article of faith, part of the ideology of land management...Not only was it right and proper that technically and professionally qualified officials should manage land, but it would be wrong and improper and subversive of good land management if persons without those skills and qualifications should engage in the business of land management, either directly or indirectly.

In other words, McAuslan (2003 at 21) argues that by not providing state officials with a proactive, positive role in Uganda's new land administration framework, "the project had set a course of events whereby the officials...would act on the basis that their survival necessitated... non-implementation of the act".

Adams (2005 at 44) makes a similar point. He writes that "Departmental Heads would appear to find it expedient to adopt what has been referred to as "a panel beating" or incremental approach rather than address the more deep-seated problems of land administration and management. It is also important to recognise that maintaining the status quo holds advantages for the political elite." Relatedly, Lund (2002 at 12–15) describes how, during formal processes of property rights recognition, a claimant goes through a process of 1) identifying a property interest, 2) staking a claim, and 3) pursuing processes to have this right recognized. The state actors involved in such procedures go through a separate but intertwining process, one of 1) identifying the state's interest in recognizing the particular land claim at

issue, 2) asserting their authority to legitimize this claim, and 3) acquiring legitimacy in their exercise of authority. Under this analysis, Mozambique and Tanzania's land laws not only removed state officials' authority over land administration and management, but also – by automatically formalizing all customarily-held land rights regardless of official registration – deprived state officials of opportunities through which they can continually assert their authority and re-acquire legitimacy. It is arguable that Mozambique's government has spent the past 13 years issuing decrees and making amendments to recapture this power; the amendments to regulations Article 35 are one example of central government's efforts to reclaim decision-making power over communities' customary land rights.

Under Mozambique's law, outside of investor consultations and the community delimitation exercises, there is little role for state officials in the management of community lands, while in Tanzania, the state's role in village land management is largely of passive supervision and consultation. Perversely, in this situation it is only through processes of stripping communities of their land rights that state officials can proactively exercise their powers. While such an analysis is hyperbolic, the point is important: these laws are not being well-implemented because full implementation would mean the diminution of state officials' power and authority. In Botswana, the opposite has been true: state officials have captured the powers of customary officials, and so the state has devoted enormous time and resources to implement the law and amend it to keep pace with Botswana's changing socio-economic atmosphere.

Lacking new powers, and unwilling to let go of their former powers to administer and manage land, officials find ways to get around the law, or simply leave the law aside and go about their desired business, *ultra vires* and in sometimes in direct contravention of the law. Commenting on this process, Ouédraogo (2002) explains, "Nor should we overlook the lack of political will shown by the administrative authorities in implementing legislation favourable to local land rights. Either no practical steps are taken to implement the law or, worse still, the administrative – and even judicial – authorities...are sometimes persuaded to take decisions which fly in the face of the law."

This fairly dark analysis points to the conclusion that laws that devolve power and authority downward to the community will likely lack the critical support of state actors – who will therefore not allocate necessary funds

towards successful implementation, focus on maintaining whatever powers over land administration they formally had or continue to have under the laws, and issue decrees or pass amendments that weaken the strength of customary land rights. On the other hand, laws that elevate custom up into formal state bodies will likely end up becoming divorced from the very factors that give customary practices and authorities their legitimacy and effectiveness: locality, knowledge, direct interaction with communities, and flexibility. However, various solutions and best practices may help to bridge these worlds. Such practices are described in the following chapter.

## VII

### CONCLUSIONS AND RECOMMENDATIONS

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With the case studies in mind, we now return to the questions posed in Chapter 1. The following analysis is offered only as a starting point for further discussion and research; such questions are complex and often unanswerable. Each nation must define for itself the most appropriate mechanism to recognize customary land rights within its formal legal system. During such efforts, it is important to remember Moore's (1986 at 142) cautionary observation that no matter how well a land law has recognized customary land rights, "Formal administrative reorganizations from above can only be understood in terms of the specific local context into which they are thrust".

## 7.1 Addressing the central questions

### 7.1.1 Elevating customary law

*When elevating custom up into statutory law, how does one maintain the best parts of custom without being overly vague or unduly prescriptive?*

**Create a space for customary land law within the national land law, but leave communities to define for themselves the local rules and land management systems they will observe.** The harmonizing or integration of customary land rights and formal law may best be done by recognizing custom as the effective, locally-valid means that communities have established over time to administer and manage their lands and natural resources. Such integration may be realized not through strict codification at the national level, but by carving out a space for custom within the formal legal framework, and then allowing each local community to determine and define for itself its rules and governance structures through fully-participatory processes (described further below). Community custom should then be written down *at the local level* to ensure transparency and justice and to allow it to be held accountable to standards of sustainability, equity, and the protection of the rights of vulnerable groups.<sup>112</sup>

Furthermore, an appropriate way to integrate customary land systems into the national legal framework would be to identify those areas of customary

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<sup>112</sup> This structure would not be unlike the system of municipalities in the United States creating their own laws; while they must observe the legal parameters set out at the national level, cities may define city laws that set forth rules particular to the smooth and effective running of that city or which create extra protections for the rights of city residents.

law that are the local, customary "versions" of similar legal constructs in formal law and allow for overlap and exchange between the two. For example, as explained in further detail below, customary laws address such legal matters as contracts and agreements between individuals, fiduciary duties of trust holders to their trustees, estate law, evidence law, and family law, among others. Human beings across the world have a relatively similar array of interactions that require regulating, and both formal law and customary laws address these interactions, albeit in different ways. It then becomes a matter of communication and exchange between customary and formal judiciary actors for better mutual understanding of the customary and national legal notions.

**Custom must be defined loosely so as to be inclusive and to allow for evolution over time.** Leaving custom undefined creates space for necessary flexibility and adaptation to changing circumstances. To expect customary law to suddenly conform to one regimented "code" is unreasonable, especially when in form and practice it bears a much greater resemblance to common law – its parameters have developed and changed through interpretation and application in the resolution of conflicts. Fitzpatrick (2005 at 455) notes that "custom is in a constant state of reinterpretation and renegotiation by all parties concerned, including the state itself. Experience suggests that what may be new and controversial today may well become 'traditional' in the future." The examples of Mozambique and Tanzania show that customary rules may be loosely defined by statute and, like Western common law, allowed to evolve in a manner that best addresses emerging land issues. The challenge going forward may be to work to record the decisions of customary authorities, so as to build a body of common/customary law (described further below) and the strengthen the rule of law to ensure its equitable and fair application.

**If codification is judged absolutely necessary, any effort to codify "custom" must take care not to prioritize one culture's customary practices over others'.** By codifying only the customary laws of the Tswana, Botswana's Tribal Land Act set the stage for discrimination against minority groups whose customs are markedly different than those practiced by the Tswana. This fixes the power - and ensures the dominance of - the majority tribal group while consigning all other groups' customary practices to the grey realm of informality (at best) or illegality (at worst). A law that leaves custom open for interpretation creates space for all cultures to feel that the

law applies to them, validating rather than marginalizing non-dominant cultures. Furthermore, the codification of Botswana's law – in its detailed dictation of some parts of custom (land allocation) but not others (sustainable rangeland resource management) – has served to erode central components of what customary land management used to be, while simultaneously "freezing" custom according to one ethnic group at one moment in time. It has also created a situation in which custom has no space to evolve. Rather, as evidenced by the case of *Kweneng Land Board v. Kabelo Matlho and Others*, custom becomes a fixed, historical template, whose interpretation (rather than custom itself) must be manipulated so as to validate modern practices.

A law that allows for fluid interpretation of "the customary" can allow the spectrum of customary practices to continue. It is likely that Tanzania and Mozambique's efforts to define customary practices more loosely will allow for all members of society to feel included within the bounds of "legality" – whether farmers, pastoralists or hunter-gatherers, whether matrilineal or patrilineal, and whether moving towards a land market or retaining systems of free allocation.

Importantly, care must be taken to ensure that "custom" is not manipulated and subverted to provide an excuse for intra-community discrimination and disenfranchisement of vulnerable populations. As such, **the law should establish opportunities for each community to publicly self-define the customs it will govern itself by.** Through such discussions, the community can arrive at a clear understanding and agreement about what exactly its "customs" are as well as self-identify those practices that serve their interests and those that do not, or that contravene national laws and must be changed. Such discussions may be an excellent time to overturn discriminatory rules or forge new rules through dialogue. Oomen (2005) provides an interesting description of a full year of meetings one community had as it puzzled over exactly what its customary rules were, arrived at conclusions, and posted them publicly so that everyone in the community could know what they were. While such processes have the danger of fixing and calcifying customary rules, they also have the power to clarify what those customary rules are so that local elites or more dominant community groups cannot twist the rules to their advantage. Once the rules are known and published, villagers (and the state) can hold their leaders accountable to enforcing them fairly. Moreover, once the laws are written and known by the community, they can also be publicly amended over time to continue to address

address community interests, as under common law systems. Such practices have the potential to merge custom and democracy in new and innovative ways.

For example, as explained in Chapter 2, research and practice are proving that as land scarcity increases, custom is being re-interpreted to weaken women's land rights and allow for dispossession of lands from widows, orphans and other vulnerable groups. Writing down agreed customary practices may help communities to stem such reinterpretations. The *Land and Equity Movement in Uganda (LEMU)* has worked with clan leaders to carefully define agreed customary practice. These guides can be used by community members to maintain customary social protections. As LEMU writes,

The "Principles, Practices, Rights and Responsibilities" (PPRR) have been written down by the customary authorities of the three largest groups in Northern and Eastern Uganda (the Acholi, Langi and Teso) making it a matter of fact what customary law said, rather than a matter of debate. These principles also make it clear that unmarried women have rights to land from their parents, and that divorced women have rights to their parents' land (or from their brothers). These principles are frequently not being respected: that is why...the real struggle is to establish the enforcement and not the abolition of customary principles (Adoko and Levine, 2009).

Meanwhile, as in Mozambique and Tanzania, the state can play its part by passing laws that specifically mandate that customary practices that contravene other national laws or the constitution – or even international human rights principles – will be voided.

**To protect against elite capture or corruption, checks on the power of customary authorities should be created.** It is important that laws establish some basic parameters concerning what may be considered valid "custom." As has been documented in Ghana (Ayine, 2008; Blocher, 2006) and some communities in South Africa (Oomen, 2005) as well as in other nations, customary authorities sometimes take advantage of their roles to reap personal benefits from land allocation. And as described in Chapter 4, there is some evidence that in Mozambique, investors meet first with the relevant chief to ascertain his approval, and *then* hold community consultations,

which, in the eyes of the community members, makes the question of the investor's presence "a done deal" (Tanner and Baleira, 2006 at 5–6).

One solution may be found in Tanzania's Village Land Act: the village assembly must vote on all and allocations in the village, and should community members disagree with actions or decisions taken by the village council, they may lodge a complaint with the district council on the grounds "that the village council is not exercising the function of managing village land in accordance with this act ... or with due regard to the principles applicable to the duties of a trustee" (VLA art. 8§8). Or, as described further in Section 7.3, customary leaders could be made subject to various downward accountability mechanisms.

### 7.1.2 Management structures and processes

*What kind of management structures and processes are best suited to proper implementation of integrated land administration systems?*

Cousins (2002) writes: "Rights without the means to realize them are meaningless. Institutional support is required to enable rights holders to become informed, to claim and exercise their rights and seek legal redress should they be denied, and to resolve disputes with other rights holders or with structures of authority." Such institutional supports should be easily accessed, local, not too radically different than those already in place under custom, and should have an element of democratic election in the composition of their leadership.

**The law should create structures that are easy for people to access physically, financially, and linguistically.** This means that the institutions or customary authorities responsible for administering community land should be local, or at the very least *mobile*, so that they arrive periodically in the villages and communities that they are responsible for managing. As shown in Mozambique, appeals processes and oversight mechanisms located outside the village/community may prove too inaccessible for the most vulnerable community members to reach. Similarly, Botswana's land boards and subordinate land boards are sometimes too far from the communities whose land they manage to know them as intimately as customary leaders do. As a result, there is a mandated check with the local ward head, although the incidence of improperly-allocated land to investors seems to indicate that this is not being done across the board.

To resolve such issues, bodies responsible for land management or oversight and supervision should have a mobile component, and make an *at least yearly trip* to each community they are responsible for to: educate about community land rights; help people complete necessary formalization procedures in expedited processes within the village, should they be sought; review conflicts related to customary authorities' abuse of powers or contravention of the law; hear appeals as appropriate, and carry out all other relevant and necessary procedures. Importantly, procedures should be very low cost or free and state officials should be mandated (as in Tanzania) to provide the poor with the assistance they need to successfully complete formal procedures.

**The law should not establish too many new management structures, institutions or procedures.** In their review of land legislation, Cotula, *et al.* (2004 at 13) conclude that laws that establish new governing institutions have proved difficult and costly to implement and advise that when legislation mandates that new institutions or governing bodies are established under a law, "implementation may be constrained by lack of human and financial resources to set up these bodies and by problems concerning the perceived legitimacy of such bodies compared to existing customary/local institutions." Rather, "building on existing structures, whether customary authorities, community-based institutions, local governments or other bodies, may be less costly and more effective where such institutions are solid and considered as legitimate by the local population" (Cotula, *et al.*, 2004 at 31). Mozambique's land law does this well: it leaves communities to continue administrating and managing their land according to any and all pre-existing practices (although with no checks on their power). By building on the village council and village assembly model Tanzania *appeared* to do this well, yet because the Village Land Act also mandated the creation of village land councils, village adjudication committees, village land committees, and created various new customary-formal hybrid processes for formally registering one's land, its implementation has been frustrated. There has simply been inadequate state capacity to help support the establishment of all these new structures, bodies and procedures. Relatedly, it is instructive to note that Botswana created its land boards in 1968, and then struggled for decades to make these Boards fully operational and well-functioning; as late as 1993 it was amending the Tribal Land Act to improve the capacity of board staff.

**The process of incorporating, registering or legally identifying customary groups as the lowest level of land administration and management should make as little change as possible to internal customary processes,** as "the greater the degree and novelty of mandatory intervention the more likely that it will be ignored in practice... [Any] law that makes 'special and demanding requirements about such things as membership, meetings and decisions...invites illegality by its unrealistic and inappropriate demands'" (Fitzpatrick, 2005 citing Fingleton, 1998 at 35). If the law mandates that communities must create new management bodies (to replace existing customary bodies) that will follow new rules, then care should be taken to ensure that there is a period of thoughtful, incremental transition between the old structures and the new, allowing for the old structures to continue holding powers and responsibilities until the new structures have the full capacity (administrative, technical and financial) to take over and run things effectively.

Given the obviousness of this point, it is interesting to question why so many nations pass laws that create new structures rather than build on the existing customary structures (including creating improved and stronger supervision mechanisms). Again, the answer may return to state officials' incentive and impulse to control land and natural resources (by elevating the mechanisms of customary land administration upward, or at least into new, state-created management structures, "legible" and accountable to the centre).

### 7.1.3 Downward accountability

*What kind of local leadership and decision-making structures best allow for downward accountability to local people in the management of customary land claims?*

There are multiple ways of structuring the local bodies that administer community lands according to custom. Each African nation that has made efforts to integrate customary and formal land rights has crafted its own particular local-level governance structures. Across these models, are there any mechanisms that can be identified as "most effective" in ensuring downward accountability?

**Laws should provide for both customary models of leadership and land management as well as direct democracy and participation.** Custom and democracy are not diametrically opposed, but rather may work

best hand in hand. The institutions created to manage community lands should have some degree of authentic democracy in the determination of their composition. Classens (2001 at vii) writes that "to counterpose democracy and tradition as opposites of one another hides more than it reveals. In many traditional societies the intricate rules, precedents and procedures which have been built up over generations ensure far deeper levels of public participation and debate than the mechanism of elections can achieve on its own."

To ensure downward accountability and a community check on the powers of customary authorities, the law should mandate that an elected group of men and women co-determine land matters in concert with the relevant customary leaders. The solution may lie in joining customary leaders with elected officials (as in Botswana's original land board composition and in Malawi, where customary authorities are accompanied by elected representatives in their decision-making) (Alden Wily, 2003b at 46). Or it may lie in creating a system of checks and balances *between* bodies (as between Tanzania's village assemblies and village councils).

Furthermore, **local land and natural resource management practices should be grounded in a legal framework that whenever possible calls for and promotes dialogue, negotiation and decision among community land and natural resource users** (as in the creation of community bylaws). Laws that provide for universal suffrage and regular all-community meetings can create important checks and balances against intra-community discrimination and elite capture. Such systems should also establish oversight mechanisms to ensure that the dialogue is inclusive and decisions are made democratically, accounting for the voices and votes of women and other often-disenfranchised groups. Tanzania's village councils are a good example of this: councillors are elected every five years, and one quarter must be women (Alden Wily, 2003 at 4). The village councils must report quarterly to the village assembly, and important land-related decisions are put to the assembly's majority vote. Legal frameworks should establish mechanisms that promote democratic and open dialogue, negotiation and decision-making among all community members.

Similarly, Mozambique's law, by establishing all community members as holders of a co-title, essentially creates a **co-operative model**, in which all community members (theoretically) have an equal voice in how community

land and natural resource decisions should be made. The community consultations and community-driven, participatory delimitation exercises are meant to effectuate this.<sup>113</sup>

One point worth making, however, is that efforts to democratize customary land administration and management practices will intrinsically alter "custom" (at least as it has been practiced in the last 100 years). Lawmakers must acknowledge and address the fundamental tension between "giving space for custom to operate" and "making sure it operates democratically."

Importantly, **laws should vest the actual rights to the land in the people themselves; customary authorities or the equivalent local land administration body should have an explicit duty to manage community land according to the fiduciary duties that a trustee owes trust beneficiaries.** One of the dangers of deferring to "customary law" in land management is that in contexts where chiefs continue to rule under the version of "custom" that emerged under colonialism (as "decentralized despots," see Mamdani, 1998): the concept of transferring land ownership to traditional communities ruled by customary leaders will then lead to abuses of power and have the effect of undermining tenure security. As mentioned above, this has been seen to be the case in some communities in Ghana and South Africa (Ayine, 2008; Oomen, 2005) and was the basis for the successful constitutional challenge to South Africa's land law. One remedy to such situations is to create effective mechanisms of downward accountability whereby legal mandates establish obligations upon customary authorities – or elected community leaders – to manage the land in the best interests of the local community. Cousins (2007 at 309) writes:

The way beyond the 'customs versus rights' polarity, I suggest, is to vest land rights in individuals rather than in groups or institutions, and to make socially legitimate existing occupation and use, or *de facto* 'rights', the primary basis for legal recognition. ... Rights holders would be entitled to define collectively the precise content of their rights, and choose, by

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<sup>113</sup> It is noteworthy that the community co-title structure set out in Mozambique's law is not radically different from the co-op model followed by residents of a large apartment building in New York City. Seen in this respect, Mozambique's co-title model is not particularly new or radical, and is a beautiful merging of customary (in which all living community members, as well as all ancestors and future generations, are co-owners of customary lands) and modern ownership structures (the urban co-op).

majority vote, the representatives who will administer their land rights (e.g. by keeping records, enforcing rules and mediating disputes). Accountability of these representatives would be downwards to group members, not upwards to the state.

A trust, and the resulting fiduciary duty that a trustee owes to beneficiaries, would provide such a check. A *trust* is an arrangement whereby property, resources or finances are managed by a person, group of people or organization (called the "trustee(s)") for the benefit of another/others (called the beneficiaries). The beneficiaries are the ultimate owners of the property, but the trustees may comport themselves like owners: they can make investments on the property and manage it according to how they think best. Trustees owe a *fiduciary duty* to the beneficiaries; a fiduciary duty is an obligation to manage the object of the trust according to the highest standard of care and the principle of good faith. Trustees are expected to be extremely loyal to the people or group to whom they owe a fiduciary duty: they must not put their personal interests before this duty and may not profit from their position as a trustee unless the beneficiaries consent. Blocher (2006) suggests that courts could rely on the concept of a trust "to more accurately reflect the interlocking land rights in ... customary communities" as the chief's "ownership" of land is often "more analogous to that of a trust administrator than to that of a fee simple owner". He cites Kenyan courts' use of the concept of an enforceable trust, in which the courts have "simply infer[red] the existence of a trust from the relationship of the parties and the surrounding circumstances and restrain[ed] the proprietor from acting to the detriment of the beneficial owners" (Blocher, 2006).

A similarly useful model comes under corporate law, wherein a Board manages a corporation on behalf of the shareholders; the fiduciary duty is essentially the same. Analysing the "corporate model" for village/community land management, Fitzpatrick (2005 at 461–2) writes that:

The corporate form provides a useful vehicle for intervention because its template processes are already designed to constrain the actions of its controlling body (its board of directors or management group equivalent). Thus, in theory, ordinary rights to voting and information should give members a degree of control over management decisions. Alternatively, 'supermajority' voting approval may be mandated for decisions

which are particularly susceptible to management fraud or appropriation, or for decisions which are fundamental to the group's livelihood (such as the sale of land). Alternatively again ... certain 'bright line' prohibitions may be introduced into the corporate constitution in order to protect the rights of women or other less powerful members of the group.

Tanzania's Village Land Act comes close to creating a trustee/beneficiary model. The act dictates that the village council should manage village land with the degree of responsibility that a trustee has over a trust, but does not actually establish this rigorous legal relationship; it sets out that the village council must manage village land "*as if* the council were a trustee of, and the villagers and other persons resident in the village were beneficiaries under a trust..." (VLA art. 8, emphasis added). It likely only goes this far because, at root, the village council is managing the land not on behalf of the village, but on behalf of the state. The village assembly, however, does have "supermajority" power on some matters, thus reigning in the village council and giving the rights holders themselves the final say on how their community land will be internally managed.<sup>114</sup>

#### 7.1.4 Protections for the land rights of vulnerable groups

*What rules and systems may best protect the land rights of the most powerless members of a community? How best to address intra-community discrimination, and protect the land rights of women and other vulnerable groups in the face of discriminatory customary practices?*

As described in Chapter 2, increasing land scarcity is leading to more competition for land within communities, and the most vulnerable community members are losing land. These groups include women, widows,

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<sup>114</sup> Another advantage of these models is the clarity they provide to outsiders negotiating and contracting with the community as a whole. The trustees or board, acting as "owners", may enter into agreements with investors, sign contracts, etc.. The security of investment and the strength of the contract may therefore be greater, as investors already know the rules of how to transact with other corporations or with trustees. In addition, judges are usually well-versed in the rules surrounding trustees' fiduciary duties and have extensive experience enforcing or nullifying contracts between corporations. However, under these frameworks, the community – as beneficiaries or shareholders – must be provided with easily-accessed mechanisms to check the power of the trustees/board. There is thus an important oversight role here for courts and government officials.

orphans, long-term tenants, and others (Mathieu *et al.*, 2003; Peters, 2004; Woodhouse 2003; Yngstrom 2002). Even when the governing body managing land is elected, elite capture may still be possible, with "the elected council being dominated by a few families having stronger (land tenure or other) status under customary law, greater capacity to mobilise resources from the outside world through political or other connections and economic resources" (Cotula, 2007 at 62). In sum, there is a need for special protections for more vulnerable community members.

**The law must explicitly establish women's right to hold/own land in their own right.** As exemplified in Tanzania's Village Land Act and Mozambique's Land Law, a law that seeks to integrate customary and statutory land management systems must clearly and in more than one instance prescribe that women (married, unmarried, divorced, widowed) may hold and own land. Tanzania's Village Land Act also explicitly protects the land rights of children, disabled individuals, pastoralists, indigenous peoples, and other marginalized and vulnerable populations. In Botswana, however, the only acknowledgement of gender issues was to replace the gendered word "tribesmen" with the non-gendered "citizen". Evidence from Botswana has shown that gender-neutral language alone is insufficient and that land board officials have in some instances denied women the right to hold land on their own (Adams *et al.*, 2003 at 10). Importantly, governments should also reform all national laws to ensure consistency across legislation; women's independent land rights should be enshrined in national constitutions as well as inheritance and family laws.

**Laws must address and tackle the complex web of customary rules that govern marriage and land inheritance.** In many customary contexts, land passes through the male bloodline, and women are "transacted" into marriage through the payment of a "bride price" or *lobola* to the woman's family. Moreover, under virilocal custom, women leave their biological households and go to settle permanently on the lands of their husband's family. As such, their own families may not allocate land to their daughters. In such contexts, simply proclaiming that women can own land and must inherit the land they have been farming from their husbands is radically insufficient, in that it ignores the heart of *why* land is supposed to remain with the husband's family. This is particularly true for poor women living in rural communities where "legal solutions that do not recognize customs followed as 'law' are largely ignored ... because individual women who

depend on their family and community for survival cannot act against those norms". Giovarelli, 2006 continues on to very rightly advise that:

Legal solutions that focus on only one aspect of family relationships or only on individual rights within a family cannot be effective in a customary system that looks at the life of a family as a whole... Rather than only focusing on equal distribution of land within a family through co-ownership or inheritance laws, the law should ensure that women have the economic power and social right to purchase land within their marriage, after a divorce, and upon the death of their father or mother. If ancestral land is passed down through the male bloodline and... land *must* remain with the husband and his family, then the law should require that the value of all property in the marital community (including property given at the time of marriage to only one spouse) be calculated, and the wife's share given to her in money or goods so that she can purchase other land or otherwise have the means to economically survive alone or as head of the household.

Statutory efforts to protect the rights of women that clash with custom will likely not be widely complied with. Rather, protections must be aligned with and derived from existing customary practice. As explained above, to best address this issue, one first step may be the untangling and recording of the complex dynamics of property holding between husbands and wives and within a family, community or culture, including a "remembering" of all customary protections that originally ensured that women and children's land interests are secure (see e.g. Adoko and Levine, 2009). Once the customary rules are recorded, they can be checked to ensure that they do not violate the national constitution or international human rights principles. Then, community and state bodies can take steps to ensure that these customary rules are not twisted by more powerful family members and that all customary protection mechanisms are complied with.

A second step may be the increased use of written wills to ensure that land inheritance does flow to daughters and wives (as well as sons) upon the death of the male head of household. Some household heads may be open to taking proactive steps to ensure that both their sons and daughters inherit land of their own, and to explicitly asserting that it is their wish that their wives not be dispossessed of their lands. Simple legal templates may be

provided that set out the basic terms of a will and serve as the starting point for individual household members to start taking actions to ensure equitable inheritance outcomes.

**The law must explicitly and specifically create local mechanisms that protect the land rights of women and minority ethnic or tribal groups.**

It is not enough to simply declare that women and other vulnerable groups have land rights; the law and its accompanying regulations should mandate express protections to ensure that those rights are implemented and enforced. For example, Tanzania's law artfully provides for sharing of land between agriculturalist communities and pastoralists communities that may pass through the agriculturalists' villages. Under Tanzania's law, both sets of customary land claims are preserved and recognized.

Furthermore, state and private institutions may not necessarily question the idea of a male head of household unilaterally taking formal action to register or transact family land. In this way, women and other vulnerable family members may be dispossessed of their lands, particularly during land sales. As done in Tanzania's Village Land Act, legislation should include protections that necessitate the *joint consent* of both spouses before land may be transacted or mortgages assumed; buyers and commercial lenders should be mandated to make adequate inquiries into the genuine consent of wives and dependents. Moreover, the burden should fall not on the vulnerable individual to protest the transaction, but on the state actors officiating the transaction to check to make sure rights are not being transgressed. Alternatively, the law may provide that the name of both/all spouses must be put on any formal registration of property used as the family homestead. Moreover, as described further in the following section, protections should be linked to oversight and supervision by state officials. If possible, the implementing regulations should include mandatory training of state officials, customary leaders, judges, and other relevant individuals and groups to ensure that they are aware of the new laws ensuring and protecting the land rights of vulnerable groups.

Furthermore, despite ample evidence of widow dispossession in rural communities throughout Africa (Save the Children, 2009), there are very few cases of women using the formal justice system to contest an intra-family or customary action that resulted in the loss of her land claim. Such a lack illustrates that the formal legal system (in some nations, the only forum

where customary leaders may be held accountable to complying with constitutional mandates) is essentially inaccessible to the poorest and most vulnerable members of society. As such, **laws should create local land management bodies that are at least partially elected and include women.** Increasing women's representation on local land administration and management bodies can improve women's ability to claim their rights by providing a check on the power of customary authorities who may be acting unjustly. Tanzania's village councils are by far the best example of this: they are elected every five years, and one quarter of all members must be women (Alden Wily, 2003 at 4). Moreover, the village land councils must have 3 out of 7 female members, and the village adjudication committees must have 4 out of 9 female members. These community-level bodies should also take care to include youth and members of other vulnerable groups.

**Various legal advocacy and social service supports must be put in place to help women and other vulnerable groups enforce their land rights.** Even when women's and other vulnerable groups' land rights are enshrined in law, they may face multiple barriers to claiming and protecting their rights. For example, women may have little decision-making power in their homes and be unable to contest violations of their rights within the family or within customary institutions, and may lack the economic independence and resources necessary to pursue legal action outside of their villages. Alternatively, a woman may be threatened or endangered for seeking to enforce her rights. Should she be able to arrive at a government office to try to claim or defend her land rights, she might face discrimination and insensitivity to her situation by government administrators. Similarly, pastoralists and hunter-gatherer groups may, in the absence of tangible evidence of occupation like houses and farms, have trouble proving their land claims when they are questioned.

Access to legal services should be set up to assist these groups in bringing claims to court, should the law not be followed. To facilitate this, community members may be trained to be paralegals to provide local support mechanisms for women and other vulnerable groups seeking to enforce their land rights in both customary and official contexts. In addition, NGOs and community groups may play a "watchdog" role in monitoring whether the land rights of women and vulnerable groups are being enforced. Other protections that may be enacted in a law's implementing regulations might include such solutions as: special loan facilities for women and other vulnerable groups to allow them to participate in emerging land markets and

mortgage opportunities; the recruitment and training of more female and minority group officials at the district and regional levels to help women and other vulnerable groups claim and defend their land rights; legal education and capacity-building about women's land rights for both woman and men; and the ability for groups of women to claim and register land collectively.

#### 7.1.5 The role of state officials

*What is the most appropriate role for state officials when land rights are managed locally and according to custom? How best to leverage the technical and administrative powers, skills, and capacities of the state?*

The case studies have illustrated that there is often a disconnect between the *de jure* land policies that may have been passed under pressure from civil society and with donor support and the *de facto* government agenda to retain control over lands and natural resources and promote investment. Lacking the political will to implement the law, government officials will not allocate the resources and finances necessary to successful implementation of those elements of the law that take power and control over lands away from them. And slowly, over time, once the donors have gone, government officials may likely begin to engineer the weakening of those sections of the law that devolve power and control over land and natural resources to communities and strengthen community rights over customary lands, particularly the (valuable) common pool resources like forests, grazing lands and areas around water sources.

As such, state officials need new powers, roles and responsibilities if a new law strips them of their previously-held authority. As described in Chapter 6, if, in the integration of customary and formal land management systems, local and regional state officials lose decision-making power, funding or technical dominion over community lands, they will have a strong incentive *not* to implement the law. McAuslan (2003 at 27) argues that: "Any fundamental changes in [land] laws, particularly changes designed to remove powers from and therefore access to public money by public officials are likely to be opposed by those officials unless they can see some specific benefits flowing to them from the reforms."

A land law that decentralizes land administration and management to the community or village level *must* create an important role for local and

regional bureaucrats and technicians, or likely face a kind of subtle bureaucratic mutiny such as described by McAuslan. Something similar can be seen in Mozambique: Negrão (2002 at 19) suggested that the successful implementation of Mozambique's land law was obstructed by "the huge resistance from employees in the title deeds offices to accept the new law; this is because, in a way, they would no longer have the monopoly in the decision-making regarding land adjudications."

Fortunately, as described above, there is great need for state oversight of customary systems. As well stated by Cotula and Toulmin (2007 at 109), "In most cases, the issue is not *whether* governments should intervene to regulate local land relations; but rather *how* they should do so." In systems that locate control over land and natural resources at the community-level, the role of government officials must change from one of "decider" to one of "overseer".

**State officials may provide technical support and capacity-building assistance to customary and village-level land administration and management structures.** To help communities best manage their land and natural resources most effectively, the accompanying regulations should establish a role for state officials to run training and capacity-building programs. These officials should be given the role of technical supporters to the new community structures, and allocated funding to rigorously carry out their new duties. Mozambique and Tanzania's land laws, as well as Botswana's CBNRM programs, all require a great deal of effort at the village level to follow the various registration/titling procedures - in resolving boundary disputes with neighbouring villages, in participatory map-making, in filing the correct paperwork for formal registration, and in creating village land use and zoning plans. In the event that they enter into agreements with investors, communities will need financial management training and support. District and regional officials and technicians should be empowered to take on the role of supporters, trainers, and advisors, with adequate funding provided to allow them to continue in their jobs as before, only with new roles and responsibilities. State officials may need to be rewarded for successfully making this transition; incentives could be provided to officials to prompt them to proactively help communities register or title their holdings and provide guidance and support for community land and natural resources management activities.

**State officials must play a role in enforcing the land rights of women and other vulnerable groups and acting as an important check against abuse of power by customary authorities.** Feminist groups and women lawyers have long called for government officials to proactively create and enforce mechanisms to protect women's land rights in the face of the gender-based discrimination and dispossession that routinely occurs under the rubric of custom (Whitehead and Tsikata, 2003; Daley and Hobley, 2005). Similarly, based on case studies in Botswana, Woodhouse (2003 at 1718) finds that "if political goals such as improving the position of the disadvantaged are not identified and pursued by the (central) state, it is unlikely they will arise spontaneously at the 'local' level." He argues that:

The evidence considered here suggests [that] the important element of "re-centralization" is that the politics of the (central) government will have a key role in setting the terms on which local institutions such as land boards operate, such as: the rights of women; the admissibility of ethnic discrimination in land rights; [and] the relative weight to be given to "indigenous" holders of customary land rights compared to immigrant land users, sharecroppers, or tenants (Woodhouse, 2003 at 1718).

State officials should provide the necessary monitoring and supervision to ensure that community-level land administration bodies are acting in accordance with basic human rights and constitutional principles. Even in those instances where customary structures are functioning efficiently, state officials may need to intervene to ensure that the land claims of women and other vulnerable populations are respected. State officials should establish appropriate but not overly meddlesome oversight mechanisms to insure against corruption, mismanagement and inequitable actions undertaken in the name of "custom" or "tradition". In this vein, Tanzania's Village Land Act creates ample requirements that local state officials closely supervise village-level activities – what remains is for state actors to begin taking on this role and for appropriate oversight practices to evolve.

As described above, part of this work may involve state officials adopting mobile strategies, in which they travel periodically throughout their districts to each community, bringing administrative and judicial services directly to the villages - a practice that would serve both to make their support more

accessible to poor communities and to allow them to better supervise community affairs and ensure against discrimination and elite capture.

Finally, as described further below, state officials and judges may help to **train customary authorities in relevant national laws**, and should actively work to make themselves easily available and accessible for appeals of customary decisions. State officials also have an important role to play in **supporting communities in their negotiations with outside investors and then supervising the fulfilment of the benefit-sharing agreements** that communities, villages or CBNRM trusts have made with investors.

#### 7.1.6 Merging and streamlining justice systems

*How best to facilitate the merging and streamlining of customary and formal justice systems?*

Throughout Africa, customary dispute resolution mechanisms quickly and inexpensively mediate and settle untold numbers of local land disputes. Meanwhile, at the national level, an elaborate judicial system also exists, processing that small percentage of land-related conflicts in which one or both of the parties had the resources to bring a claim in a formal court of law. As described in Chapter 2, the concurrent and un-coordinated existence of customary and formal judicial mechanisms has led to forum shopping, confusion, and tenure insecurity. A well-functioning, respected, and integrated judicial system has the potential capacity to powerfully and seamlessly integrate the customary and the statutory. What mechanisms and strategies are necessary to ensure that the merging of these conflict resolution systems – a process integral to statutory recognition of customary land rights – is accomplished most effectively and efficiently?

**The law should establish a clear system of judicial appeal, leading straight from the lowest level of conflict resolution (often the sub-chief or headman) all the way up to the highest court.** National justice systems should allow for and create mechanisms that facilitate the automatic ability to appeal a decision of a customary dispute resolution body directly into the national judicial system, all the way up to the highest court, with continued reference to the customary rules of evidence and procedures that applied in the original customary forum. Again, periodically bringing the justice system down to the village level may be one way of facilitating this: judges may set up rotating tribunals or mobile courts, visiting remote areas periodically to

hear disputes locally; justices of the peace or local small claims tribunals may be set up in rural areas, with clear lines of oversight and appeal; among other strategies that promote access to justice in rural areas. Such efforts will also help to address jurisdictional conflicts between customary and formal justice systems.

**To protect women's land rights, laws could prescribe that an elected woman or group of men and women should co-determine cases in concert with relevant customary leaders.** Laws that integrate customary and formal land tenure systems should allow for pre-existing customary dispute resolution mechanisms to continue, rather than establishing completely new judicial mechanisms at the village level (which may increase uncertainty and promote forum shopping). This is especially important in contexts where customary authorities are seen by community members as the most legitimate, authoritative arbiters. However, there must be village-level checks on their powers to ensure that their decisions are in alignment with relevant national laws and with a just and equitable interpretation and application of customary law. To do this most seamlessly, customary leaders should remain as dispute resolution authorities, but could be joined by an elected woman or group of men and women who are trained about women's rights under national laws (as prescribed in Tanzania's village land councils).

**A written record of customary decisions and cases must be created.** To allow for this, laws should mandate that a village secretary or scribe – or, at higher levels, a tape recorder – record each land-related conflict and the resulting settlement, resolution or decision. Such decisions must then be collected at the district and provincial levels, and trends identified. In this way, the decisions of customary dispute-settlement bodies may eventually coalesce into a customary common law, blending local/customary and national/formal jurisprudence and creating a resource for higher level courts to refer to when hearing an appeal. McAuslan (2007 at 4) notes that "the legal systems should begin to create a framework for the orderly development of a jurisprudence of customary law, thereby strengthening what is good in custom while at the same time subjecting it to overarching values contained in the constitutions and global human rights."

**Laws should seek out those components of customary justice systems that are similar to the formal justice system and bridge the two.** Rules of evidence are a relatively simple and easy mechanism through which to do

this. For example, **landscape-based evidence should be formalized**; as explained above, under some customary paradigms, making changes to the natural landscape creates public proof of one's rights over land and increases tenure security. Under Mozambique, Tanzania and Botswana's laws, customary rules of evidence are considered at all levels of the judicial system to be equivalent in weight to formal rules of evidence. (However, lawmakers must take care that such "landscape-based evidence" does not discriminate against pastoralists or hunter-gatherers, who may not leave such permanent marks on the lands they have customary rights over). Relatedly, laws should **allow oral testimony as proof of land rights**. In Mozambique, the oral testimony of neighbours is sufficient to establish a valid and enforceable land claim. The legal weight of collective verbal testimony made publically in front of the whole community – often much harder to falsify than a piece of paper or an individual declaration – is made equivalent to the legal weight given to testimony made under oath on the witness stand. In making group oral testimony valid proof of a land claim, Mozambique has elegantly created a way around both the high rates of illiteracy in rural villages and the need for written evidence of customary land rights.

Lawmakers and judges may seek other creative areas of overlap; another simple and effective example is to **leverage the customary system's reliance on conflict mediation and alternative dispute resolution**, integrating a pre-trial mediation sessions into formal procedures (as is increasingly being done in developed nations).

**Customary authorities and judges should train each other, so that each is well versed in the laws of the other system and can apply and understand these laws in making their decisions.** To best effectuate an integrated system, there must be an ongoing, bi-directional exchange of information. If customary authorities are truly going to be embraced as the first tier of the national justice system for the majority of rural people, customary authorities must be continually trained in the laws of their nation. Blocher (2006) observes that "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. 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."

Mozambique, Botswana and Tanzania's land laws all include caveats that customary practices must not contravene the national constitution, yet it is not clear that customary authorities are even *aware* of relevant constitutional mandates and protections. Customary authorities must be given an opportunity and supported to study their nation's constitution. Judges should train customary authorities in statutory law, teaching them how to blend constitutional principles into their local decisions. The few projects that have tried training chiefs in national laws have found that chiefs were highly responsive, and indeed curious and interested in learning this information.<sup>115</sup>

Meanwhile, as the formal justice system increasingly recognizes customary land rights and practices as legally valid and allows for appeal of customary decisions, the judges mediating cases appealed from the village level will increasingly be scrutinizing customary authorities' decisions. Yet judges often come from elite – or at least urban – backgrounds and may have a degree of resistance to validating customary rules. Similarly, judges may lack awareness and understanding of the daily circumstances and concerns of the poor or may need support in understanding customary paradigms. To remedy this, customary leaders should train judges about their general dispute resolution practices (which may look more like mediation) and clearly explain the rules by which they resolve conflicts and govern land under their jurisdiction. Judges should also be trained in the basic precepts of the customary law practiced within their jurisdiction, taking into account that customary laws are in constant evolution and are flexible and responsive to socio-political changes.

Such reciprocal training exercises will help to create stronger bonds between the two systems, aligning them and facilitating exchange and integration.

**The justice system must be made accessible to the poor.** Access to justice mechanisms are necessary to ensure that the rights of the poor and relatively powerless are protected. This is especially critical because while village-level customary dispute resolution mechanisms may be very able to settle conflicts *between villagers*, they have very little authority to mediate disputes and address injustices *between villagers and outsiders*, particularly when the outsiders are wealthy investors. For this, villagers have little recourse but

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<sup>115</sup> WOMED's project on the Manyu Gender-biased Customary Laws had success in Cameroon with just this tactic, so has *Centro de Formação Jurídica e Judiciária* (CFJJ) - or Centre for Juridical and Judicial Training (CFJJ) in Mozambique.

to take a dispute into the formal court system, or to the office of a state administrator. However, a variety of obstacles may keep people from pursuing formal legal action: judicial review can be expensive, time-consuming, hard for claimants to travel to, in language that claimants cannot speak, or technically inaccessible and overwhelming. Alternatively, the composition of the court or a judicial history of corruption may be such that claimants feel that even if they were able to afford the costs of bringing a case or lodging an appeal, they may not receive a fair hearing or have a verdict enforced.

To better integrate customary and statutory dispute resolutions systems and ensure that appeals bodies are more easily accessed, regulations should mandate that appeals hearings take place at a convenient time and place for community members and in the local language. Court costs should be determined by the wealth of the parties; for the very poor, every level of appeal should be free. The composition of the reviewing body should be established to be both in line with the national justice system as well as with customary ideas of impartiality. Court procedures (such as rules of evidence and discovery processes) should be simplified and should allow for customary practices, as in Tanzania's and Botswana's land acts. Proceedings should be conducted in a manner easily understandable and accessible to a lay person. Whenever possible (specifically at higher levels of appeals) free legal counsel should be provided to those individuals or communities at risk of losing their land.

#### 7.1.7 Managing markets in customary land rights

*How best to address emerging markets within the context of customary land administration and management systems? How best to formalize land transactions so as to ensure fairness and provide a measure of security?*

Even in those nations where land sales are deemed to be illegal according to national concepts of state ownership, **governments must take steps to begin to recognize growing informal land markets and establish legal tools to manage them.** As described in Chapter 2, land is increasingly being acquired through a range of financial transactions, from rental agreements to sharecropping to outright sale and purchase. Robust informal markets for land are emerging, in which land transactions often take place between actors with different levels of power and wealth. Because they are unregulated and oftentimes clandestine, these new practices lack transparency and may

perpetuate uncertainty and injustice. Moreover, these transactions are rarely accompanied by "legal" proof of purchase or ownership. Lack of openness and the hidden quality of these transactions tends to exaggerate the effects of inequality and information asymmetries and to encourage manipulation and deception. Such unregulated land transactions hurt the poor most: they may engage in distress sales and be taken advantage of in times of hunger, illness and great need. Women, children and less powerful members for the family may have their land sold out from under them by the male head of household and become homeless.

**In nations where land sales or transfers of customary land rights are condoned, greater legal protections must urgently be crafted.** Mozambique, Botswana and Tanzania all allow for land to be transacted - in "sales" or "transfers" of customary rights of occupancy or improvements to the land. However, only Tanzania's Village Land Act includes any formal legal mechanisms to protect parties to these transactions; the village council must be notified of a proposed sale or transfer before it is to happen, and can refuse to allow a sale or transfer that will dispossess women and children from their land or render the "seller" unable to make a livelihood for themselves and their family in the future. Sales to outsiders must be approved by the village council and all land sales must be recorded in the registry (VLA art. 30). Botswana's Tribal Land Act, as amended in 1993, now mandates that transfers between citizens of Botswana and foreigners be approved by and registered at the land board (art. 38). However, transfers between citizens of Botswana need not be approved; there is no check against power imbalances between national elites and the urban and rural poor.

Such a check of power imbalances may be established by more rigorously applying the basic principles of contract law. As such, governments should **make customary land transactions legal and enforceable or voidable under national contract law.**<sup>116</sup> In the face of emerging covert and

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<sup>116</sup> Ouédraogo (2002 at 83) suggests that contract law may provide a solution to complex and impracticable land laws. His contractual option is an interesting one, based on the idea that "although the law should define the general rules governing land tenure relationships, it should not dictate the way in which an individual arranges every aspect of his relationship with others." Ouédraogo argues that land tenure legislation should set general principles regulating access to land, guaranteeing rights, establishing tenure security, etc. but that the mechanisms for how land is transacted and managed should be left as community or personal decisions. Ouédraogo's intention is to locate the power and initiative in local land management decisions in the grassroots community and individual families themselves. The

unregulated land markets, protecting the land rights of the poor necessitates clarifying "the rules of the game". Where "sales" of land are increasingly common, it is only by making these sales legitimate and visible that they will be subject to legal and institutional regulation. Acknowledging the existence of land transactions and applying basic precepts of contract law can help to protect the rights of the poor.

As described in Chapter 2, these processes are already going on informally; people *want* written records of their transactions. Signed, written papers, sometimes witnessed by government officials, are increasingly being drafted to create "legal proof" of a land transaction as a kind of contract of sale (Mathieu *et al.*, 2003). These documents are often incomplete and unclear as to their full terms and conditions. Simply legalizing these agreements and making them subject to existing national contract law would provide a degree of safety and security to both sellers and buyers. Rather than laying out these rules in the body of the land law, it would only be necessary to recognize the validity of interpersonal contracts and mandate that they would be witnessed by third parties, subject to national contract law, and enforceable or voidable in local judicial forums. Certain tenets of contractual law would then apply, such as rules that unconscionable contracts or contracts signed under fraud or duress would be void. The state may work to disseminate contract models outlining basic, essential clauses to help to improve the quality of these contracts.

Such contracts may nicely span the divide between customary and the formal law. They could be witnessed by customary authorities, with the requirement that a copy of every contractual agreement be duly entered into the village, district or provincial registry or cadastre. The appropriate registry official could translate the contract into a standard form showing ownership or use rights, attaching the original signed and witnessed document as proof, and officially record the transfer. Basing land management in contract law also nicely avoids the quagmire of determining "use rights" or "ownership"; what one has is "transaction rights". Citing Knetsch and Trebilcock's work in Papua New Guinea, Fitzpatrick (2005 at 469) writes:

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local communities "will have to establish local agreements regulating land and natural resource management in their own local circumstances by negotiating a consensus and a minimum of rules to which all can submit voluntarily" while individual families "will have to negotiate the land tenure arrangements (or transactions) they require to make productive use of land" (Ouédraogo, 2002 at 85).

A system of registered dealings would produce many of the benefits of registered titles without incurring the conflicts engendered by adjudication processes. In particular, they suggest that dealings in customary land to which outsiders are a party, or which take a form not contemplated by customary law, may be recorded by a local magistrate who must first review the dealing in order to ensure its fairness. A recorded dealing would take priority over an unrecorded one, in the absence of issues of fraud or lack of good faith. The form of the recorded dealing would also be sufficiently standardized so as to yield useful information both in a decentralized registry and in duplicate in a centralized filing system.

**Protect the rights of tenants by passing anti-eviction laws and encouraging the use of lease contracts.** Tenants' land claims may be protected by anti-eviction laws and enforceable lease contracts. Tenants oftentimes have no written record of contractual agreements for short- or long-term land use. As described by Mathieu *et al.*, when property values rise or land becomes scarce, tenants may be driven off of land that they have farmed for years. To proactively take steps to address such injustices, landlords and tenants should be encouraged to create simple, clear lease contracts (at minimum, something written down informally) which protect all parties while providing maximum tenure security. Local registers should be given a copy of all lease contracts for record-keeping purposes, and courts or local dispute resolution bodies should be trained to address lease violations and adjudicate tenancy-related conflicts. Again, the state may work to disseminate contract models outlining basic, essential clauses of lease contracts, such as clauses specifying the customary rules that, if breached, are cause for eviction, or protections against evicting tenants from fields that have already been planted but not yet harvested.

#### 7.1.8 Transactions between communities and outside investors

*How to address power imbalances during land transactions and benefits negotiations between communities and outside investors?*

Tanzania's Village Land Act and Mozambique's land law provide that when outside investors seek lands or natural resources located on a community's customary lands, the investors must ask the village or community's

permission and may negotiate with the community for the conditions of a long-term lease. However, due to information and power asymmetries, communities may have little idea of the market value of their land or the financial profits to be derived from local natural resources, and may request only a one-time payment of the construction of a school, medical clinic, or the drilling of wells. Sometimes the process is co-opted by local leaders – customary or state – who request side-payments or personal monthly allowances. Communities may not fully understand the proceedings, may feel intimidated or forced into signing agreements, and may not be given a copy of the negotiated agreement that they had signed, leaving them without written proof of the contractual arrangement they "agreed" to. Meanwhile, lawyers and other advocates are rarely present to represent the community's interests. To address such power and information asymmetries, various regulatory protections must be enacted. Such measures are becoming increasingly urgent in light of the new trend towards large-scale agricultural investment.

**Laws should compel investors to equitably compensate communities for their lands or share profits with the local communities upon whose lands they are operating.** If Mozambique and Tanzania's laws truly vest rights to customarily-held lands in the community (even if root title is held by the state), then loss of this land *without* community agreement (as may happen when village land is converted to General Land under Tanzania's Land Act) amounts to compulsory acquisition, and the community should be compensated accordingly for the loss of its land, even in the absence of community registration or delimitation certificates. Loss of land *with* community agreement (as in Mozambique) amounts to either the long-term rental or sale of a valuable community asset, and under no circumstances is it equitable or fair to ask impoverished communities to lend or give their greatest fiscal asset to wealthy investors for free. Fair and just compensation in one form or another should be made compulsory.

**Law should mandate the creation of fair and enforceable contracts between investors and communities, with penalties for non-fulfilment of the terms and oversight mechanisms to ensure implementation and fair distribution of all profits.** In nations like Mozambique and Tanzania (or in Botswana under CBNRM practices), where communities are empowered to enter into partnership with outside investors for long-term commercial use of community lands, the negotiated agreements *must* be subject to legal protections and enforcement, including the prohibition of

unconscionable or coerced transactions. These agreements should be recorded and registered, copies must be given to community leaders, trusts should be set up to help communities manage rental payments, and oversight mechanisms should be put in place to ensure that investors and communities alike are complying with and fulfilling the terms of the negotiated agreement. If an investor is not complying with the terms of the contract, established penalties must be enforced. In those instances where the community has successfully negotiated for rental payment or the payment of a "premium," the state has a role to play in ensuring that the profits are not co-opted by local elites but rather used for community development or distributed fairly and equitably to all community members.

**Laws should mandate that lawyers or other advocates for the community must be present to assist them in their negotiations with investors.** Communities must be provided legal and financial representation during negotiations over the extent of shared profits, benefits, premiums or rental payments. The power and information asymmetries inherent in community-investor negotiations warrant the obligatory presence of an advocate or lawyer who can negotiate on behalf of the community or support and advise the community in its negotiation strategies. During negotiations, the actual value of the land being ceded and investors' projected annual profits must be revealed to the community. The social and environmental costs – such as degradation of the water supply, etc. – must be fully revealed so that the community can understand the long-term burdens of the proposed development. Appropriate yearly rental rates should be calculated in addition to agreements for the provision of basic infrastructure in the short term. State agencies, national NGOs, and regional advocacy groups may provide the appropriate technical support, with the potential role for international donor financial support. In addition, all relevant laws should allow that any contract or agreement made between an investor and a community without legal counsel is void and does not create a binding agreement.

Importantly, **care must be taken to ensure that legal protections for communities are included in all national laws that govern foreign investment;** including such mandates in the national land law alone may inadvertently create loopholes that allow investors to eschew these obligations. All relevant laws – investment, mining, agriculture, forestry, etc. – must be

synchronized, and the ministries responsible for their enactment supported to collaborate towards more equitable community-investor partnerships.

**Relatedly, government officials should actively support communities as they work to form partnerships with investors.** Local officials should be trained to understand the long-range benefits of a fair consultation and benefits sharing agreement. To facilitate improved negotiations, state officials may receive incentives for their support in negotiating fair and community development-inducing agreements. For example, a percentage of the rental money, shared profits or premium charged may be directed to the state as an incentive to ensure that state actors help communities negotiate fair contracts and successfully collect any agreed payments.

### 7.1.9 Registration of customary land rights

*Should customary land rights be compulsorily registered?*

Although Botswana, Mozambique and Tanzania's land laws all formalize and make customary land rights enforceable whether they are registered or not, the evidence suggests that state officials are ceding large tracts of community land to investors with little to no community consultation (Tanzania, Botswana) or with a brief, cursory consultation (Mozambique). And because, at the end of the day, all land in these countries is owned or held by the state and subject to its ultimate control, communities have little power to resist. The data on the implementation of the land laws examined here indicate that the only way to fully safeguard the land rights of the poor is to formally register their holdings. As such, the answer to this question is unequivocally "yes" – **customary land rights *must* be registered.** In the words of Liz Alden Wily (personal communication, 2010), steps must be taken to "double lock" communities' customary land rights by seeking documentation and registration in national cadastres. Such efforts are urgently necessary, particularly in light of the increasing granting of large scale land concessions to foreign private investors and other sovereign nations; research is showing that common areas not officially claimed and fiercely protected by communities are easily lost in state allocations to investors (Cotula *et al.*, 2009; World Bank, 2010). Moreover, there should not be one system or documentation of land registration for customary lands and another for "private" or investor-acquired lands. **Customary land rights must be granted the exact same legal status and visibility in records as lands acquired by more "formal" avenues.**

**However, customary land claims are best registered, titled, or delimited at the level of the village, community, or extended family *first*** (with "community" being defined by the individuals involved<sup>117</sup>) in the manner suggested by the community delimitation and registration processes in Tanzania and Mozambique. Only once the community has been registered/titled (and therefore doubly-protected, with documentation) and the community has discussed and established land use and zoning plans, sustainable natural resources management practices, rules for the use of common properties, etc., then, afterwards, may the community decide to address the issue of individual titles within the larger meta-unit.<sup>118</sup> Meanwhile, unregistered individual customary holdings should continue to have the same validity and weight as registered holdings, as allowed for under the laws of Botswana, Tanzania and Mozambique. This should be done in public forums at the village level with the participation of both customary authorities and state officials and should take care to protect overlapping and secondary use rights (such as rights of way) and to safeguard common areas necessary for the livelihood strategies and religious practices of all of a nations' diverse peoples.

**Registration of community common-properties (forests, pastures, etc.) is particularly important**, as these areas may appear to outsiders as "unused" or "vacant." In both Mozambique and Tanzania, the state now has the legal power to proactively reclaim apparently "unused" land and then use

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<sup>117</sup> Care should be taken to ensure that the *definition* of the customary group is crafted in such a way that it both allows for a wide range of self-definition (so that customary groups can decide for themselves on their composition) as well as inclusive (so that more vulnerable community members cannot be purposefully excluded).

<sup>118</sup> Although outside the bounds of this publication, a full review of individual land titling initiatives in Sub-Saharan Africa has shown them to have myriad negative ramifications, including loss of land and natural resource rights by the poorest of the poor. See e.g. Whitehead and Tsikata, 2003; Hanstad, 1998. In this vein, Fitzpatrick (2005 at 466) concludes: "In many customary tenure systems, registering individual customary interests will not be warranted because of the probabilities that (1) submerged conflicts will crystallize as a result of the 'once and for all' nature of the adjudication process; (2) subsidiary rights-holders such as occasional users or transhumant groups will be excluded from registered plots; and (3) opportunistic group members will engage in legal institution shopping so as to manipulate the register for their own benefit ... Broadly speaking therefore, only where there is considerable tenure insecurity within a group, particularly as a result of individualization, tensions and/or the emergence of dealings with outsiders, would the benefits of recording individual interests potentially outweigh the considerable costs and risks of the recording process." Experiences showing the feasibility of this approach are discussed in Tanner, *et al.*, 2009.

it for its own purposes, thereby cancelling a community's customary land rights. In this context, formally delimiting, registering and titling common properties (and then supporting communities to take actions to demonstrate that the land is being actively used, such as by erecting fences, markers, or other improvements) is becoming a matter of urgency. These bounds should be entered into national cadastral systems and appear on national and local maps as quickly as is feasible. Alden Wily (2005 at 1–2) argues that:

Priority focus should be upon the rural commons... It is these community-owned properties to which governments throughout the continent have so consistently helped themselves with generally no compensation at all and/or reallocated to others. Despite a decade-plus of reform in this area, most commons on the continent still bear the status as *de facto* un-owned land or public land owned by everyone and which accordingly fall to government jurisdiction and *de facto* tenure... Whether we like it or not, this means registration. We cannot escape the reality that each and every common property estate must be defined, its customary owners known and institutional representation established in order for the owners to hold onto that property and reap future benefits from it. If this is not undertaken we are merely sustaining the past and present in which some millions of hectares of invaluable property on this continent are annually lost to the majority rural poor.

Relatedly, **laws should provide for and encourage community creation of land and natural resource management plans that ensure sustainable and equitable management of communal areas.** Laws should include mechanisms that prompt communities to identify, record and continue customary land and natural resources management practices that have proved over time to enable the sustainable and equitable use of community natural resources. Protecting the commons and then recording the rules of how community natural resources should be managed may bolster communities' sense of ownership over the resources contained within communal areas and support conservation and responsible use (Ostom, 2010). These plans may also help communities to leverage their commons for economic ventures and internally-driven community development, and may be a place where communities can proactively plan for possible future negotiations with outsiders over community land and natural resource transactions.

Alternatively, formalising common property management regimes under CBNRM initiatives may help to play a critical role in protecting these lands. Taylor (2007 at 2–5) suggests that for "states unwilling to accord full recognition to customary rights...[or] in the absence of legal systems that acknowledge direct community *ownership* of land, the granting of *management* rights may be sufficient recognition of the legitimacy of community control to protect such lands from allocation to outside interests.

Finally, and most importantly: **laws should establish genuine tenure security by placing land ownership in the people themselves.** The foundation for such systems – and for true tenure security – will only come from putting land ownership into the hands of the people. None of the laws examined in this publication offer true tenure security to rural communities, as they allow the state to reclaim at will lands that they deem to be "unused". (Mozambique's law did not originally allow for this, but recently government decrees have been intended to legitimize this practice). In consideration of the recent trend of granting of vast areas of land to foreign investors for large-scale agricultural ventures, the urgency of placing real ownership in the hands of the people living and making their livelihood upon lands held according to custom cannot be overstated. Government officials cannot be properly held accountable for what often amounts to massive land grabbing without compensation when all land is technically "owned" by the state. Particular care must be taken to ensure that even if the people themselves are made the owners, safeguards are put into place to ensure that government officials do not abuse state powers of compulsory acquisition to take land from communities and hand it over to investors without notice, due process, or fair compensation.

#### 7.1.10 Drafting the laws

*What considerations should inform the process of drafting legislation that harmonizes customary and statutory law?*

**Legislators and policy makers should clearly identify and articulate the end goals of the legislation.** When seeking to integrate customary and statutory property rights systems, lawmakers must be extremely clear about what they are promoting in these efforts. The end goal will drive the content of the law, so stakeholders' and governments' genuine, authentic *long-term goals* must be carefully specified. Is the focus on the recognition,

formalization and documentation of individual and community *customary rights* over land so as to increase tenure security? Or is the focus on recognizing and leveraging *customary systems* of land management and administration, to ensure low operation costs, knowledge of the local terrain, and accessibility, among other benefits? (Alden Wily (2005 at 3) suggests that "what is required is obviously less to entrench customary rules or laws themselves, than the transparent and accountable mechanisms through which community derived rights are identified, secured, sustained, regulated and managed"). Is the state's true goal the slow phase-out of custom, to allow for a liberalized land market and greater control by the modern nation-state? Or, is it to create a customary-formal hybrid system that attempts to leverage the best of both worlds and effectively eliminates legal pluralism in land matters? While the land laws analysed in this publication are clear about the mid-range goals – national development, greater tenure security, a law grounded on uniquely African principles, etc. – lawmakers did not go far enough in articulating an agenda for how custom would function in the long term, or exactly what the final vision of a national land system would look like.

**Seek places of overlap between custom and formal law and start from there.** In the process of integrating statutory and customary land administration and management systems, there is merit in carefully identifying places of similarity and overlap between the systems and beginning there. As explored above, there are traces of formal contract law, corporate law, property law, civil law, and evidence law inherent in customary land administration and management systems. Indeed, the structure of customary common-property co-ownership is almost identical to the structure of cooperative or "condominium" property-owning in urban areas of the United States and other developed nations. Blocher (2006) suggests that "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." It is in the creative harmonization of the similarities *between* the systems that lawmakers may be the most imaginative.

**Be explicit and clear, leaving no room for interpretations that can weaken protections for the rights of rural communities or vulnerable groups.** The case studies repeatedly illustrate that the laws must be written with their practical implementation and enforcement in mind. If something critical to the protection of customary land rights or the land claims of more vulnerable groups is not explicitly written out word for word, *it will very likely not be inferred*. Land administrators have proved immune to implicit mandates,

especially when power and control over land and natural resources are at stake. Sadly and cynically, laws must be written with the expectation that powerful elites will look for every opportunity to interpret them in such a way as to weaken customary land rights. For example, had lawmakers in Mozambique simply clearly written "the right of community consultation includes the right to say yes or no" or "all agreements between communities and investors are subject to the contract law of Mozambique" then the authentic consent and the integrated development envisioned by the legal drafters would more likely have been fulfilled. Similarly, granting women land rights in Botswana by extending landholding to "citizens of Botswana" has not proved good enough. If the intent is for women to have clear land rights, a law must say, "women and men have the same rights to hold/own land." At the very least, reference should be made to supporting legislation. For example, a law could simply state, "once registered, a community gains legal personality and the rules of corporate association apply".

**Proactively involve members of rural communities and local state administrators in both policy discussions and discussions of draft laws.** The processes set out in a draft law should be reviewed by a wide range of stakeholders and amended before the law is passed. Because legal drafters and legislators usually do not live in rural villages or informal urban settlements, even the best laws, drafted with the fullest intention of protecting the poor's land rights, may have unforeseen flaws or gaps. The poor's participation in the conceptualization of laws that aim to integrate customary and statutory systems will produce better laws. This is because the poor are already using and holding land rights according to custom, and thus know these processes intimately. Involving community members in analysis of draft policies and legislation may help to identify problems or contradictions and bring to light critical issues that have not been adequately resolved in the draft legislation.

Such a process is possible; both Mozambique's and Tanzania's laws were passed after extraordinarily participatory processes and after extensive consultation with a range of stakeholders. Their processes involved exhaustive anthropological and sociological research; consultation with villagers; and national land conferences or workshops that included representatives of donor agencies, members of political parties, religious groups, the private sector, academic institutions, customary authorities, local and grassroots NGOs, and members of rural communities. Mozambique

took the results of its research and consultations very seriously, and the end result was a highly progressive law, reflecting the concerns and needs of a range of Mozambicans.

Similarly, local state officials should be consulted to ascertain whether they have the capacity to carry out the jobs that they will soon be mandated by law to do, or asked about what they would need to successfully carry out their responsibilities. In Botswana, land board officials' difficulty in physically reaching the communities whose land they administer has led to mismanagement and confusion concerning what lands are already held under customary tenure. Before a law is passed, the front-line officials responsible for interacting with communities and individuals should be consulted about its workability, given a chance to request the tools and training they believe they will need to do the job that will be asked of them, and then, once supplied with those requested supports, held rigidly accountable to successfully completing their work.

A final suggestion may be for lawmakers to **pre-emptively investigate how usable and used the systems crafted would be. In an ideal world, a new land law and regulations could be "test driven" or piloted to determine "implementability"**. The legal systems examined herein proposed new governing bodies, new procedures, and new technologies and strategies for claiming, managing and enforcing customary land claims. However, in practice, some of these new structures and systems have proved to be complicated, inaccessible, or easily manipulated by elites, and have in many ways failed to produce the desired results. It is of note that in Tanzania, the Ministry of Lands' project to register informal dwellings in Dar es Salaam had trouble convincing the intended beneficiaries of the utility of following the procedures and paying the low costs of formal registration. One suggestion may be for future lawmakers to draft an administrative process and then allocate time and resources to piloting it on a trial basis in multiple, compositionally-diverse communities throughout the nation. Community members could participate in identifying the structural flaws, brainstorming improvements, and identifying how the draft law could better streamline statutory and customary processes and best protect their interests.

Furthermore, these pilots would be useful for measuring the actual costs of full and successful implementation of the law's mandates. **Before a law is enacted, government officials should undertake a rigorous financial estimate of the costs of the proposed implementation.** A law that is too

costly will not be well-implemented; if the projected costs will be too high to be feasible, changes should be made to the law to bring the projected necessary budget within reasonable limits. Procedures that are too financially burdensome could then be re-conceptualized and amended before the final draft of the law and regulations are presented to legislators.

## **7.2 Recommendations**

Protecting and enforcing the land claims of the rural poor is critical not only for the promotion of local development and prosperity, but also as a matter of justice and equity. As land scarcity and food insecurity continue to grow and governments continue to grant large scale land concessions to foreign investors, documenting land held under customary tenure will become increasingly critical to protecting the poor's land rights, safeguarding rural livelihoods and enhancing sustainable and profitable local natural resource management. Importantly, Alden Wily (2006) reminds us that "insecurity of land tenure is essentially a political condition that can be made, and unmade, at the political level". It is now up to governments to pass or amend national land laws to streamline and simplify these processes and adapt their administrative systems to make them accessible to and affordable for rural communities.

However, one of the key findings of this study is that central governments may more likely embrace and implement laws that elevate customary law upwards, clarifying it, formalizing it, and to some extent making it legible or transparent to outsiders and state officials. In contrast, when land laws decentralize land administration bodies, bringing the state apparatus downward, institutionalizing community-level land administration and management and decreasing central state control over land and resources, the central state is likely to lack the political will or not devote necessary resources to properly implement the law. For the latter approach to work in practice, it is therefore critical to devise methods of ensuring that there is political will to successfully implement such laws, and not only to adopt them.

The foregoing review of the laws of Botswana, Mozambique and Tanzania has revealed various practical considerations and "best practices" that may be applied to other nations' efforts to enact and implement land laws that

harmonize custom and statute. The following recommendations are therefore presented in this light:

1. **Make customary land rights equal in weight and stature to "formal" statutory land rights.** The law must clearly and unequivocally recognize customary land rights as formal land rights that are equal in validity and weight to any rights that have been granted by state agencies, whether or not they have been registered. The law should allow communities and individuals to register their rights at will and according to need, not according to a strict time limit or deadline.
2. **Vest ultimate land rights to the land in communities and create an enforceable fiduciary duty between land management bodies and community members (the land holders).** The land laws analysed within this publication lack sufficient protections for community lands deemed to be "unused" by the state or private investors. To create true tenure security, ultimate ownership and control over all village land must be held by the village or community itself, and community land administration bodies should be granted an explicit fiduciary duty to manage community land on behalf of the community according to the duties that a trustee owes trust beneficiaries.
3. **Establish procedures for documenting and protecting community lands as a whole to protect the meta-unit** from encroachment. Documenting the community as a whole allows for recognition of communal, overlapping and secondary land rights and provides particular protection to poor and vulnerable community members who may rely on communal lands for their survival. Community titling has the potential to safeguard an entire community's land at once, and may therefore be a faster and more cost-effective means of tenure protection than individual titling. Only once community or village lands are registered and protected, then, *slowly*, over time and *according to holders' own volition* may individual or family customary land rights be documented and recorded.
4. **Leave "custom" largely undefined.** Custom must be defined loosely so as to be non-exclusionary and to allow for evolution, flexibility and adaptability over time. Law should allow each community the freedom to define its rules and systems on its own terms, as currently practiced or as changing circumstances would dictate. As such, "custom" can be

defined slowly and according to local needs, in much the same way that common law has changed and developed over centuries. The most appropriate mechanism to recognize customary land rights within its formal legal system may be done not through strict codification at the national level, but by carving out a space for custom within the national legal framework and then allowing each local community to determine and define for itself its rules and governance structures through fully-participatory processes. The law should allow for the expression and practice of the full range of customs within that nation while establishing restrictions that impose basic human rights standards on customary practices, protect against intra-community discrimination, and ensure alignment with the national constitution.

5. **Explicitly protect communal areas, customary rights of way and other shared land use and access rights.** As land claims become increasingly individualized and competition for scarce land and natural resources intensifies, it is important that the range of land use entitlements protected by law include communal areas and customary rights of access and rights of way – especially to shared water points like springs and rivers, community forests, grazing lands, and other natural resources that are rapidly increasing in value. Specific protections should ensure that common properties and other lands not currently under cultivation or use by a specific family are protected from allocation to elites, investors, and state development schemes.
6. **Provide for and encourage the creation of community bylaws.** Documenting customary land claims and devolving land administration and management to the local community only works if the community has a strong sense of community members' rights and responsibilities and of the rules that govern the use of community lands and natural resources. Laws should mandate that communities discuss and determine how they will jointly administer communal areas and shared natural resources. In requiring communities to publicly debate and define the rules by which they will govern themselves, these laws create a space for dialogue and democracy, and can help to ensuring that customary protections for the rights of vulnerable groups are included in established "custom" and adhered to by all.

7. **Provide for and encourage the creation of land natural resource management plans that ensure sustainability.** Laws should provide for community-based decision-making procedures and protocols that vest land and natural resource management decisions in the local communities themselves. Laws may include mechanisms that prompt communities to identify, record and continue customary land and natural resources management practices that have proved over time to enable the sustainable and equitable use of community natural resources. Legal mechanisms (such as CBNRM initiatives) that build upon the strengths of customary land management practices and support conservation and the sustainable use of common pool resources should be established.
8. **Integrate customary practices and direct democracy.** Laws should establish systems of checks and balances between rights holders, state land administrators, and local/customary leaders. A model similar to the original configuration of Botswana's land boards – governing bodies composed of a combination of customary leaders, elected community members, and part representatives of government agencies – may be used as a model for more local, village-level land administration. Certain critical decisions should be put to a community-wide vote. The legal framework should establish mechanisms that promote democratic and open dialogue, negotiation and decision-making among all community members.
9. **Create local land administration and management structures that come out of – and look much like – existing local and customary management structures; are easily established; are highly accessible; and leverage local individuals' intimate knowledge of local conditions.** Even if the formal legal system recognizes customary land claims, if rural community members cannot successfully use the formal legal system, then they have little protection against land speculation by elites and investors.
10. **Locate customary land administration and management systems close to the land and communities they govern.** A land management system too far physically removed from the land it is directed to administrate and manage will not work efficiently and effectively. The institutions or customary authorities responsible for managing community land should be local, or at the very least *mobile*, so that they

regularly visit the villages and communities that they are responsible for managing.

11. **Establish land administration and management systems that are free or extremely low-cost for the poor.** This includes mandating that land surveying services are also free. New technologies (such as GPS/GIS systems) may be leveraged to reduce the costs of technical surveying and associated mapping exercises.
12. **Include accessible, pragmatic and appropriate safeguards against intra-community discrimination.** There should be mechanisms *directly within* the community land governance structure that can effectively protect against intra-community disenfranchisement and ensure that women's and other vulnerable group's land rights are secure within the paradigm of customary land management. To do this laws may provide for community leadership structures that include both customary leaders and members elected by the community, with women and representatives of other vulnerable groups comprising a certain percentage of the members.
13. **Explicitly and clearly protect women's and other vulnerable group's land claims and establish women's right to hold or own land.** Laws must directly address the web of reasons that impact *why* women are not allowed to own land individually within some customary systems. In addition to simply proclaiming the right, the law should also establish formal mechanisms that protect women's land rights. Legislation should place the burden of protection on local officials (state and customary), rather than on the women themselves. Similarly, laws should mandate that the name of all spouses and dependents be put on any formal registration of family property.
14. **Establish good governance in land administration.** Laws must put in place safeguards and oversight mechanisms to make sure that customary and formal land tenure systems are integrated in a way that promotes justice and provides for both upward and downward accountability for both state officials and customary leaders alike. This may be done by creating appropriate mechanisms to ensure the law's enforcement; penalizing state officials who are contravening the law's

mandates; and setting up accessible dispute resolution mechanisms that allow for appeal of community-level decisions.

15. **Proactively address issues of political will.** Lawmakers need to anticipate that implementation of the more progressive aspects of a law that recognizes customary tenure and increases the land tenure security of the poor will be frustrated by elite power holders. The case studies illustrate that government officials tend to selectively enforce and implement only those sections of the law that advance their agendas and interests. Lawmakers must therefore be ingenious in drafting context-specific laws that include mechanisms that foster and generate the political will necessary for comprehensive implementation of all sections of the law.
16. **Create powerful new roles and responsibilities for state officials.** State officials need new roles and responsibilities if the new law devolves their duties to local or customary bodies. Laws should establish appropriate supervisory mechanisms to insure against corruption, mismanagement and inequitable actions undertaken in the name of "custom." State officials must play a role in enforcing the land rights of women and other vulnerable groups and acting as an important check against abuses of power by customary authorities. They may also provide technical advice and capacity-building to customary and village-level land management structures, help communities negotiate, manage and enforce contracts with investors, train customary leaders in national laws and adjudicate appeals from the local level.
17. **Establish a clear system of judicial appeal leading straight from the lowest level of local customary conflict resolution all the way to highest court.** To address jurisdictional confusion between customary and formal legal systems, there should be no disconnect between the customary and the formal legal system during an appeals process; one should merge directly into the next as a ruling is contested and customary rules of evidence and procedures should continue to apply as appropriate. The lowest tiers of appeal should be highly accessible to the poor, with magistrates/judges travelling according to a set schedule throughout their areas of jurisdiction to bring the formal court system directly into villages. **Customary decisions should be recorded for use and reference by higher-level tribunals, and a body of common customary law should be created.**

18. **Align legal proof of land claims with customary practice by formalizing landscape-based evidence and allowing oral testimony as proof of land rights.** Under some customary paradigms, making changes to the natural landscape creates public proof of one's rights over land and increases tenure security; formal laws can easily incorporate "landscape-based evidence" (Unruh, 2006) as proof of land claims. However, lawmakers must take care that such evidence does not discriminate against pastoralists or hunter-gatherers, who may not leave such permanent marks on the lands they have customary rights over. Similarly, the legal weight of collective oral testimony made publically in front of the whole community should be made equivalent to the legal weight of paper documentation and to testimony made under oath on the witness stand.
19. **Customary authorities and judges should train each other, so that each is well versed in the rules of both systems and can apply and understand these rules when making their decisions.** On-going national and regional training sessions should be held, in which customary authorities educate state administrative officials and judges about the basic rules of customary land administration and management systems, while state officials and judges train customary leaders about the national constitution and legislation relevant to their jurisdiction (land and natural resources law, inheritance law, environmental law) as well as basic tenets of international human rights law.
20. **When land laws allow for integrated development** whereby the local community chooses to share some of its lands with an outside investor in return for a premium, rental payment, share of the profits, or other mutual benefits), **legal representation for communities during negotiations concerning land-sharing agreements with investors must be made mandatory.** Similarly, **agreements made with investors must be written down and considered to be formal contracts, enforceable or voidable according to national contract law.** The law should establish penalties for investors that fail to fulfil their terms of the contract, and create a role for state officials in the enforcement of these agreements, with financial incentives for proactively assisting in the creation and fulfilment of agreements that promote measurable community prosperity.

21. **Make customary land transactions legal and enforceable or voidable under contract law.** Where sales, rental and other land transactions are common, the formal legal system must acknowledge the existence of these transactions and make them subject to the basic precepts of national contract law.
22. **Compulsory acquisition laws should be extended to state expropriation of community common areas held under custom, even those that appear to be "unused."** Protections and compensation granted to private landowners in the event of compulsory acquisition must be extended to customarily held claims, and expropriation of common areas held by the whole community must be handled in the same way as individually- or family held lands.
23. **Recognize that customary rules and statutory laws are often not radically different.** It bears repeating that "custom" may be best thought of as "the local way" of doing things, and that societies across the world have established surprisingly similar mechanisms for addressing what is actually a fairly limited set of property transactions and relations. When closely analysed, customary and statutory legal systems are not as divergent as may be thought. Lawmakers may start by working to understand customary laws and then identifying areas of overlap that may be useful for creative integration of statutory and customary land law.

In conclusion, it is important not to underestimate rural communities' desire to document and protect their customary land claims and to remember that communities and custom are flexible and adaptable. Recent studies<sup>119</sup> are illustrating rural communities' profound desire to leverage the formal system to document and protect their customary lands. Data<sup>120</sup> is showing that with minimal external support, rural communities will learn the formal laws, will take action to pursue their legal rights to customary lands and will put in the time and effort to follow the requisite administrative procedures to protect their land claims. In consideration of various African nations' recent trend of granting of vast areas of land to foreign investors, the urgency of placing real ownership in the hands of the people living and making their livelihood

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<sup>119</sup> See the International Development Law Organization's (IDLO) Community Land Titling Initiative, available at [www.idlo.int](http://www.idlo.int).

<sup>120</sup> See e.g. IDLO's Community Land Titling Initiative, final report forthcoming.

upon lands held according to custom cannot be overstated. True tenure security will only come from elevating customary land rights up into formal law, and making customary land rights equal in weight to registered rights. National governments must take steps to both amend their land laws to strengthen protections for customary land claims as well as devote the resources necessary to ensure their efficient, just and equitable implementation.

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8. Legislación de aguas en América Central, Caribe y México – Vol. I, 1983 (S)
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10. Water law in selected European countries (Belgium, England and Wales, France, Israel, Italy, Spain, Turkey) – Vol. I, 1979 (E\* F S\*)
11. Fundamentos teóricos para una legislación tributaria en el sector agropecuario, 1976 (S\*)
12. International food standards and national laws, 1976 (E F\*)
13. Derecho agrario y desarrollo agrícola: estado actual y perspectivas en América Latina, 1978 (S\*)
14. Legal and institutional responses to growing water demand, 1977 (E\* F\* S\*)
15. Systematic index of international water resources treaties, declarations, acts and cases by basin – Vol. I, 1978 (E/F/S\*)
16. Seed legislation, 1980 (E F\* S)
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18. Reforma agraria y desarrollo rural integrado, 1979 (S\*)
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20. Legislation on wildlife, hunting and protected areas in some European countries, 1980 (E\* F\* S\*)
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23. The law of international water resources, 1980 (E\* F S)
24. Irrigation users' organizations in the legislation and administration of certain Latin American countries, 1983 (E S)
25. Legislation on wildlife and protected areas in Africa, 1984 (E F)
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27. Regional compendium of fisheries legislation – West Africa (CECAF Region), 1983 (E/F\*)
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30. Water law in selected European countries (Cyprus, Finland, the Netherlands, Union of Soviet Socialist Republics, Yugoslavia) – Vol. II, 1983 (E)
31. The role of legislation in land use planning for developing countries, 1985 (E)
32. Agricultural census legislation, 1984 (E\*)
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35. Regional compendium of fisheries legislation (Western Pacific Region) – Vols. I and II, 1984 (E)

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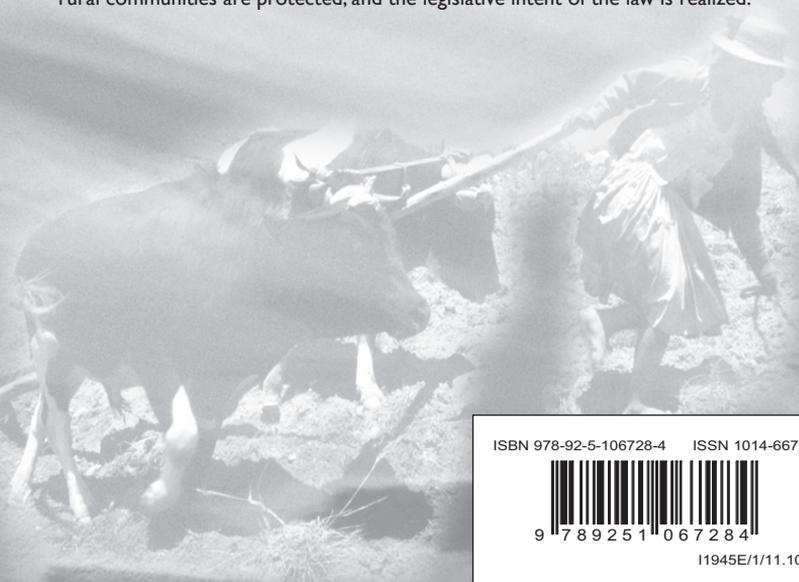
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Given the recent trend of granting vast areas of African land to foreign investors, the urgency of placing real ownership in the hands of the people living and making their livelihood upon lands held according to custom cannot be overstated. This study provides guidance on how best to recognize and protect the land rights of the rural poor. Protecting and enforcing the land rights of rural Africans may be best done by passing laws that elevate existing customary land rights up into nations' formal legal frameworks thereby making customary land rights equal to documented land claims. This publication investigates the various over-arching issues related to the statutory recognition of customary land rights.

Three case studies of land laws in Botswana, Tanzania and Mozambique are analysed extensively in content and implementation, concluding with recommendations and practical considerations on how to write a land law that recognizes and formalizes customary land rights. It cautions lawmakers that even excellent laws may, in their implementation, fall prey to political manipulation and suggests various oversight and accountability mechanisms that may be established to ensure that the law is properly implemented, the land claims of rural communities are protected, and the legislative intent of the law is realized.



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