VII

CONCLUSIONS AND RECOMMENDATIONS

Contents

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.[112]

Furthermore, an appropriate way to integrate customary land systems into the national legal framework would be to identify those areas of customary

[112] 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 and 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.[113]

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

[113] 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.[114]

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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[114] 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' 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, and 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 been 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.[115]

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

[115] 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.**[116] In the face of emerging covert and

[116] 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 [117]) 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.[118] 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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[117] 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).

[118] 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 or 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. C**ustomary 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 contact 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[119] are illustrating rural communities' profound desire to leverage the formal system to document and protect their customary lands. Data[120] 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

[119] See the International Development Law Organization's (IDLO) Community Land Titling Initiative, available at www.idlo.int.
[120] 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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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.

ISBN 978-92-5-106728-4 ISSN 1014-6679

I1945E/1/11.10

105 Statutory recognition of customary land rights in Africa – An investigation into best practices for lawmaking and implementation FAO