IV

MOZAMBIQUE'S LAND LAW

Contents

4.1 Introduction

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

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

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

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

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

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

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

4.1.1 Historical context

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

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

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

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

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

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

4.1.2 Mozambique's land policy

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

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

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

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

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

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

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

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

4.2 Customary rights in the law

4.2.1 Turning customary land rights into statutory rights

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

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

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

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

[41] Article 1§7 also makes this point, defining "occupancy" as a "form of acquisition of the right of use and benefit of land by national individual persons who have been using the land in good faith for at least ten years, or by local communities."

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

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

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

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

4.2.2 Accommodating diverse customs under one law

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

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

4.3 Community land rights

4.3.1 Making the community a formal legal entity

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

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

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

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

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

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

4.3.2 Community land administration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[45] SPGC representatives are also often included as representatives of the district administrator, and therefore perform both a technical and a representative function.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.3.4 Community land and natural resources management

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

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

4.3.5 Respecting customary rights of way

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

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

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

4.4 Individual land rights

4.4.1 Claiming individual customary land rights

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

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

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

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

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

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

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

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

4.4.2 Transfer, inheritance, sale and mortgage

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

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

4.4.3 Women's land rights

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

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

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

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

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

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

4.5 Consultations and community-investor partnerships

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

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

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

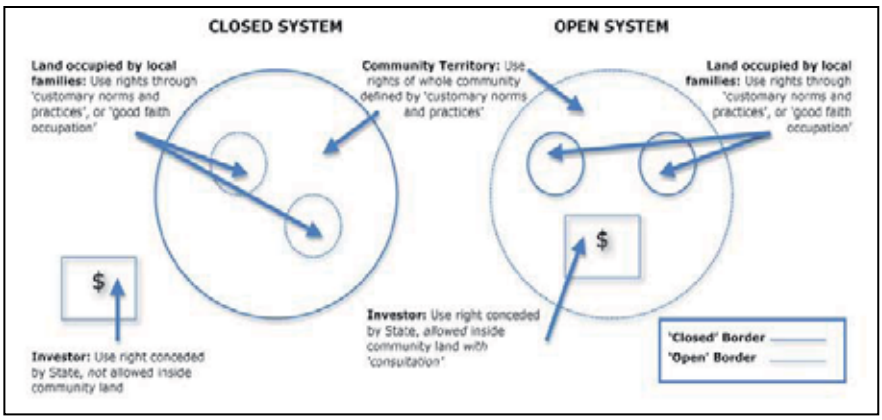
is likely, given the definition of occupation by a community in Article 1 of the land law) then "A joint operation shall be carried out, involving the Cadastre Services, the district administrator or his representative, and the local communities.[55] The outcome of this work shall be written up and signed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

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

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

receive certain "benefits", amenities, or rental payments in exchange for the use of their land.[56]

Diagram 2: Closed versus open land use systems



Tanner, 2002

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

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

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

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

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

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

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

4.6 Dispute settlement and accountability mechanisms

4.6.1 Conflict resolution

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

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

4.6.2 Oversight and supervision

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

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

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

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

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

4.7 Implementation challenges

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.7.4 Pro-investment policies impede quality community consultations

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

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[62] www.portaldogoverno.gov.mz

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.8 Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[67] Personal communication, Chris Tanner, September, 2010.

V

TANZANIA'S VILLAGE LAND ACT

Contents

5.1 Introduction

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

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

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

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

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

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

5.1.1 History

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

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

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

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

5.1.2 Customary land management in Tanzania

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

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

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

5.1.3 The land policy

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

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

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

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

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

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

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

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

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

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

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

5.2 Accommodating diverse customs under one law

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

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

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

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

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

5.3 Village land claims, rights and governance

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

- **Reserved land** is defined in the acts as all land set aside for special purposes, including forest reserves, game parks, game reserves[71], land

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

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

- **Village land** is the land falling under the jurisdiction and management of a registered village. The land determined to be "village land" in Tanzania is comprised of 12 000 villages (10 500 of them registered) that are in turn divided amongst 55 066 sub-villages (Shivji, 1999 at 4; Alden Wily, 2003 at 16; SPILL, at 12). Village land includes:
  - Lands within the boundaries of the village established by demarcation or designated under previous laws (art. 7§1(a–d));
  - All lands that are part of a registered village (under the Local Government (District Authorities) Act;
  - Land designated as village land under the Land Tenure (Village Settlements) Act of 1965;
  - Land that has been demarcated as village land under any law or administrative procedure – whether formally approved or not;
  - Land that has been agreed to be village land by relevant stakeholders; and
  - Land that villagers have been regularly using in the 12 years before the Village Land Act was passed, including lands lying fallow, lands used for pasturing cattle, and land used for passage to pasture lands (art. 7§1(e)).

- **General land** denotes all land that is neither reserved land nor village land; all urban areas fall under this category.

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

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

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

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

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

Customary Rights of Occupancy	**Granted Rights of Occupancy**
1. Apply, with some exceptions, to village lands. Stem from customary law and pre-existing land holdings. 2. May or may not be backed by a certificate or written document. 3. Carry the same weight and validity as granted rights of occupancy.	1. Apply to general lands and reserved lands. Are awarded by the state after formal application. 2. Always have formal written documentation. 3. Carry the same weight and validity as customary rights of occupancy.

(Land Act sec. 4§3)

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

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

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

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

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

5.3.1 Claiming community land rights: the village registration process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

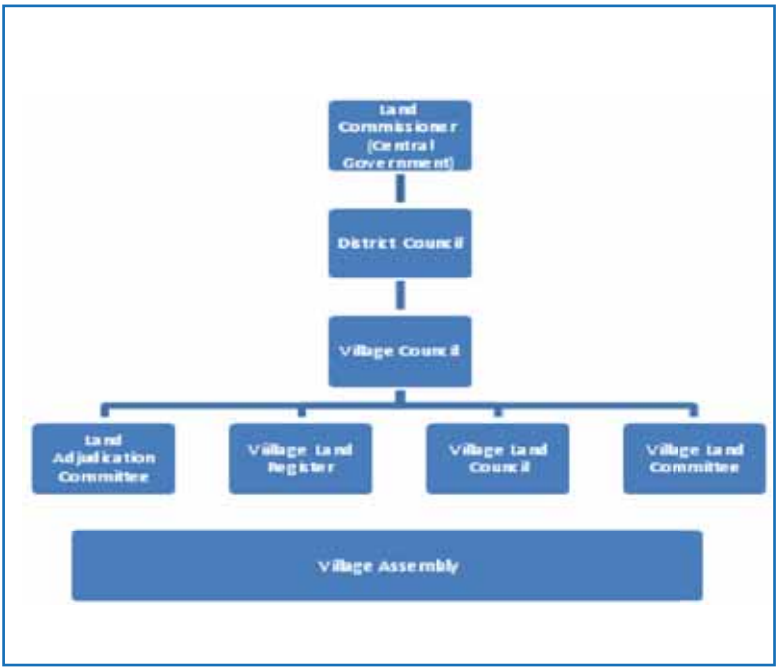
More troubling are the varying definitions of general land in the two acts, which have created a legal loophole through which village land can be taken out of the village and vested under the control of the Commissioner of Lands. While the Village Land Act defines general land as "'all public land which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

5.3.2 Village land administration and management

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.3.3 Village land registration and pastoralists' rights

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

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

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

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

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

5.4 Individual rights

5.4.1 Formalizing customary land rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.4.2 The adjudication process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.4.3 Transfer, inheritance, sale and mortgage

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

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

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

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

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

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

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

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

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

5.4.4 The land rights of vulnerable groups

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

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

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

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

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

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

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

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

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

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

5.4.5 Granting customary rights of occupancy to non-villagers

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

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

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

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

When making this recommendation, the village council must consider:

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

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

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

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

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

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

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

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

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

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

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

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

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

5.5 Dispute settlement and governance

5.5.1 Conflict resolution

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

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

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

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

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

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

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

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

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

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

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

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

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

5.5.2 Accountability, supervision and control

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

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

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

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

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

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

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

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

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

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

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

5.6 Implementation challenges

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

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

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

5.6.1 Challenges identified by stakeholders

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

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

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

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

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

Moreover, the lack of finances and actual administrative capacity necessary to implement the Village Land Act have so far been an almost insurmountable obstacle; at the 2005 symposium, the permanent secretary described that "The cost of full implementation nationwide is staggering" and explained that difficulties in implementation stemmed from shortages of resources, especially the lack of village level maps for land use planning (Symposium 2005, opening address, Sijaona). Participants expressed concern at the lack of capacity at the district level to implement the acts, the lack of central support for implementation-related tasks, and the lack of funding for adjudicative processes and tribunals.

A range of suggested steps for improved and expanded implementation were recommended by symposium participants, including:

- Clarification of the land laws, so as to make their language simpler for a lay person to understand and apply;

- Raising public awareness of the acts through training and education programs and dissemination of brochures and other materials, by both the state and NGOs;
- Mainstreaming the land acts into the laws of the local governments to ensure application;
- Simplification and shortening of procedures to facilitate villagers' use of forms and administrative processes;
- Increased focus on the issuance of village land certificates to relieve land-related conflicts between neighbouring villages;
- Increased funds available to decentralized bodies to facilitate implementation and issuance of certificates;
- Improved training and increased resources for adjudication bodies at the village/ward level, so as to facilitate dispute resolution and bring it closer to villagers for easier access (Symposium 2005, group 1, paper 6).

It is not at all clear whether these or other steps have been taken to enhance capacity and awareness.[96]

5.6.2 Challenges identified by the Ministry of Land and Human Settlements

In 2005, seven years after the land acts were passed, the Ministry of Lands and Human Settlements published its "Strategic Plan for the Implementation of the Land Laws" (SPILL). SPILL was created after a national workshop and consultation with over 2 700 stakeholders throughout Tanzania. SPILL's articulated aim is to provide a broad framework for the implementation of the Land Acts, enabling all that "needs to be done by the land administration machinery to frame and safeguard customary and granted land rights for users so as to…facilitate the alleviation of poverty through enhanced incomes arising from investments in land" (SPILL at v.).

SPILL outlines the various challenges to successful implementation of the Land Acts. Its list is overwhelming in scope and breadth; challenges identified include:

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[96] Personal communications with a range of land-related NGOs in Dar es Salaam, October 2008.

- Lack of capacity and technical skills of land administration professionals;
- Lack of government initiative and effort to resolve land-based conflicts;
- "Inefficient and ineffective land administration";
- Shortage of planned, surveyed and serviced land available for investment; massive growth of irregular settlements;
- Poor enforcement of rules and planning regulations;
- Unregulated land markets;
- Poor provision of urban services and infrastructure;
- Absence of mortgage facilities;
- Lack of dispute settlement institutions and machinery;
- "Non-optimal institutional framework for land administration and development";
- Absence of maps for land administration and planning;
- "Paucity and inconsistency of data" for geo-referencing of land;
- Suspension of key survey and mapping activities;
- Incomplete boundary surveys of registered villages;
- A "duel centralized" land administration system far "detached from land users";
- Lack of harmonization of all laws related to land administration;
- Under-funding for maintaining the information critical to land administration, including lack of computerization of records, digital mapping and GIS surveys;
- Concentration of land administration services in certain areas of the country, with a lack of services in other areas;
- An "old mindset on modern land dispensation"; and, perhaps most importantly,
- "Lack of will to enforce the law," among other factors (SPILL at x–xi, 9, 94–98).

In relation to the settlement of land disputes, during consultations with stakeholders in preparation for the drafting of the SPILL, it was noted that the settling up of village councils and land tribunals has been so delayed that there was a feeling that "the delay of justice was tantamount to the denial of justice." Moreover, rural consultations undertaken in preparation for the drafting of SPILL revealed that ward tribunals were generally located so far

from many villages that it was difficult for villagers to reach them, creating an inability to appeal land conflicts or land decisions above the village level (SPILL at 21).

The Ministry of Lands' long list of highly self-critical obstacles, impediments and hindrances indicates that the task of implementing the land acts is immense in scope. The cost of full implementation is estimated to be in the hundreds of millions, and it is as yet unclear where this funding will come from (Sundet, 2005 at 63).

5.6.3 The "Strategic Plan for the Implementation of the Land Laws" (SPILL)

The SPILL's plan of action relative to villages centres on certain main interventions. These are: making efforts to curb explosive land conflicts; instituting limits on household landholding to ensure that more families can access land; increasing the number of registered villages; creating and delivering certificates of customary rights of occupancy throughout Tanzania; setting up village land councils; and creating formal links between NGOs, CBOs and district land offices to facilitate implementation (SPILL at xii). SPILL also identifies capacity-building and "re-orientation" of land administration staff as a central need to ensure effective and just implementation of the land acts, as well as greater inter-ministerial cooperation (SPILL at 26 and 29).

Other work identified in the SPILL plans plan of action as critical to effective implementation of the land acts includes:

1. Strengthening, expanding and decentralizing land administration offices and staff;
2. Devolving responsibilities for physical planning, surveying, registration and valuation to the district land offices;
3. Facilitating the delivery of justice in safeguarding land rights (in particular enforcing the sanctity of certificates of occupancy);
4. Involving the private sector's expertise in the execution and delivery of technical/professional services;
5. the creation of a regulated land market; and
6. Resources for land-related finance, investment and adjudication (SPILL at 38).

SPILL's final assessment of the major work that needs to be accomplished for the medium to long term is:

- Ending discrimination against vulnerable groups in land access and administration through affirmative action at all levels;
- Developing land information systems and geographical information systems in district land offices to enhance data manipulation information and record keeping;
- Expanding and empowering the national council of professional land surveyors;
- Educating the public (including community leaders) on fundamental principles of land law and policy;
- Enforcing land development conditions for land held under a granted right of land occupancy;
- Providing national mapping infrastructure;
- Produce participatory land use plans at all levels to guide physical planning and land use processes;
- Developing a modern land administration infrastructure;
- Establishing district land boards;
- Creating training programs in universities to create the next generation of trained land administration professionals;
- Decentralizing all land administration support services to the district level;
- Amending legislation to harmonize all relevant laws with the land acts;
- Forming a national land advisory council; and
- Establishing district compensation funds to manage all taxes collected and costs of decentralize land administration, among other solutions (SPILL at 48).

In essence, therefore, SPILL calls for the total and complete overhaul of every component the national land administration system. Indeed, the Village Land Act, in and of itself, calls for the total and complete overhaul of every component the national land administration system. The changes that both the act and SPILL outline go to the heart of local and national governance and call for structural changes to existing state bodies at every level of government.

Four years after its formulation and publication, there is little information publicly available about SPILL's progress. One study, undertaken in Mvomero district and published in 2009, found generally, that:

> [The] decentralized land administration bodies have been established, [but] with villagers and officials having minimal knowledge of the role and functions of the bodies [they serve on]. Women are represented on such bodies but their participation has not resulted in equal access and ownership of land by both men and women...The study has also found out that awareness creation, orientation, and training on the implementation of the land laws is yet to commence, a decade after their enactment (Kassim 2009 at 33).

Of particular interest is the study's finding, verified in an interview with the District Land Office, that: "the issuance of certificates of customary rights of occupancy is yet to commence" both in the study district "and in most parts of Tanzania" (Kassim 2009 at 27, 33).

5.6.4 The President's Property and Business Formalization Programme (MKURABITA)

The Property and Business Formalization Programme (MKURABITA is the Kiswahili acronym) is a plan of action housed in the President's Office. MKURABITA's goals and objectives are based upon the work and theories of the Peruvian economist Hernando de Soto[97] and supported by the UN Commission on the Legal Empowerment of the Poor, centre on opening up Tanzania's land and entrepreneurial resources to greater economic profitability by deregulating and simplifying administrative procedures. Its

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[97] Hernando de Soto generally promotes a land privatization agenda, so as to "unlock" the "dead capital" that keep the poor "trapped in the grubby basement of the pre-capitalist world" (De Soto, 2000 at 56). De Soto's remedy for this is to craft legal systems that legitimize customary and informal land holdings and give citizens of developing nations formal legal title to their lands, homes and businesses. As MKURABITA illustrates, de Soto's theories continue to impact and influence the tenure security debate. As such, they deserve a brief explanation. *The Mystery of Capital* has two main points: 1) that formal legal systems must be usable, navigable, and must reflect the lived realities of the poor and accommodate their needs and interests (de Soto, 2000); and 2) that the way to do this is to formalize and privatize all property claims. A full debate on the limits of De Soto's theories is outside the scope of this paper.

stated objective is "to build legal and institutional frameworks for property (real estate) and business that will bring together, standardize and modernize the prevailing local customary arrangements and property matter, so as to create unified national property and business legal system that incorporates all sectors of the society".[98]

MKURABITA is not a policy or an implementation programme but a process of researching and designing legal reforms and government practices to "open up the formal economy to those who are presently excluded from it."[99] Arguing that "even though the poor owners and small entrepreneurs collectively have substantial wealth in terms of property and businesses informally held and operated, their assets are 'dead capital' which cannot be used to generate more wealth," the policy brief explains that "the Government of the United Republic of Tanzania has initiated [MKURABITA] to enable it to address these economic and legal imbalances, and develop a property and capital formation system that is tailored to the circumstances of the disadvantaged".[100] As such, MKURABITA aims to "standardise and modernise prevailing customary arrangements into one national property and business legal system"; "enable the government to govern market activities more effectively"; "standardise recording of poor people's assets so that they are widely accepted as a basis for raising money"; and "enable overall economic policies and supporting mechanisms such as monetary and fiscal stimuli to work once most people are inside the legal market economy".

Of MKURABITA's ten planned final outputs, two are of note. First, MKURABITA plans to overhaul existing land laws in Tanzania; it will work with central and local government to "streamline and decentralize procedures for issuing title [and] chang[ing] applicable laws and regulations." Under this objective is the recommendation that "community-level customary land management practices reflect local cultures but should be harmonized into a unified system that works for the whole country." Second, MKURABITA plans a "revision of the legal framework governing property rights." This will involve "conducting studies and preparing draft bills for a new, unified legal system that incorporates useful aspects of current 'extralegal' practices and will be more friendly to the majority of

[98] See www.mkurabita.go.tz

[99] See groups.google.com/group/mkurabita_debate.

[100] See www.mkurabita.go.tz.

people…[and creating] one unified legal system governing properties and businesses created for Tanzania and Zanzibar." To do this, the MURABITA team will "prepare a regulatory framework for the informal sector." In doing so, it will "review existing laws governing property rights and business," as "current customary practices are a rational response to a hostile legal framework."

While Tanzania's Village Land Act indeed need to be simplified and the administrative procedures it mandates need to be reduced (along with the 50 necessary forms that accompany the Village Land Act) the MKURABITA' plan to overhaul the land acts appears to be a perpendicular, rather than parallel path to SPILL. It is of some concern that Tanzania is currently undertaking two separate large-scale interventions, one of which is designed to implement the acts, and the other to overhaul them. Palmer cites Alden Wily as explaining that the land acts are meant to be under constant review and subject to frequent amendments (Palmer, 1999 at 1). Yet the complex relationship between the President's Office's MKURABITA program and the ministry's SPILL initiatives indicate a deeper conflict than review and amendment.

Adams and Palmer report that the outcomes of MKURABITA "remain somehow vague" and that the relationship between MKURABITA and SPILL "remains unclear." Yet they find that MKURABITA has strongly influenced the official language around land tenure in Tanzania; they report that "the debate is increasingly being framed in terms of 'making dead capital come alive', and emphasising the importance of formalisation as a basis for accessing credit" (Adams and Palmer, 2007 at 50–53).

5.6.5 SPILL and MKURABITA implementation limited to pilot projects

Over the past few years, both SPILL and MKURABITA have implemented pilot projects to try to effectively implement the Land Acts. The (mostly unintended) results of these pilot projects sound a note of caution, and are worth analysing in consideration of how the Village Land Act may best be implemented.

MKURABITA ran a pilot project in seven villages in the district of Handeni, to test the land use planning, registration and formalization processes set out

in the Village Land Act. Langford explains how the NGOs contracted to run the pilot project described how many elements of the processes of land registration had gone well, including: demarcation of village boundaries; issuing of land certificates in five villages; a participatory rural appraisal process; development of land use plans and by-laws; zoning of farms; and processing of certificates of customary right of occupancy (Langford, 2007).

Yet Langford describes how during the pilot program, the NGOs ran into a number of unanticipated problems and consequences, including: conflicts between farmers and pastoralists that arose from registering land under a single owner and "leaving communal usage to the mercy of regulatory by-laws"; "minimal genuine participation" in the process, with most participants only becoming aware of the purpose of the project in its final stage, as they filled out applications for certificates of rights of customary occupancy; and the fact that the process raised awareness of land ownership to "near-hysterical proportion", paving the way for unanticipated land grabbing." Langford (2007, citing Kosyando, 2007) cites the NGOs as concluding that "all in all, the titling process created new landlords and formalized landlessness." These NGOs also observed that "pastoralists were among the 'main casualties' and that future processes needed to embrace 'both individual and communal ownership'." Their reports describe how joint registration by women and men was the exception rather than the norm, and how "men, often in polygamous marriages, usually registered all property under their name."

Meanwhile, the Ministry of Lands, Housing and Human Settlements Development was simultaneously implementing its own "residential licenses" project in Dar es Salaam, the aim of which was to register all land in informal settlements in the city, providing residents of these areas 33-year Granted Rights of Occupancy Certificates. Langford reports how from 2004 until 2006, the project surveyed roughly 400 000 properties with satellite and aerial photography and compiled the information into a public property register. Residents of informal settlements were then encouraged to complete the formal application process for a granted right of occupancy, which cost the equivalent of US$5.00 plus an annual rent of less than US$3.00. Langford describes how "occupiers were reticent about payment of costs" and that by the end of the pilot project in 2006, less than 255 of the surveyed properties had been registered. Langford (2007) suggests that this may indicate that in

the minds of the informal residents, "that the benefits of informality outweighed the costs of the formalisation that was offered."

Furthermore, it appeared that two-thirds of the informal residents were tenants who had been excluded from the project. According to one analyst, the entire project was "conceived and planned without much consultation" and sensitisation was only carried out "after the project planners had laid down elaborate implementation procedures" (Langford, 2007, citing Midheme, 2007). Adams and Palmer (2007 at 50–53) suggest that these low registration figures were due to "a lack of interest among those eligible," possibly caused by: "the short-term character of the licences; local government branches using the occasion to collect other taxes and fees when people come to pick up the licences; wealthier landlords not wanting their properties (and the related incomes) documented; and generally a lack of visible advantages for rights-holders." They note that due to the costs of registration, the program has encountered criticism for benefiting mainly relatively wealthier informal residents.

The Ministry of Lands and Human Settlement Development also undertook pilot programs establishing land registers at the village and district level in the district of Mbozi. Adams and Palmer (2007 at 50–53) cite Kironde (2007) as explaining that a team from the Ministry of Lands' "Land Act Implementation Task Force" spent four weeks holding seminars and training and educating both district and ward officials and administrators and villagers about the Village Land Act. In partnership with their neighbours, villages then demarcated their boundaries, and surveyors were called in to prepare cadastral survey plans based both on participatory village maps and photo interpretations. A computer database was created, with individual surveyed parcels numbered and linked to the names of the families on the land. The project was considered to be a success, yet its high costs raised concerns that such efforts would not be widely replicable. [101]

[101]Although not a disinterested party, The ILD, De Soto's research institute, who carried out the research component of MKURABITA, reported that "approximately 45 percent of villages have yet to be officially demarcated, or at least with general boundaries recognized by the Minister of Lands. It is estimated that only 38 percent of the mainland villages have been surveyed and only 167(1.6 percent) of the same have obtained an official certificate of village land from the Minister of Lands" (ILD, 2005 at 26–27).

5.6.6 Increased marginalization of pastoralists despite legal protections

As mentioned above, the Village Land Act contains numerous provisions for the protection of the land rights of pastoralists. However, Odgaard reports that various pastoral organizations are afraid that as a large percentage of the land areas used for pastures fall under the category of general land, which is under the exclusive control of central government, these pastures may be looked at as "idle" or "bare" land and be identified by officials as suitable for allocation for investment purposes. Alternatively, they fear that the government will argue that it is "in the public interest" that their pasturelands be allocated for commercial production. According to Odgaard, the pastoralists' fears are well-grounded. He cites one SPILL document as asserting that:

> Pastoral production has very low productivity levels (meaning it marginally addresses poverty reduction policy)…. Pastoralism degrades large masses of land (meaning is not environmentally friendly)…Pastoralism invades established farms (meaning it violates security of tenure)…At the moment it is impossible to control livestock diseases, thus making it difficult to export meat, milk and livestock due to international demands on livestock, health and products free of infectious agents (meaning has marginal support only to economic development).... Pastoralists have to be given land and told to settle (meaning nomadic tradition has to stop) (SPILL, URT 2005d, p. 14, cited in Odgaard, 2006).

Odgaard (2006 at 23) reports that although a number of pastoral organizations have been actively working to influence the policy processes, their concerns and interests have not been afforded much weight. He argues that despite the Village Land Act's numerous protectionary provisions, pastoralists may not be able to harness or leverage these protections to protect their land claims. In particular, under the Village Land Act, for a land claim application to be successful, an applicant must be able to illustrate visible proof of use of and investment in his or her land – such as planted trees, stranding crops, or residential structures, etc. Because pastoralists range over wide areas and so not erect permanent structures, they generally cannot provide this proof; as such, there has "therefore been a continuous

marginalizing process, which has forced pastoral peoples ... to leave their home areas because their lands have been taken and used for other purposes" (Odgaard, 2006 at 33).

5.6.7 International investment in Tanzania

A 2009 report by IIED and FAO relates how Tanzania has been converting vast swaths of village land into general land to transfer that land to investors. The report explains that the national-level Tanzania Investment Centre (TIC), the agency that coordinates and facilitates large-scale national investments, has to date allocated about 640 000 hectares for biofuel production in Tanzania (out of a total of 4 million hectares requested by companies). According to one case study, "a Swedish company is in the process of securing 400 000 hectares for sugarcane production in the Wami River basin in Bagamoyo District. Evidence suggests that about 1 000 small-scale rice farmers on these lands will need to move, and are not eligible for compensation as the land is 'general' not 'village' land" (Cotula *et al.,* 2009 citing Sulle, 2009 at 73).

The study found that in this case, while investors negotiated directly with village councils for payment and compensation for the lands, "there are no formal documents to bind either party to these agreements." Moreover, the report finds that rather than paying for the land, "given the lack of an active land market in Tanzania, market-based per hectare rates have little meaning… [s]some companies compensate for the value of the resources on the land, such as trees and grazing, rather than the land per se." Meanwhile, the state does not appear to always pay the compensation mandated for compulsory purchase processes (Cotula *et al*., 2009 citing Sulle, 2009 at 73).

Importantly, access to water resources after the transfer of this land has so far proven to be a source of conflict, difficult to resolve in the absence of clear regulations or guidelines from government on sustainable levels of water abstraction (Cotula *et al.,* 2009 citing Sulle, 2009 at 73). Finally, the report finds that

> There is little sign that efforts are made specifically to include [in the interactions surrounding the large-scale land concessions] significant social groups such as women, or user groups such as pastoralists. Indirectly affected communities,

> for example those affected by migration out of project areas, have not been included to date. Consultation tends to be a one-off event rather than an ongoing interaction through the project cycle. An underlying problem is not so much reluctance on the part of local government and companies to "do the right thing" but rather a lack of experience and guidance to shape better practice (Cotula *et al.,* 2009, at 74).

As such, despite the Village Land Act's protections and mandates, the fair, equitable, and inclusionary aspects of village-investor partnerships envisioned in the law (described in section 5.4.5) are not being realized. However, it is heartening that the issue may be less of trying to avoid payments or partnerships but more of inexperience and lack of guidance. There is therefore potential for these negotiations and transactions to be improved by training and supports for state officials.

Finally, there is anecdotal evidence that suggests that large areas of land are being removed from village jurisdiction and transferred to investors, using the loophole providing for a wider classification of "general lands" in the Land Act. This evidence suggests that such transfers are occurring without villagers' knowledge or approval.[102]

5.7 Analysis

Reaction to the Village Land Act has been very mixed. For proponents of the law, the challenges are merely ones relating to training, capacity-building, and oversight to ensure compliance with the extensive procedures laid out in the act. Alden Wily has argued that the land acts are "basically sound", and at the time of its passage called the Village Land Act, "The best land law passed in Africa in terms of ´vesting authority and control over land at the local level´" (Palmer, 1999, citing Alden Wily).

Like Mozambique's law, Tanzania's Village Land Act devolves land administration and management to the village level. Yet the Village Land Act seems to have been written with each of the questions left unaddressed in Mozambique's law at the forefront of lawmakers' minds: How to allow communities the freedom to govern themselves according to their own rules, yet guard against intra-community discrimination? How to ensure that

[102] Personal communication with Haki Ardhi, November 2008.

women's land rights are enforced by local customary authorities? How to ensure that the poor cannot sell their land in times of desperation through unconscionable land deals? How to make district officials downwardly accountable to the people? How to create systems of checks and balances to protect against local-level corruption and manipulation by elites? How to ensure that agreements made with outsiders are enforceable, and that abuses by outsiders are subject to penalties? In this respect, Tanzania's Village Land Act does a superb job of addressing both the potential injustices inherent in an unregulated customary system and the possible abuses of power and influence that often emerge when villagers negotiate with outsiders over land and natural resources.

The law does many other things exceptionally well: all existing and valid customary land claims were instantaneously transformed into formal and defendable land rights at the moment of the law's enactment, thus ensuring protection of the poor's land claims. Pastoralists' land uses and land claims are protected right alongside the claims of small scale farmers, including allowance for dual and joint use and management of certain lands by different communities. Women's land rights are protected not only in processes of application for land, divorce and widowhood, but also in the event of a land sale, transfer or surrender; every assignment must be reviewed by the village council and will be nullified if found to undermine a woman's right to land. Mechanisms to protect the poor against bad faith market transactions are included. Both upwards and downwards accountability mechanisms have been put in place: the village council cannot assign a grant of customary land right without approval from both the village assembly (composed of every adult village member) and review by the district commissioner, and must report on its land management efforts both to the village assembly and to the ward. Unconscionable, corrupt or fraudulent land sales will be voided, and penalties enforced. There is a right to appeal village-level dispute resolution outcomes all the way to the highest court of Tanzania.

For those inherently opposed to the Village Land Act, the law's inscrutability promises to allow only for elite capture and increased tenure insecurity for the poor. For the Village Land Act so extensively prescribes these myriad protections, in impenetrable legal language, that they are often lost in the sea of caveats, clauses and exceptions. Article 3§1(m) of the Village Land Act mandates that "Rules and law about land have to be laid out in such a way

that every citizen may easily understand them." This assertion is ironic at best: the Village Land Act is extraordinarily complex and confusing. Every protection is there, for every possible vulnerable group, yet it is unlikely that anyone but a very determined advocate or Justice of the High Court will ever read the law with enough concentration to adequately distil the legislative intent. It appears that because of its complexity and impenetrability, very few Tanzanians are aware of either their new land rights under the act or how to go about implementing and enforcing them. Even the Kiswahili version is "not very accessible" writes Alden Wily (2003). How then, will villagers and pastoralists be able to learn the law fully enough to use it as a tool to protect and defend their land claims? [103]

Patrick McAuslan, the British consulted hired to help draft Tanzania's land acts, argues for a "painstakingly detailed" approach to legislative drafting, in which considerable procedural detail is included in the land law itself rather than in regulations under the land law. He writes:

> [O]fficials armed with powers and subject to few or no restraints cannot be relied upon to behave reasonably …but at least where there are rules and procedures which have to be followed, a challenge can be mounted to unreasonable behaviour. In much of Africa, the allodial title to land is vested in the state … this means that the citizen has to obtain land from the state and its organs, with state officials managing the land as landlords or trustees. In such cases as these, land law ceases to be a private matter, but becomes part of public law; it is in fact, administrative law. Administrative law or administrative justice requires that official power be bounded by legal rules, be exercised in accordance with certain principles of fairness, allow for hearings and appeals, and be subject to review. [A further] reason for supporting an

[103] However, this may say more about the state of the legal profession in Tanzania than about the Land Act *per se*. It is noteworthy that with the exception of the original guides made by the state, some Swahili-language guides made by NGO's, and Alden Wily's 2003 manual, entitled *Community-Based Land Tenure Management: Questions and Answers about Tanzania's New Village Land Act, 1999*, it is arguable that not enough has been done to ensure that Tanzanians know and understand their rights under the Village Land Act. In particular, Tanzanian lawyers and the national bar association have not taken steps to ensure that the state administrative and justice systems are well versed in the law, or to file cases to demand its proper implementation.

> approach of "more" rather than "less" law is, paradoxically perhaps, the existence of the market. [O]nce the land law recognizes and protects private rights, and facilitates dealing with those rights in the market place, the law has to be much more specific, detailed and clear (McAuslan, 2003 at 255–58).

McAuslan is perfectly correct. Indeed, when land is owned by the state, land law does become a form of administrative law, which is best tightly bound by clear procedures and specific mandates.[104] Yet extensive regulations work well when there are advocates, attorneys and watchdog groups making sure that administrators follow every regulation. McAuslan's argument is an optimistic one, for it rests on a faith in the rule of law and the accessibility of courts and judicial proceedings. But when there is a dearth of such advocates and the law is so detailed that few have read and comprehended it, the opposite is more likely the case: a long, detailed law will go unread and un-understood by administrators, and thus unheeded. Ten years after its passage, local and regional administrative officials are waiting for instruction on how to implement the law, and many of the important structures for administrating and enforcing the law are not yet in place. McAuslan's argument about procedural fairness falls flat if the law is inaccessible to local communities and state administrators alike.

The law's complexity and frustrated implementation may stem from the difficulty of creating a fully customary-formal hybrid system: Botswana kept all the customary rules in place, and simply shifted the responsibility of carrying them out from the customary leaders to the land boards. Mozambique left all existing customary practices and local leadership in place, creating only a few new procedures for those specific moments when the outside world and the community intersect. Yet Tanzania attempted to do something much harder: it kept some of the existing customary/local administration structures, but created many new ones. It kept some of the customary laws, but created multiple new ones. For example, the Village Land Act allows that village councils may go on administering village lands according to local custom – yet then sets out extensive, exhaustive new procedures and rules, albeit designed to protect the rights of vulnerable groups and provide a systems of checks and balances on customary powers

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[104] As Botswana has learned over the years, land administrators *should* be proscribed by detailed regulations - in its amendments to the Tribal Land Act, Botswana more than doubled the rules and regulations concerning land board officials and their fulfilment of their duties.

and practices. Parts of custom are preserved, such as customary rules of evidence, customary dispute resolution procedures, customary practices like the pointing out of land boundaries, and customary livelihood and land-use systems. However, the act's rigorous prescriptions for every step of all land-related procedures have the effect of transforming custom's practical application; local leaders must now consult an extensive set of statutes to implement alongside their customs. Similarly, the Village Land Act required the creation of over 50 separate forms to be used in its implementation. Such a proliferation of paperwork automatically takes the process to a new level of administrative formalization; custom, being primarily unwritten, is forever changed. Moreover, Alden Wily (2003 at 23) points out that there is no clarity as to the legitimacy of any records that are somehow are not recorded in the format prescribed. What room is there left for the flexibility inherent in custom among the multiple forms?[105]

Of greatest concern, however, is that Tanzania's Village Land Act ultimately fails to provide true land tenure security to villages. Because the land is held by the state, and because villagers have very weak rights under the act to oppose a state decision to allocate some of their land to investors, in the final analysis the Village Land Act's multiple protections for the land rights of communities are secure and good only until the state decides otherwise. This is best exemplified by the varying definitions of general land in the two acts, which have created a legal loophole through which village land can be taken out of the village and vested under the control of the Commissioner of Lands. The Land Act's definition of general land as "all public land which is not reserved land or village land *and includes unoccupied or unused village land*" (Land Act, art. 2, emphasis added) means that the state has the right to at any moment rezone what it feels to be "unused" village land (even lands zoned as communal areas and areas zoned for future village expansion) as general

[105] These forms are also impractical; considering the general dearth of supplies at the village level, it is not clear how village officials will manage to acquire and maintain the full range forms necessary to each process (Sundet, 2005). Moreover, the Village Land Act requires an extensive exchange of documents between the village and the district, as well as sometimes between the village and the central government. Such processes allow opportunity for administrative power struggles and corruption, and hinder the prompt processing of applications and certificates. Larsson notes that as "most villages lack both electricity and telephone, it is questionable whether the flow of documents for permits, approvals and signatures, will ever come to work in a smooth and efficient manner (Larsson, 2006). While these procedures were undoubtedly included as a check against local corruption, it may grind processes to a halt, or a slow crawl.

land, and therefore remove it from village jurisdiction entirely. Also, under Article 4§1–2, the state may compulsorily acquire even clearly *used* village land for "investments of national interest" and rezone it as general land. Sundet (2005 at 12) notes that "the procedures outlined for transfer of village land to general land provide no strong guarantee that most villagers are informed and does not give the village the final say in whether the land may be transferred or not." There are no clear mechanisms in the Village Land Act through which communities can appeal or block such reclassifications of their lands. This opens the door to large-scale land concessions to international investors – and means that the villages whose lands are being seized have very weak legal grounds upon which to contest these grants. These provisions seriously undermine authentic tenure security; for national-level decisions, there are no checks on authority and control.

For this reason, various commentators have concluded that the village assembly and village council are merely consultative, land management bodies whose decisions can be easily overturned by the central government. Shivji (1999) has vehemently argued that by not vesting full control over village land in the village assemblies, the village council administrates village land as an agent for the commissioner, rather than as an agent for the village.[106] He writes: "The best managers of land are those who own it and use it. Let people be given back their land. Let land be vested in their own organs such as village assemblies … Public administration should do what it is meant to do: advise and give technical assistance to the people as 'obedient servants', not control, manage and lord over people's lands" (Shivji, 1999).

In the balance, the Village Land Act is arguably one of the best in Africa in its careful, solid, and repeated protections of the land rights of vulnerable groups in the context of both customary and statutory law. However, at root the question of implementation may decide the end results; the complexity and length of the law may mean that the poorest of the poor never learn about their rights, new administrative structures are never set up or funded, and only certain sections are fully implemented. Or, as we see in the current struggles of SPILL and MKURABITA, a very good law may be tossed aside because of shifts in political and economic ideology without ever being fully implemented.

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[106] Shivji (1999) has long argued for placing the full use rights, management and control over village land in the village council, with the district council and other state officials taking on support and technical advisory roles.

VI

ANALYSIS OF THE CASE STUDIES

Contents

At root is the question of whether what is necessary, are better laws, or rather improved implementation. Obviously, the answer is both. A law may set out excellent procedures and practices but fail to be implemented, as in Tanzania, or, as in Botswana, be changed over time so that the original legislative intent is gradually lost. Alternatively, as in Mozambique, the law may fail to include protections necessary to ensuring that its mandates are fulfilled, thus leaving room for elites to exploit information and power asymmetries.

This chapter first looks at the case studies together as a group and identifies each law's strengths and weaknesses. It reviews and summarizes the basic tasks of laws that seek to recognize customary land rights, and analyses how well each piece of legislation, as written, did in these respects. It then turns to an analysis of the factors that have impacted the laws' implementation and identifies general trends that can help to explain where the implementation of these laws has broken down.

6.1 Key strengths and weaknesses of the text of the legislation

Chapter 1 outlined the multiple, oftentimes conflicting concerns lawmakers confront when crafting land legislation and asked the question: *How to best write a land law that merges the practices of the people with the objectives of the central government and arrives at solutions that will simultaneously: be used, adopted and successfully implemented on the ground; advance state interests; advance community interests; and advance individual interests?*

The above analysis of the case studies has revealed that to accomplish this, a law that devolves power down to the local level and allows a space for the free-flow of customary land administration and management must do seven equally-important things well within its text:

1. Flexibly allow for the full range of customs within a nation to be expressed and practiced while implementing restrictions that impose basic human rights standards on customary practices, protect against intra-community discrimination, and ensure alignment with the national constitution.
2. Create local land administration and management structures that: come out of – and look much like – existing local and customary land management structures; are easily established; are low cost both to the

state and for users; are highly accessible; and leverage local individuals' intimate knowledge of local conditions.
3. Establish administrative processes that are simple, clear, streamlined, local, and easy for rural communities to use to claim and defend their land rights.
4. Establish appropriate checks and balances between customary/local leadership and state officials, create new, supervisory roles for land administrators, and ensure direct democracy and downward accountability to the people.
5. Include accessible, pragmatic and appropriate mechanisms to safeguard against intra-community discrimination against women, widows and minority groups.
6. Protect community land claims and create real tenure security while allowing for investment in rural areas, ensuring that all development will be sustainable, integrated, and beneficial for local communities.
7. Establish good governance in land administration by: creating appropriate mechanisms to ensure the law's enforcement; penalizing state officials who are contravening the law's mandates; and setting up dispute resolution mechanisms that allow for appeal of community-level decisions.

It is therefore useful to analyse the strengths and weaknesses of Botswana, Mozambique and Tanzania's legislation – as written – within the framework of these precepts.

6.1.1 Recognizing customary law within the limits of human rights

Flexibly allow for the full range of customs within a nation to be expressed and practiced while implementing restrictions that impose basic human rights standards on customary practices, protect against intra-community discrimination, and ensure alignment with the national constitution.

Mozambique and Tanzania's laws do an excellent job of allowing for flexibility and the continued flourishing of a broad range of "custom". In both Mozambique and Tanzania, the laws do not attempt to define what customary practices and principles are. They simply establish communities' customary rights to their lands as equal in strength and validity to state-granted land claims and create mechanisms through which communities can formally define the boundaries of their lands. The moment the laws were

passed, all the customary land-holding systems practiced throughout Mozambique and Tanzania became a part of the national legal system, enforceable in a court of law, and all existing customary land claims were instantaneously transformed into formal and defendable land rights at the moment of the law's enactment, thus ensuring protection of the poor's land claims. Custom is not codified, but may evolve and develop as flexibly as local conditions necessitate.

In Mozambique, community members are left to define the community's composition and decide how to govern themselves, their lands and their natural resources; they may choose to adopt local customs, or to elect new leaders and draft new laws. The only rules imposed upon customary practices of land administration and management are for women's equal right to land to be respected, and that no customary practice should contravene the Constitution of Mozambique. However, there are no mechanisms in the law to ensure that these mandates are complied with. In this respect, important protections for groups with more vulnerable land claims remain unprotected. A restriction that community laws must align with the national constitution becomes meaningless if 1) communities are never informed about the content of the national constitution, and supported to make necessary revisions to ensure compliance and 2) communities are not asked to subject their internal rules and procedures to some kind of review or oversight to certify that this mandate is abided by.

In Tanzania, the Village Land Act does an excellent job of both allowing communities the freedom to govern their land according to *some* local customary rules and practices while also providing myriad safeguards to ensure against intra- and inter-community discrimination and disenfranchisement. The customary law being practiced in villages may continue to govern land administration and management practices, but the land claims of groups with different livelihood strategies are specifically protected; pastoralists' land uses and land claims are protected alongside the claims of small scale farmers, including allowance for dual and joint use and management of certain lands by different communities. However, in setting out so many safeguards, Tanzania's law inexorably changes how custom is to be practiced; under the law, local leaders must now administer a customary/statutory hybrid, in which basic customary practices remain, but must be balanced with new legal procedures, a very difficult mandate to carry out without rigorous training, capacity building and state support efforts.

In contrast, Botswana's Tribal Land Act codified only Tswana customs, leaving little allowance for the customary practices of non-Tswana tribes that do not practice the same livelihood strategies as the Tswana. Because rights of hunting and gathering are not recognized under either Botswana's statutory law or in the dominant customary law of the Tswana, a strict interpretation of the law leaves the land claims of non-sedentary, hunter-gatherer groups like the Basarwa (San) people unprotected. The Government of Botswana has taken few steps to adopt less discriminatory policies and practices or to widen the definition of "customary" land rights to include provisions that could apply to the practices of non-Tswana tribes. Meanwhile, various government officials have used the law's narrow definition of custom to legitimize actions and policies that have served to alienate and dispossess non-Tswana groups, converting their lands into national parks and granting them to private cattle ranchers without payment of the proper compensation set out in the Tribal Land Act. In more than 40 years, no action has been taken to amend the act to include provisions that protect the livelihood practices of non-Tswana tribes or allow for hunter-gatherer groups' secondary use and access rights, so critical to their survival and way of life. The long-term evidence of Botswana's denial of the land rights of the Basarwa (San) people arguably amounts to institutional racism; even as late as 2006 the state was forcibly removing the San from their customary lands.

6.1.2 Building on existing local structures

Create local land administration and management structures that: come out of – and look much like – existing local and customary management structures; are easily established; are low cost both to the state and for users; are highly accessible; and leverage local individuals' intimate knowledge of local conditions.

A law must be written so that it can be easily explained to officials, customary leaders and lay people and easily integrated into rural villagers' daily lives. Like custom, the law's mandates should be logical, practical and workable, as well as tangible and grounded in the landscape of the local. If a land law that integrates customary practices up into statute has been properly researched and written, it should look very much like the custom that communities are already practicing.[107] The procedures set out should mirror

[107] In fieldwork in Mozambique, the author found that because the land law does not rigidly define custom but allows the flexibility for the law to look very much like traditional, local

the customary practices people have been following all along. Furthermore, the processes and rules set down by the law should be clear and unambiguous, as should be the rights and responsibilities it establishes for all actors. All three local land administration and management systems examined herein appear to do this well, but miss the mark in very different ways.

Botswana's Tribal Land Act simply shifts customary land management out of village and community structures and into regional land boards; it elevates the exact tasks and roles of customary leaders into the functions of the land boards and establishes systems of land claims formalization that mirror customary practices. This was an elegant and simple transfer of existing powers and functions to new state structures. In theory, all that was supposed to change was that in place of customary leaders, state-run land boards were to implement customary laws and practices. However, as time has shown, the boards' distance from the communities whose lands they administer has served to erode some of the most important and useful aspects of "custom" – namely: accessibility and an intimate familiarity with both the terrain and the people living upon it. Positively, the land boards' distance from and lack of knowledge about local conditions has created the need for continued reliance upon the ward heads, which has grounded the system more strongly in local practices. However, the land boards did not fully adopt the "land and natural resource management" component of chiefs' functions – which has led to policies, propagated by the central government, that have contributed to degradation and the unsustainable use of local natural resources in rural areas.

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conservation and land-apportionment practices, communities were *assuming* that their practices were contained within the law. Interestingly, although the law does not outline concrete land management rules, rural communities working with NGOs to delimit their communities were using the law as a jumping off point to reinstate customary land and natural resource management rules. For example, one sub-chief, in response to the question, "Has the new land law changed things in your community?" replied:

> The new land law hasn't changed anything, only it has strengthened things. Traditionally, we used to avoid people cutting trees unnecessarily, or starting veldt fires, or burning the cemetery grounds - the land law also recommends these things. The land law itself has also avoided people to cultivate in or open our traditional forests where we practice our spiritual ceremonies. Definitely the land law has strengthened our rules that were existing in the past. With the introduction of the land law, things are seeming to resemble the past… (Knight, 2002 at 8).

In both Tanzania and Mozambique, existing, community-level structures have been left intact. In both nations, local-level knowledge, expertise, and practice are harnessed. For example: the customary rules of landscape-based evidence of all ethnic groups within the nation are valid proof of land claims; as under custom, streams, mountains, rock formations and other markers are considered adequate descriptors of community boundaries. Most land administration procedures take place at the community level, according to local procedures, and with a heavy emphasis on oral testimony and community participation in or validation of major land-related decisions. [108] As such, they are easily accessed: in Tanzania, village-level bodies deal with almost all aspects of land administration and management, while in Mozambique, state officials must come to the communities to carry out delimitation exercises and community consultations.

The fact that the Village Land Act is grounded in and based upon existing land administration bodies and is to be applied to pre-existing community units should have greatly facilitated implementation and allowed for the simple and easy devolution of land management and control to villages. Under the Village Land Act, the "customary unit" is a "predefined legal entity, endowed with predefined institutions and processes and a governing entity already in place" (Cotula, 2005). However, the Village Land Act mandates the creation of various new administrative bodies – a village-level land registry, a land adjudication committee, and a land council to mediate local land disputes. Both the central government and the villages themselves are having trouble establishing these bodies and securing the funding and support necessary to ensure their technical capacity - the costs and efforts to do so, are, in the words of one Tanzanian official, "staggering." Again, this may be attributed to the very difficult task of creating a customary-formal hybrid land administration system; The Village Land Act's frustrated implementation may stem from the difficulty of keeping some of the existing customary/local administration structures intact while creating many new structures that must function alongside and in tandem with them.

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[108] One thing of note that Tanzania does excellently in this regard is to charge the village council with maintaining and updating a village-level register of village lands and all allocations made, in accordance with rules set by the minister (VLA, art. 21§1). The village land registry is supposed to be a simple record of customary ownership and all land dispositions in the village, the lowest branch of a larger district register, subject to supervision by the district registrar (VLA, art. 21§3). Research into the efficacy of these village-level registries is needed; Tanzania's system could serve as a model for other nations seeking to localize land cadastres.

Mozambique's land law creates the opposite problem by being exceptionally vague on all matters of village-level land administration: communities have been left to administer community lands as they see best, but with no suggested management structures. Although Article 30 establishes that rules and guidelines concerning community land administration are to be promulgated, in the 13 years since the law's passage this has not yet been done. Because the law has mandated almost no changes to intra-community practices, there are no cost, inaccessibility, or no "new system to learn" impeding factors. As a result, communities have continued to manage land as they always have, which in many instances has been quite a good and successful tactic. Local knowledge and expertise continue to be leveraged. Yet without safeguards to ensure that community land-management structures are equitable, fair and just, some communities may suffer from poor internal land administration or local elite capture, without checks or balances to ensure that such decisions reflect the needs and interests of the whole community (described further below).

6.1.3 Establishing simple, clear and easy administrative procedures

Establish administrative processes that are simple, clear, streamlined, local and easy for rural communities to use to claim and defend their land rights

A land law that merges customary and statutory systems should be exceedingly clear on the procedures to be followed in formally claiming and enforcing one's land rights. The administrative procedures that people must follow should not be overly technical or complex, yet should ensure adequate protections and oversight mechanisms. All three laws examined herein establish relatively simple and transparent procedures for land claims registration and documentation. In all three nations, customary land rights were implicitly or explicitly formalized at the laws' passage, and all processes of registration, titling or delimitation were made optional; community and individual customary land rights exist and are enforceable regardless of paper documentation. Yet, if a community, family or individual does seek to title and register land rights, the procedures set out by law are aligned with existing customary practices. In all three nations, most of the procedural steps take place on the ground, within the community. All three laws are quite successful in this manner.

Relatedly, laws should not require an impossible amount of documentation to prove one's customary land claims, as such demands will only

disenfranchise individuals who cannot read and write, and will serve to strengthen the land claims of the relatively wealthier, who are literate and can spend time collecting and accumulating the necessary written documentation. Mozambique's land law – in its establishment of oral testimony of one's neighbours as adequate proof - is a good model in this, as is Botswana's provision that applicants can verbally furnish necessary information, and that land board officials must help applicants to successfully complete the administrative procedures. Allowing for verbal provision of this information and mandating assistance both allows illiterate applicants equal opportunity to seek land grants and aligns with customary practice.

In Mozambique, community lands are the focus of land claims formalization; although the law is clear that individuals may follow a similar, simplified process if they wish to seek a delimitation certificate for family lands. The community delimitation process set out in the law is relatively clear, community-based, and relies heavily on testimonial evidence provided by community members and the leaders of neighbouring communities. Community land claims are to be mapped and entered into the modern state cadastre after participatory community self-definition exercises that include: legal education and consciousness raising; a participatory appraisal and map-making processes; the generation of a descriptive report that may centre on landscape-based evidence to articulate the boundaries of the community; and the physical marking of the boundaries on the ground with customary boundary markers or by planting trees. The community must sit together and decide upon a land use plan. The community-generated documents and maps are then sent to state technocrats, who create computer-generated cartograms and other official documents, which are only entered into the national land cadastre after community review and approval. Similarly, in Tanzania, for a village to seek a formal certificate of village land, it must confer with all neighbouring villages, resolve any boundary disputes, determine village boundaries using landscape-based and customary forms of evidence, and create land and natural resources management and zoning plans. Excellently, in both nations, all of the procedures (with the exception of the technical file creation) are done at the village level, in the local language.

Applications for individual land claims in Botswana centre around approval from and verification by the local ward head, whose job it is to ensure that

the land requested is free and available for allocation, and to point out the boundaries of the land. Tanzania's Village Land Act also establishes an excellent, local process for family, group or individual land registration. As in Botswana, in accordance with customary practice and to keep costs extremely low and ensure that the process is affordable and accessible to rural community members, the Village Land Act does not require that the applicant(s) have the land at issue formally surveyed, measured or mapped; a description of tangible, local boundaries and sketches of the area are sufficient. In Tanzania, applications are submitted locally to the village council, which reviews the application, seeks the approval of the village assembly, and if there are no objections or inconsistencies, grants the application. If there are objections or potential problems, an adjudication process occurs, including a walking and marking of the boundaries, a public hearing, and resolution of existing conflicts. The resulting documents are entered into the village registry.

In all three nations, the processes nicely provide for state oversight, the involvement of local customary officials, the space for public contribution, comment or objection, and then inclusion of customary or non-written forms of claims proof. Yet while all three procedures are relatively simple, in practice they have proved to be more expensive (Mozambique) than local capacity and resources can support, dependent on a back-and-forth of papers/forms with bureaucrats located oftentimes far away from an applicant's community (Botswana), or unusable, due to the lack of the local structures necessary for their implementation (Tanzania). For example, while Mozambique's process is local and easy to follow, the processes' reliance upon (relatively unfunded) state technicians and administrators has impeded its wide-scale use and implementation; in the absence of state funding, communities must wait for an NGO to lead them through the process and pay associated costs. Meanwhile, Tanzania's individual/family/ group application process has barely been implemented, which, along with the lack of necessary local structures, may also be due to the fact that the instructions set out in the law are not clear and do not follow in order in the legislation, making a very easy process seem much more complicated than it is.

6.1.4 Roles of officials, local leaders and the people

Establish appropriate checks and balances between customary/local leadership and state officials, create new, supervisory roles for land administrators, and ensure direct democracy and downward accountability to the people.

Tanzania and Botswana's laws (as written) do this very well, in different ways – and as such provide good examples for future laws in other nations. As first configured, Botswana's land boards were carefully balanced between customary authorities, the central government, and the people: third of members were affiliated with the chief and his authority, one third were locally elected, and one third were appointed by the Minister of Lands. This was designed to ensure a system of checks and balances between the state, customary leaders and the people. Had the boards' configuration remained this way, they might have been a model – or at least an excellent case study - of how customary leaders, state officials, and community members may best work together and share power. However, Botswana amended its law and regulations to remove chiefs and customary authorities from the land boards and replace them with representatives of the central government. Meanwhile, the election process for those elected board members became notably less democratic, which has meant that the Botswana's land boards currently have little accountability to the people whose land they are managing. Indeed, their only accountability – including reporting obligations – is upward, to the central government, not downward to the people.

Tanzania's law also does a very good job of creating new supervisory roles and oversight mechanisms for state officials. Rather than create one body with a range of actors, as in Botswana, the Village Land Act establishes a locally-elected village body and then creates both upwards and downwards accountability mechanisms: the village council cannot assign a grant of customary land right without approval from the village assembly (composed of every adult village member) and review by the district commissioner, and must report on its land management efforts both downward to the village assembly and upwards to the ward. Should a village council carry out an adjudication process in a corrupt manner, villagers have the right to go to the district and request that the matter be re-investigated by higher level officials. The law also does an excellent job of giving existing state land administrators and officials new supervisory and oversight roles to replace the and management functions that have been decentralized to the village.

Mozambique's law fails to adequately address these issues. State actors only interact with communities when 1) an investor has applied for land located within a community and a consultation is required, and 2) if a community has requested to be delimited, at which point technical officials arrive to support the community to carry out the requisite procedural steps. Other than these discrete events, there are no clear oversight structures or procedures set out in the law; appropriate supervision and oversight structures that can ensure against unjust acts within communities or between communities and investors are completely lacking. The law fails to establish a role or responsibility for state officials to ensure that communities are treated fairly and justly by outside investors, or that community leaders are acting in good faith and in their communities' interests.

6.1.5 Safeguard mechanisms against intra-community discrimination

Include accessible, pragmatic and appropriate mechanisms to safeguard against intra-community discrimination against women, widows and minority groups.

Tanzania's law excels in legal safeguards against intra-community discrimination and is a model in this regard; Mozambique and Botswana's laws fully fail to do this. The general lesson is that unless such protections are extensively and explicitly written out in the law, the land rights of vulnerable or minority groups will not be protected in practice.

Mozambique's law is completely lacking in mechanisms to ensure against intra-community injustices: there are no village-level supports to help women enforce their land rights, no penalties for intra-community discriminatory practices, and no checks on unjust or inequitable intra-family actions. All of these matters are left up to the community to decide how to adjudicate or address on its own; the law only mandates that their customary practices may not contravene the constitution. In the event that local leaders condone and perpetuate customary practices serve to deprive women, widows, orphans and other groups of their land rights, then there is little for the vulnerable individual to do to enforce her rights other than eventual appeal in court, outside her community, which may be difficult for her to access. The burden of enforcement falls on the widow herself; the vulnerable person is left with the responsibility of ensuring that their own rights are protected. This is highly inadequate protection for vulnerable groups whose land rights have been transgressed within their communities.

Botswana's Tribal Land Act is similarly devoid of provisions or legal mechanisms that protect against both official and intra-community discrimination. The Tribal Land Act provides no affirmative protections for women's and ethnic minorities' customary land rights. Such lack of explicit mention of women's land rights has borne out the warning that gender- or ethnicity- neutral language is akin to lack of protection. Rural women's land claims are generally undermined by the law's gender-neutrality: applications for customary land grants may be put in the name of the male head of household only (although the *Deeds Registry Act* may serve to remedy this); the law does not include provisions that allow family members joint or derivative rights in the land; and land boards have reportedly made little effort to ensure or enforce women's land rights.

In contrast, Tanzania's Village Land Act does a superb job of addressing both the potential injustices inherent in an unregulated customary system and the possible abuses of power and influence that often emerge in the course of land and natural resources transactions. It is a model in this respect. Women's land rights are protected not only in processes of application for land, divorce and widowhood, but also in the event of a land sale, transfer or surrender. Importantly, the burden is not on the woman, widow or orphan to raise an objection in the event of a transgression against her land claim, but on the village council (and, in the event of a land sale or transfer, the burden is on the purchaser/lessor to check that the seller's/assigner's family has consented to the transfer of land rights, or else the transaction may be voided). In the event that a man has surrendered his land, the village council must offer that right first to the individual's spouse(s) and then to all dependants. Finally, to ensure against intra-community discrimination in land administration, management, and dispute resolution, the act provides for gender balance on land administration and management bodies, and allows the village assembly to seek the support of district officials when they feel that the village council is acting unjustly. Such protections are extraordinary, and should be replicated in contexts where rural women have relatively little bargaining power within their households, limited access to advocacy supports and judicial fora, lack awareness of their land rights, or do not have the power, resources or time to defend their land claims.

6.1.6 Community tenure security and integrated rural development

Protect community land claims and create real tenure security while allowing for investment in rural areas, ensuring that all development will be sustainable, integrated, and beneficial for local communities.

This component has two inter-related parts: a) tenure security in reference to the state, and b) integrated rural development and investment that benefits communities.

In reference to community land rights *vis-à-vis* the state, in the final analysis, it not clear that any of these laws actually strengthen the tenure security of rural communities' customary land rights. Despite all the provisions establishing ways to formalize customary claims, none of these laws actually root land ownership in the community itself, leaving the community's lands as vulnerable as ever. While these laws seem intended to promote tenure security for customary land claims, all three laws grant the state the power to simply claim, at will, shared common-pool resources held according to custom on the grounds that they appear to outsiders to be "unused." Meanwhile, if deemed "unused," it remains to be seen if these nations' legal protections around compulsory acquisition extend beyond individual homesteads to apply to state takings of common-pool resources which rural villages depend on for their livelihood and survival.

Under Tanzania's Village Land Act, because all land is ultimately held by the state, villagers have very weak rights under the act to oppose a state decision to allocate large areas of village land to an investor, and no right to oppose state re-zoning (under the Land Act) of what state officials feel to be "unused" village land into general land, removing it from village jurisdiction entirely. For this reason, various commentators have concluded that the village assembly and village council are merely consultative, land management bodies whose decisions can be easily overturned by the central government. In other words, the Village Land Act's multiple protections for the land rights of communities are secure and good only until the state decides otherwise. It appears that investors may simply request whatever apparently unused lands interest them, at which point the government can then declare these lands to be unused, convert them to general lands, and grant them to investors, as has reportedly been the case in some of the recent large-scale concessions. It is yet to be seen if Article 18(i)'s promise that "A customary right of occupancy is in every respect of equal status and

effect to a granted right of occupancy and shall [be]…subject to the prompt payment of full and fair compensation for acquisition by the state for public purposes" will be honored when a village's land is re-zoned as general land.

Similarly, under Botswana's Tribal Land Act, while each family's residential lands may be well protected under the act, rural communities' claims to critical common areas and water sources have been severely weakened in the past few decades. Land boards have adopted and enacted policies driven more by the central government's interest in promoting private investment in rural areas than by local needs, dispossessing rural communities of their communal pastures.[109] The land boards' practice of allocating vast tracts of communal grazing land to private cattle ranchers has left the remaining communal lands degraded by overuse and contributed to the impoverishment of rural communities dependent on those lands for their livelihood. It is not clear that communities were ever consulted about the transfer of their customary lands into the hands of investors, or given an opportunity to challenge what could be argued to be a massive expropriation of common property. Certainly, they were not paid compensation for the state acquisition of their lands, as mandated by Sections 32 and 33 of the Tribal Land Act.

Now that Mozambique has decreed that the issuance of community rights of use and benefit certificates is subject to government decision-making authority (rather than being only documentation of a pre-existing right, and therefore not up to the government to determine), and issued the mandate that the state can claim "unused lands" for its own purposes, it appears that Mozambique's community lands are today just as insecure as those in Botswana and Tanzania. It remains to be seen how these changes will add to rural land insecurity. Furthermore, as in Tanzania, it seems unlikely that the land law's regulations, Article 19§3 - "The procedure for termination of the right of land use and benefit in the public interest shall follow the procedures for expropriation and shall be preceded by the payment of fair

[109] Furthermore, the 1993 amendment to the Tribal Land Act that allows the land boards to cancel privately-held lands if they have not been cultivated, used or developed "to the satisfaction of the land board….in accordance with the purpose for which the grant was made" (art. 15) is worrying. While this clause was undoubtedly added to help protect against land speculation, its vagueness, and reliance upon the subjective opinion of the land board, could be cause for concern and should be challenged.

indemnification and/or compensation" - will apply to community lands deemed by the state to be "unused."

In reference to community land rights *vis-à-vis* investors, between Mozambique's mandated consultations and Tanzania's explicit protections for communities ceding village lands to an investor, all of the right ingredients for true integrated and beneficial rural development are there; lawmakers may do well to borrow components of each.

In Mozambique, before being granted a right of land use and benefit by the state, all investors must personally consult with the community or communities in which the land to be granted is located, "for the purpose of confirming that the area is free and has no occupants" (art. 13§3). This provision was designed to ensure that community land claims are respected, and to allow for a process of integrated development and community prosperity in which investors acknowledge that they are using community's customary lands and agree to provide certain negotiated mutual benefits in exchange. The intention was that the communities themselves would point out the land free for concession, and then ask for a percentage of the profits generated, a monthly rent, or amenities like jobs and the construction and maintenance of necessary infrastructure.

However, because the law does not expressly say "consultation includes the right to say yes or no", government officials have been interpreting the law to mean that communities have no explicit power under the law to deny an investor's request for a piece of their lands; the right is only to be "consulted" about whether the land is free and available for concession. Once again, it becomes clear that implicit protections may be lost, and that important protections must be spelled out and made explicit. Furthermore, Mozambique's land law does not: establish appropriate safeguards to ensure that consultations are attended by the entire community; mandate that the community be told of the market value of their lands and the specific details of the planned investment, including projected annual profits; allow time for private intra-community discussion; ensure that communities have adequate legal representation during these consultations; or direct that these negotiations are recorded in detail and transformed into contracts enforceable in a court of law. In addition, there are no enforcement mechanisms or penalties established to ensure that investors fulfil the benefits-sharing agreements they create with communities during these obligatory

consultations. As a result of these gaps in the legislation, communities have been losing key lands to investors and receiving very little in return.

Interestingly, Tanzania's law sets out excellent provisions for partnership agreements between villages and investors (including safeguards to ensure that investors follow through on their negotiated agreements) to be followed for ventures located fully within villages. Unlike Mozambique's law, the Village Land Act establishes that villages have an explicit right to deny an application and reject an offer. When lodging an application for a grant of derivative rights within a community, a potential investor must prepare a land use plan proposal and present it to the village council, which must then consider how the village will benefit and whether the requested concession will impact the land and livelihood needs of community members, among other factors. The village council may then grant or deny the application. The law specifically states that village councils may require the payment of rent or a "premium" for the land grant, and may consult with the national land commissioner as to exactly how much should be charged. This provision may help to ensure that the village asks a fair and equitable price. Should it be accepted, the certificate of customary land grant may be withheld until the payment has been made in full or an instalment payment plan has been agreed to. Failure to make these payments is "deemed to be a failure to comply with a condition of the right of occupancy" and "shall give rise to revocation" of the grant of customary land rights. This is an excellent check to ensure that the investors follow through and fulfil their side of the agreed transaction, although, tellingly, the village council does not have the authority to cancel the land grant of an investor who has failed to make the contracted payments; only Tanzania's president has this power.

6.1.7 Ensuring good governance

Establishes good governance in land administration by: creating appropriate mechanisms to ensure the law's enforcement; penalizing state officials who are contravening the law's mandates; and setting up dispute resolution mechanisms that allow for appeal of local-level decisions.

A good law may be ignored or simply not enacted because it does not reflect the desires and interest of state officials and other power holders. Or, as the case studies show, state actors may implement only those parts of the law that suit their purposes, or twist the law to achieve such ends. As such, a law

must contain within it text provisions to ensure that the law is carried out according to legislative intent. Tanzania's Village Land Act is perhaps best understood as lawmakers' attempt to create a law so extensive and detailed that it could be a road map for good governance in land administration and management. Reflecting on the length of the Tanzanian land acts and the appropriate role for law to play in restructuring land relations, Patrick McAuslan, the legal consultant hired to draft the land acts, wrote:

> The real revolutionaries, therefore, might turn out not to be those who propose radical policies but those who…propose a radical legal methodology for implementing policies, namely a detailed and inevitably lengthy new land code in which legal rules and checks and balances replace reliance on administrative and political action based on goodwill and common sense – which according to the evidence, are in short supply where land relations are concerned (McAuslan, 1998 at 533).

It is arguable that McAuslan is quite correct in this. Mozambique's land law and regulations are clear and artfully brief, but contain almost no safeguards to ensure that the law is implemented faithfully by either government officials or customary leaders. In deference to custom, the law allows communities to select their own leaders and establish their own rules for how such leaders will govern. Such a model functions well when the leaders are valid, and their management decisions reflect the needs of their people. But when community leaders act in a way that is detrimental to the interests of their community, Mozambique's land law does not contain any procedural mechanisms for the community to weigh in on or dispute its leaders' actions. There are no rules protecting community members from their leaders' improper land and natural resources management practices or related unjust and unilateral decisions.

Furthermore, there are no incentives or penalties laid out in Mozambique's law to ensure that government administrators work to actively protect community land claims. Data on the land law's implementation indicates that state officials often take the side of investors rather than helping to safeguard communities' land rights. In addition, rather than pass amendments that go to the heart of the law's weaknesses – creating further protections for the land rights of vulnerable groups or taking steps to ensure that community consultations result in fairly-negotiated and enforceable contracts - the state is moving in the opposite direction, issuing decree and making statements

that serve to weaken the strength of community land claims. The law does not include any protection mechanisms - other than legal action - to ensure good governance.

In contrast, Tanzania's Village Land Act provides the full range of protections for the rights of the poor and vulnerable and establishes various accountability mechanisms to ensure good governance in land administration and management at the local and district level. In this regard, it is exemplary. However, all the local-level protections set out in the law are not particularly useful in the event of central government decisions to re-classify unused village lands into general lands (where it seems the most egregious violations of customary land claims are occurring). In this instance, again, the only remedy is legal action.

In Botswana, the extensive 1993 amendments to Article 11 of the Tribal Land Act that served to professionalize the land boards are a good example of how lawmakers can integrate new mechanisms to ensure good governance by land administrators. Also, although the Tribal Land Act provides very few procedural safeguards, an activist judiciary and strong rule of law in Botswana has in at least certain instances helped to ensure the law's appropriate fulfilment; in the 2006 case of *Sesana, Setlhobogwa and Others v. Attorney General*, the High Court of Botswana ruled that government policies that discriminated against the Basarwa (San) were illegal according to the Tribal Land Act and the constitution. Such judicial protections are to date lacking in Mozambique and Tanzania; as in Botswana, the burden is now on national lawyers to bring class action cases to challenge those government actions and policies that contravene the legislative intent of each nation's land law or that serve to weaken communities' customary land rights.

Obviously, the actual text and the practical implementation of a law are interrelated: a law that lacks appropriate enforcement mechanisms and systems of checks and balances will not be well implemented. The roots of implementation challenges are explored below.

6.2 Implementation challenges

The case studies illustrate how the actual practice of integrating statutory and customary land rights is an extraordinarily complex endeavour. Despite lawmakers' best intentions, in practice none of these laws are protecting

customary land rights to the degree to which they were designed. While this is due in part to the construction and content of the laws (as described above), most of the blame should be placed on lack of appropriate or effective implementation.

At root, these laws are not being implemented in a manner that protects the land rights of the poor simply because of lack of political will. The laws analysed here create important legal frameworks that in many ways do an excellent job of integrating formal and customary legal systems and strengthening the customary land rights of the poor. But as the data on their implementation has shown, even if a land law grants powerful new rights to local communities, the weight and strength of those rights may be reconfigured and renegotiated during implementation, shifting power and authority over lands into the hands of elites. These are questions of governance; for these laws to be successful, the full participation and support of state officials at all levels of government is necessary.

6.2.1 Funding and capacity constraints linked to political will

As shown by the case studies, a central – and very important – challenge to effective implementation of laws that strengthen and protect customary land rights is lack of funding, technical capacity, training, adequate salary or incentives, legal knowledge (on the part of both state actors and local communities), and other essential resources. State officials may not have been trained in the new laws, or may not be allocated the funding and technical capacity to implement them correctly. Critical information and maps may be missing; government offices may not have necessary information and data-management systems, or incomplete land registers may leave officials with only a partial picture of community and customary land rights. In many situations, district- and local-level bureaucrats do not have the vehicles, petrol, or other resources to visit the lands they govern. Low-paid officials may extort bribes or act corruptly to supplement their income and better provide for their families, actions whose end result may make formal land documentation processes too expensive for rural communities to follow. Such capacity constraints raise the very difficult question of whether attempts to formalize customary systems on a national basis by operation of law seriously overreach the capacity of governments, even when they rely heavily on local communities' existing practices, structures and resources.

It is arguable that this is not so. Rather, lack of necessary funding and resources to support the state infrastructure critical to proper implementation of a law is often a policy choice; the state simply did not allocate an appropriate degree of funding to properly carry out the law's mandates. As exemplified by implementation of delimitation exercises in Mozambique, community-by-community land documentation is neither particularly expensive nor time-intensive. Had sufficient funding been allocated, the country could have slowly accomplished the complete delimitation of all communities over a ten year period. The same could be said for village land registration in Tanzania.

6.2.2 Government emphasis on investment

Despite the intentions of extremely progressive, visionary lawmakers, the case studies illustrate that state officials – often more focused on fostering investment and national economic growth – tend to selectively enforce and implement only those sections of the law that advance this agenda. Yet while government leaders and state administrators should indeed promote investment, such investment should not – and need not – be pursued to the detriment of community, family and individual rights.

However, the pursuit of national economic development does at times undermine tenure security and foster injustice. In Mozambique, state officials often rush communities through investor consultations, so intent on getting the necessary "community approval" for the investment project that they pay little heed to ensuring that the communities' rights have been protected and that local people will benefit from the commercial venture. In Botswana, government policies designed to foster commercial cattle ranching have contributed to communities' loss of grazing lands and access to important water sources, leaving the remaining communal areas degraded and rural pastoralists more deeply impoverished. In Tanzania, the state is circumventing the Village Land Act - through the provision that the state may unilaterally convert huge tracts of village land into general land - and granting tens of thousands of hectares of land to investors with very little regard to the customary land claims of the villages living and making their livelihood upon those lands. In all three countries, many of these investment projects benefit

the national elite.[110] The enrichment of a few, and the growth of private industry and commercial farming, is happening at the expense of the many.

The irony is that these laws are designed to enable customary land claims to be profitable for investors, the state, and the communities themselves. There does not have to be a dichotomy between community rights and "investment;" it is possible for both to be realized, in such a way that all parties involved prosper and benefit. Under Mozambique and Tanzania's laws, investors are encouraged to locate their ventures within communities and make profit-sharing deals with community members; in Tanzania, the investors are directed to negotiate with village councils over the price or periodic rent of the land to be granted them, while in Mozambique "mutual benefits" are to be negotiated. In Botswana, CBNRM has this potential to create benefits-sharing agreements between communities and investors over the natural resources located on community lands.

These would be win-win-win situations, most especially because - having been consulted, given their permission, negotiated for community benefits, and begun receiving the products of these negotiations - the communities would be pleased by an investor's presence. As such, they would be less inclined, as has been the case when communities feel that they have unjustly lost their lands, to fight for their lost land, engaging in acts of what James Scott (1985) has called "passive resistance" like sabotage and quiet property destruction, and/or resorting to outright violence and open hostilities. Under the provisions allowed for in these laws, investments – welcomed by communities, and therefore not having to expend resources to fight legal and extralegal battles – would be more profitable, and both the investors and the central state would gain.

6.2.3 Official resistance to devolution of power and control over land and natural resources

Funding or capacity constraints and state emphasis on national economic growth are insufficient explanations for the implementation challenges

[110] Bruce makes the point that, "Oftentimes, a lot of what passes for investment is … simple land grabbing for speculative purposes… in which elites have captured vast areas of land and are holding it waiting for genuine investors to show up" (personal communication, John Bruce, 2010).

described in the case studies. It is useful at this point to remember McAuslan's warning that the creation, passage and implementation of a new land law is a "major exercise in institutional reform, and such exercises generate a whole host of problems, challenges and opposition that need to be addressed if reform is to have any chance of being successful" (McAuslan, 2003 at 21).

By definition, the creation, implementation and enforcement of land laws that seek to merge customary and formal land management systems by decentralizing land administration and management functions to the community level necessarily take power away from central and mid-level officials. Through their new land laws, Mozambique and Tanzania have created processes that devolve power over land management to the communities themselves, out of the hands of district and regional or provincial officials. These officials were accustomed to managing local lands and holding the full array of powers that such land management entails. They have no impetus to let go of this power, and in fact have a strong incentive to find opportunities within the laws to continue to exert such influence. In contrast, Botswana's Tribal Land Act centralizes local powers, and so despite a long record of mismanagement, is going on its fortieth year. All of the mandates in the 1968 version of the act's law that stood in the way of greater state control – in particular land board composition – have been amended and eliminated over time. Mozambique is currently in the process of similarly re-shaping its 1997 Land Law.

In other words, and this may be the crux of it: Botswana's law has been widely embraced and implemented by government because it elevates the customary upwards, clarifying it, formalizing it, and to some extent making it legible or transparent to outsiders. In contrast, Mozambique and Tanzania bring the state apparatus downward, which both allows for the continued "concealment" or "privacy" of community-level land administration practices and a decrease in central state control over national land and resources.

Scott describes how, during Enlightenment-era government administrators in Europe, eighteenth century state planners envisioned, "in place of a welter of incommensurable small communities, familiar to their inhabitants but mystifying to outsiders," a "single national society perfectly legible from the center." Scott (1998 at 32, 33) writes: "The centralizing state succeeded in imposing a novel and… legible property system which… not only radically abridged the practices that the system described but at the same time

transformed those practices to align more closely with their shorthand, schematic reading." This is a good approximation of what Botswana has accomplished through its land boards. Today, modern government similarly work to assert their power to manage national investment, state and private natural resource extraction and regional economic development in even the remotest regions of the state..

Custom – under Mozambique and Tanzania's laws – is not made legible to outsiders. It is left open and undefined, and can thus largely remain unknown and un-controlled by state officials. Conversely, in Botswana, the government codified a specific set of customs and transferred chiefs' functions out of their hands and into the hands of state officials. The general brushstrokes of the "customary" therefore became both known and practiced by bureaucrats. Customary land administration and management became the purview of the state.[111]

Furthermore, a related, second dynamic is at work: officials' desire to retain power and control over land and natural resources. Describing some of the pitfalls of a project designed to help implement Uganda's new land law, McAuslan explains how the project was undermined by professional and technical officials in the central government. He argues that they did this because they felt "sidelined"; Uganda's Land Act makes local bodies at the community level the primary managers of land, and mandates that these bodies are "not [to] be subject to the direction or control of any person or authority". Government officials, whose primary job before the new law was to manage land, felt as if they had lost all of their powers. As a result, McAuslan (2003) writes, the central government officials essentially hindered and hampered all effective implementation efforts. Reflecting on the implementation of Uganda's 1998 Land Act, McAuslan (2003 at 17) makes an important point, worth quoting at length:

> Overnight, [central] officials were stripped of their powers of land management, which were [now] vested in district land boards. Even worse, the inherent powers of land management

[111] Today, you can see government officials in Mozambique struggling to shift the land law to allow for just this; Decree 15/2000 was an effort to re-instate a form of administrative control over communities at a lower level than the existing localities by turning "community authorities" into a kind of extension of state administration, exercising an essentially public role.

> that are inseparable from land ownership also disappeared from the public domain and became vested in millions of peasants and urban dwellers. Perhaps most shattering of all was that the loss of powers was accompanied by loss of control over resources — funds hitherto available to the centre were to be allocated to the districts. What, then, was to be the future role of the officials, and what access would they have to public and donor funds? …
>
> [Previously], most land in the country was public land, and the central government was the primary manager of that land….Within the ministry, officials with technical and professional qualifications relating to land — surveyors, valuers, lawyers, physical planners — managed the land. This had gone on for so long that it had become an article of faith, part of the ideology of land management…Not only was it right and proper that technically and professionally qualified officials should manage land, but it would be wrong and improper and subversive of good land management if persons without those skills and qualifications should engage in the business of land management, either directly or indirectly.

In other words, McAuslan (2003 at 21) argues that by not providing state officials with a proactive, positive role in Uganda's new land administration framework, "the project had set a course of events whereby the officials…would act on the basis that their survival necessitated… non-implementation of the act".

Adams (2005 at 44) makes a similar point. He writes that "Departmental Heads would appear to find it expedient to adopt what has been referred to as "a panel beating" or incremental approach rather than address the more deep-seated problems of land administration and management. It is also important to recognise that maintaining the status quo holds advantages for the political elite." Relatedly, Lund (2002 at 12–15) describes how, during formal processes of property rights recognition, a claimant goes through a process of 1) identifying a property interest, 2) staking a claim, and 3) pursuing processes to have this right recognized. The state actors involved in such procedures go through a separate but intertwining process, one of 1) identifying the state's interest in recognizing the particular land claim at

issue, 2) asserting their authority to legitimize this claim, and 3) acquiring legitimacy in their exercise of authority. Under this analysis, Mozambique and Tanzania's land laws not only removed state officials' authority over land administration and management, but also – by automatically formalizing all customarily-held land rights regardless of official registration – deprived state officials of opportunities through which they can continually assert their authority and re-acquire legitimacy. It is arguable that Mozambique's government has spent the past 13 years issuing decrees and making amendments to recapture this power; the amendments to regulations Article 35 are one example of central government's efforts to reclaim decision-making power over communities' customary land rights.

Under Mozambique's law, outside of investor consultations and the community delimitation exercises, there is little role for state officials in the management of community lands, while in Tanzania, the state's role in village land management is largely of passive supervision and consultation. Perversely, in this situation it is only through processes of stripping communities of their land rights that state officials can proactively exercise their powers. While such an analysis is hyperbolic, the point is important: these laws are not being well-implemented because full implementation would mean the diminution of state officials' power and authority. In Botswana, the opposite has been true: state officials have captured the powers of customary officials, and so the state has devoted enormous time and resources to implement the law and amend it to keep pace with Botswana's changing socio-economic atmosphere.

Lacking new powers, and unwilling to let go of their former powers to administer and manage land, officials find ways to get around the law, or simply leave the law aside and go about their desired business, *ultra virus* and in sometimes in direct contravention of the law. Commenting on this process, Ouédraogo (2002) explains, "Nor should we overlook the lack of political will shown by the administrative authorities in implementing legislation favourable to local land rights. Either no practical steps are taken to implement the law or, worse still, the administrative – and even judicial – authorities…are sometimes persuaded to take decisions which fly in the face of the law."

This fairly dark analysis points to the conclusion that laws that devolve power and authority downward to the community will likely lack the critical support of state actors – who will therefore not allocate necessary funds

towards successful implementation, focus on maintaining whatever powers over land administration they formally had or continue to have under the laws, and issue decrees or pass amendments that weaken the strength of customary land rights. On the other hand, laws that elevate custom up into formal state bodies will likely end up becoming divorced from the very factors that give customary practices and authorities their legitimacy and effectiveness: locality, knowledge, direct interaction with communities, and flexibility. However, various solutions and best practices may help to bridge these worlds. Such practices are described in the following chapter.