

# **Customary Land Management and Legal Frameworks: Experiences from Around the World**

## **A Report to Enhance Discussions about Customary Land Rights in Burma**

Written by: Jason Lubanski  
Chiang Mai, Thailand; March 2014

A report by Ethnic Community Development Forum (ECDF)



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## **Customary Land Management and Legal Frameworks: Experiences from around the world**

This purpose of this paper is to present a brief summary of the issues and current situations facing ethnic and indigenous communities around the world that are using a customary rights framework to manage their land and natural resources. By outlining these experiences, ethnic groups in Burma will be able to better understand their own context and possibilities as they struggle to gain control over their lands during this transitional time. While examining how other countries have incorporated customary land management structures into their rule of law, it is hoped that the ethnic groups in Burma can more effectively discuss, debate and outline their own strategies to obtain just and participatory land management systems.

### **Section 1: Present Status of Customary Law across the World**

#### *Growing worldwide acceptance of Customary Land Rights*

Customary land management structures and policies are in place in a growing number of countries around the world. These practices have been **integrated and recognized in the modern world on every continent**. Customary land tenure is a major tenure system on a worldwide scale, even in industrial economies—including rural commons in Spain, Portugal, Italy, and Switzerland and territories belonging to indigenous minorities in Europe, North America, and Oceania. Customary tenure operates most commonly in agrarian economies, where most of the population is dependent on land-based production and use, not off-farm industry and urban employment.

Recently, even the World Bank has supported customary land tenure: “...by the 1990s, **land experts on the World Bank research staff had accepted the advantages of communal and customary tenure over formal individual titles regarding cost effectiveness and equity** (depending on sufficient accountability)...and urged caution about state-led intervention in land tenure systems, suggesting the possibility of building on existing systems.”<sup>1</sup>

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<sup>1</sup> Deininger and Binswanger (1999)

Despite the growing awareness of the importance of customary law, Central State recognition of customary law is still lacking in many countries, and even where it is recognized there is often conflict between national regimes and customary law. This may be partially explained by the fact that customary law may be seen as a challenge to a nation's sovereignty. Additionally, customary law has not historically been recognized by many scholars as a valid body of law, thereby decreasing the chance of recognition by policy-makers.

### ***Background and meaning of “Customary (Land) Rights”***

The term “customary” can be a vague and misleading term. It could also be as having the same meaning as: “traditional”, “ancestral”, “indigenous”, “native”, “local”, “organic”, or more simply and directly—“the way things have been done/ are done around here”.

There is no universally accepted definition of customary law. Customary land laws vary across countries, within countries, and even within the same ethnic group living in the same region of a country. Despite the large variance in the implementation details, there are commonalities among customary land management systems as follows:

- Community-based management and control over lands,
- Territories, domains or community land areas: acknowledgment that each community owns and controls a discrete areas,
- Collective ownership or possession and control over naturally communal resources such as forests, rangelands, and waters.

#### **Processes and Issues that Customary Land Management Systems need to determine**

- Inheritance process
- Arbitration (dispute settlement) process
- Registration process
- Rights to sell and/or lease land
- Rights to conduct what kind of activities/ build what kind of structures on a given piece of land
- Communal lands use regulations (especially forests areas)
- Rights of landowners facing compulsory acquisition of land by government/ military/ private actors (including FPIC and compensation procedures)
- Land taxation
- Local enforcement of Land Regulations (including penalties/fines/ consequences for rules/regulations violations)
- Selection/ designation of Land Administration Committees/ Boards
- DOCUMENTATION of all of the above points



- Regularly adjustment of the size of customary territories or domains so that they remain at the scale at which community-based control can be effective.

One of the most common misunderstandings about customary laws is that they are ancient and have been passed on from hundreds or thousands of years ago. While this may be the case in some instances, it is not necessary for the rules, regulations, or laws to be ‘old’ in order for them to be ‘legitimate’. One of the defining characteristics of customary law is that it is **flexible** and should change/adapt over time, as the social, economic and cultural influences and conditions change. A key strength of customary law is that each community’s customs are rooted in and respond to the particular history, values and needs of that community.

“Customary” can also be better understood when contrasted with “**statutory**” **law**, which is generally written by legal experts in a ‘top-down’ process, and then, after approved by the nation’s legislative body, enacted as law upon all the persons living on the land. Unlike Central State-introduced landholding rules, **customary tenure practices derive from and are sustained by the community itself** rather than the state. Although the rules which a particular local community follows are known as customary law, they are rarely binding beyond that community. Customary land tenure is as much a social system as a legal code and from the former obtains its enormous resilience, continuity, and flexibility. Of critical importance to modern customary landholders is how far national law supports the land rights it delivers and the norms operated to sustain these.

Asking modern communities to administer/manage land rights according to customary law could throw some communities into confusion asking questions such as: **What is our custom? How do we now know what is customary? What if our community norms conflict with what the elders say was/is customary? Who shall decide?**

### ***Major Challenges and Obstacles to obtaining Customary Land Management Rights<sup>2</sup>***

The major challenges facing the writing and implementation of Customary Land Law around the world can be divided into five main categories: Legal, Institu-

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<sup>2</sup> Adapted from Colchester, et.al, pp. 78-79.

tional/Technical, Economic, Political/Cultural, and Community Level obstacles. Many of the problems do not fall into only one of these categories, but it may be helpful to consider each of these categories when analyzing the difficulties that can/will arise when working to obtain customary land rights. Below are a few highlights under each category of what kinds of challenges have been encountered around the world.

### ***Legal obstacles***

- National laws to implement constitutional norms on indigenous land tenure and autonomous land administration do not yet exist or are only slowly being adopted.
- Forestry laws, protected area and natural resource legislation are developed and adopted with limited indigenous participation.
- Measures to increase indigenous land security and local autonomy are challenged by “vested interests” in national legislatures and in local government.

### ***Institutional and technical obstacles***

- Newly developed administrative procedures for demarcation, titling and registration of ownership often remain slow, complicated and may even complicate land conflicts.
- Land/agrarian policies still tend to have a narrow agricultural and economic focus and fail to support alternative food policy based on indigenous and small-scale farmers.
- Roles and duties of different government agencies in regulating customary lands and resource management are confused or overlapping.
- Mitigation/compensation programmes associated with large infrastructure projects employ external consultants who impose top-down solutions without consultation and with little understanding of indigenous tenure regimes and prior land claims.

### ***Economic obstacles***

- Agencies responsible for demarcation and titling lack adequate budgets and staff for processing claims, carrying out field surveys and issuing titles.
- Limited funds for compensating relocating third parties illegally occupying indigenous territories.
- Land speculation by third parties obstructs state land purchase and compensation schemes.

***Political and cultural obstacles***

- Misunderstanding of customary land practices/mechanisms by outsiders/general public.
- Lack of political will to implement agreed international standards on human rights and indigenous peoples and little interest among provincial government staff and agencies to promote demarcation and titling of indigenous lands.
- Reluctance to title large indigenous territories due to persistent mainstream view that indigenous lands are “under-utilised”.
- Unfounded fears that indigenous territorial autonomy will weaken national unity and result in secession.

***Community level obstacles***

- Local chiefs/leaders abuse/ take advantage of increased power in land issues
- Usually requires more active participation from local communities to ensure rights are attained
- Local land owners may have less freedom to sell land to anyone for the highest price

## Section 2: Legal Frameworks for Recognition and Implementation of Customary Law

**Legal Pluralism:** Co-existence of many levels of laws protecting customary land rights

The legal frameworks that apply to customary land rights can be confusing for even legal experts. In order to best understand the legal frameworks, it may be useful to consider the three levels of regulations that exist at the same time (see Chart 1 below for an illustration of the different levels and relationships):

- **International/Regional Conventions regarding Land Rights for indigenous persons,**
- **National formal land laws and regulations (Statutory Land Laws)**
- **Customary Land Law**

The relationship between these three levels varies greatly across different countries and even within the same country depending on the current government's political leanings.

Chart 1 on page 6 illustrates the range of regulatory bodies and relationships that could exist in any country which recognizes customary tenure. The structures and relationships depicted in this chart, however, are only a rough and general representation of how these actually exist in countries where customary tenure has been legalized. Each country has a unique background/ circumstances and most have adopted/ recognized/ implemented only parts of what is outlined in Chart 1. Furthermore, each country emphasizes some structures (levels) and relationships over others. Each of the 6 'levels' from Chart 1 will be examined in the following sub-sections, while examples of how different countries have structured and implemented their Customary Land Laws will be presented later in Section 3.

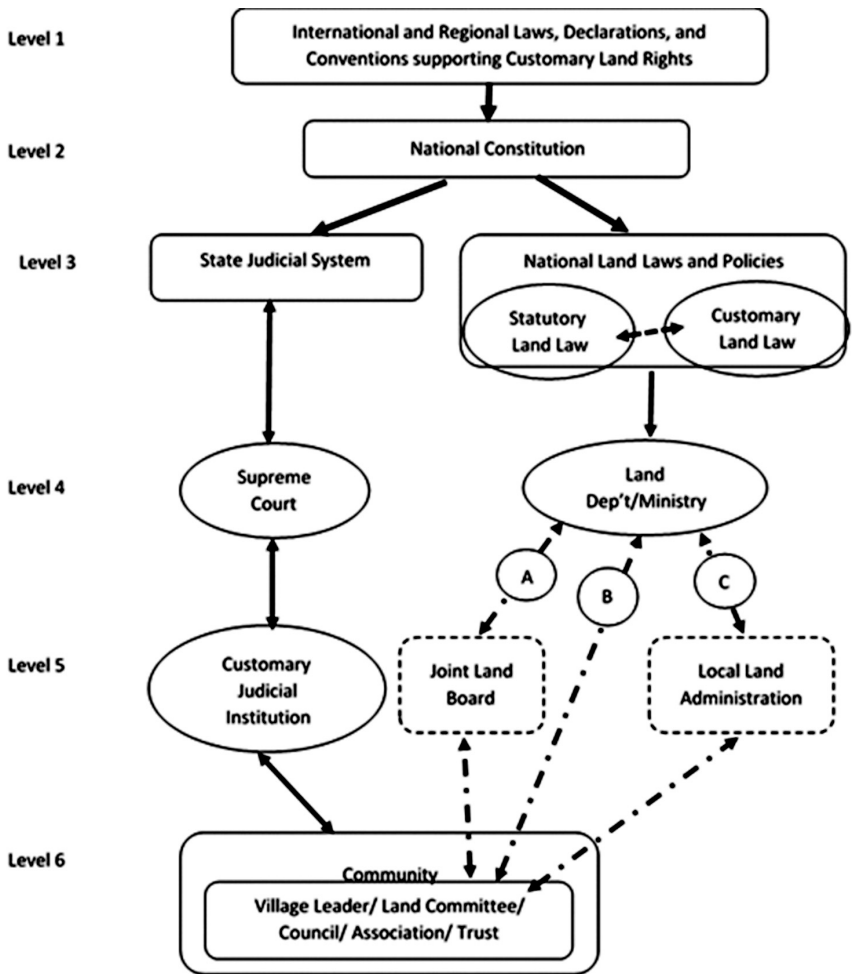
Countries that recognize Customary Land Law, also have Statutory Land Law (formal, detailed legal codes and structures) existing together at the same time (Statutory land law will at least be used in large urban areas). With co-existing legal systems, some individuals or institutions may choose to adopt a 'selective approach' to the law by promoting the system of law that would benefit them most. A party seeking to defend or assert rights to land may do some '**legal forum shopping**' – shopping for the set of rules and laws that best suits their own interests.

For example, if an investor or a community leader finds that national (Statutory) laws are useful for securing their own individual rights and power over land and resources, they may choose to base their claims on only these national (Statutory) laws and disregard Customary laws that contradict their claims, even though these Customary laws are recognised by the people who have lived on the land for generations. Lack of clarity about which law decides who actually has rights to the land creates an obvious danger of conflict and potential loss of lands/natural resources.

A more ‘inclusive’ approach recognises that, in reality, multiple legal systems and sources of law exist in the same place, over the same community, at the same time. This ‘**legal pluralism**’ approach seeks to integrate different systems of law – that is, find a way for them to work together – to achieve legal clarity. National (Statutory) law reforms based on legal pluralism can provide a stable foundation for communities to thrive, for the sustainable management of land and other natural resources, and for investments that support sustainable economic development.

Instead of suppressing legal pluralism by absorbing or dominating one legal system by another, the adaptive, inclusive pluralistic approach retains the most beneficial/useful aspects of each legal system and draw upon the strengths of the existing legal systems. This allows for more effective rules and policies, responding flexibly to the differing customs, circumstances and evolving needs of different communities while enforcing national and international principles of equity, human rights and good governance.

**Chart 1: Possibilities for Multiple Levels and Bodies Responsible for Customary Land Law**



## ***Level 1: International law documents protecting indigenous land rights***

Some countries have signed the international/regional treaties and conventions that provide legal support for customary land rights, while others haven't. Even in countries which have signed the treaties, it can be difficult to try to obtain the rights that are provided under these documents. In the best case scenario, countries which have adopted the following international conventions have explicitly written Customary Land rights into their constitutions. The following three documents provide the most clear and comprehensive coverage for customary land tenure.

- **International Labor Organization (ILO) Convention No.169** contains protections for indigenous customs and land rights and requirements for indigenous participation in decisions affecting those rights. Article 4 requires States to adopt measures to secure indigenous peoples' property, institutions, and cultures, consistent with the desires of the community concerned. Article 8(1) requires State parties to have 'due regard' for indigenous customs and customary laws in applying national laws and regulations. Article 15(1) requires safeguards for indigenous peoples' **rights to use, manage, and conserve natural resources associated with their lands and to participate in decisions affecting use and management of the resources.**
- **The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)** is a comprehensive list of rights of indigenous peoples. The Declaration contains 46 articles covering both individual and collective rights. Common themes in the articles include non-discrimination, land rights, indigenous customs, and State obligations to obtain the 'free, prior and informed consent' of the community prior to taking actions that threaten indigenous interests in traditional lands. Article 26(3) requires that **States provide 'legal recognition and protection' for indigenous lands** and that '[s]uch recognition shall be conducted with due respect to the customs, traditions and land tenure systems of indigenous peoples'.
- **The International Covenant on Civil and Political Rights (ICCPR)** is the foundational international human rights instrument elaborating on the civil rights protected under the UN Universal Declaration on Human Rights. Article 27 rights are **'closely associated with territory and use of its resources. This may be particularly true of members of indigenous communities constituting a minority.'**

## ***Level 2: Constitutional Protections***

Ideally, each country that had adopted international protocols outlining indigenous/ customary rights would then include in its constitution some sections which detail the rights of indigenous persons, including recognition of their rights to practice/enforce customary laws and customs.

Currently, over 100 constitutions have provisions recognizing some aspect of customary law, and 39 constitutions have provisions on customary law relating to land tenure and resource rights. Africa, Central and South America and Oceania account for 35 of these countries, all in roughly equal proportion<sup>3</sup>.

Constitutionally enshrined recognition of customary laws and rights is important because, in many States, statutory law prevails over conflicting customary law, unless there is constitutional protection. The most comprehensive recognition of customary law is found in the constitutions of Bolivia and Ecuador. Both of these constitutions contain significant provisions relating to land, customary law in the courts and traditional institutions, as well as provisions directly relating to customary law and the governance of natural resources.

**Ecuador:** “Indigenous communes, communities, peoples and nations are recognized and guaranteed the following collective rights: ... (4) To keep ownership, without subject to a statute of limitations, of their community lands, which shall be unalienable, immune from seizure and indivisible. These lands shall be exempt from paying fees or taxes. (5) To keep ownership of ancestral lands and territories and to obtain free awarding of these lands. (6) To participate in the use, usufruct, administration and conservation of natural renewable resources located on their lands.”

**Bolivia:** “Given the pre-colonial existence of the indigenous originary farmer nations and people and their ancestral domain over their territories, their free determination is guaranteed within the framework of the unity of the State, which consists in their right to autonomy, to self-government, to their culture, to the recognition of their institutions and to the consolidation of their territorial entities, in accordance to this Constitution and to the law.”

Having constitutional backing is very useful, but it is important to understand that **Governments may recognise customary law in other domestic law and**

<sup>3</sup> Cuskelly, p. 24-25.



**policy without constitutional provisions relating to customary law.** The doctrine of Native Title in Australia, Canada, New Zealand is one such example, where countries without significant constitutional recognition of customary law acknowledge the rights of the traditional inhabitants of land. **Not having** a specific provision in the constitution, therefore, **does not mean** that Customary Laws and Policies have no legal basis.

“It is important to emphasise that constitutional silence on the issue of customary law does not mean that customary law does not exist or is unimportant or irrelevant in a country. **As long as there is no provision expressly excluding or limiting the application of customary law, there is potential scope to develop the relationship between customary and statutory law.**”<sup>4</sup>

### *Level 3: Relationship between Statutory and Customary laws*

At Level 3, laws are enacted and the highest level of judicial decisions are made. Ideally the laws and judicial decisions will be in line with the Constitutional provisions for recognition of customary laws and customs. Questions to consider about the relationship between customary and statutory laws:

- In countries where both Statutory and Customary laws exist, do they exist ‘separately but equally’?
- Is the intention of the Central State to eventually adapt customary mechanisms to fit into the existing statutory model?
- Can Statutory and Customary laws be ‘harmonized’ so they do not conflict with each other, but be allowed to have equal legitimacy in the eyes of the law?

Having customary and statutory land laws existing together does not automatically lead to conflicts or problems. Having both structures allows rights to adapt to changes in economic and power relations. In many countries, customary norms and authorities remain dominant, government authorities do not interfere, and outside stakeholders are obliged to respect local standards<sup>5</sup>. In some other places, multiple institutions find ways to cooperate and coordinate, creating hybrid, new regulation frameworks. Even with legal pluralism as a reality at the national level, it may or not have concrete impacts for rural people, depending on history and the local power balance.

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<sup>4</sup> Cuskelly, p. 27.

<sup>5</sup> For example in Burkina Faso as described by JP Jacob (2002).

## ***Levels 4-6: Land Administration and Justice Structures and Roles***

After customary land laws and policies have been enacted, the administration and implementation of them occurs through a wide range of institutions/ structures. Levels 4-6 are where interactions between local communities and the Central State occur. As shown in Chart 1, at levels 4-6, there are a wide range of structures that exist in different countries. The level of Central State intervention in local community level mechanisms (shown as Paths A, B and C in Chart 1) typically ranges from a ‘hands-off’/ non-interference approach to a direct ‘top down’ local land administration unit that is under the direct control of the Central State Land Ministry.

Path B in Chart 1 represents the case of minimal Central State interference. This approach has been implemented in a number of countries, including Mozambique, Ecuador, Columbia, Panama, and most South Pacific Islands. Under this type of land administration, the Central State does not intervene unless there are disputes between neighboring communities or with Central State claimed lands. The major advantage for the Central State is that it places few demands on Central State resources. The biggest disadvantage has been that there is little transparency or mechanisms to protect community members against rights violations when the Central State does not have an oversight.

In situations where the Central State wants to retain their presence in local customary land administration Path C is used: a Local Land Administration office under the Land Ministry is responsible for the implementation of land policy at the local community levels. This Local Land Administration Office will ensure that the Central State is near the areas under customary land use and will allow the Central State to more easily access and interact with the community level administrative body.

*The Joint Land Board option (Path A) represents another approach that is in-between the two extremes discussed above. Here a Board consisting of both Central State and local community representatives is responsible for land administration. In some instances, the local community representatives on the Joint Land Board serve also serve as members on the Local Village Land Committee or Council. In best practices, this Joint Land Board is balanced, with an equal amount of representatives from both the Central State and the local communities. It is also a good practice to have some ‘at-large’ or non-political community representatives on this type of board to best keep local community leaders accountable.*

At the local community level (Level 6 in Chart 1) land is managed under a wide range of bodies: from individuals (village leader(s)/ elder(s)) to groups (councils, committees, associations, cooperatives, incorporated groups, etc.) These administrative persons/ bodies can be elected, appointed or inherited. Some have formalized the roles and responsibilities of the person(s) on the committees/ councils. Some of these bodies are officially registered and regulated by the Central State and some are have no Central State oversight. These considerations and others are listed in the box on top of page 10. In some communities, their decision-making is more consensus-based, involving some or all of the community depending on the decision being made. Most customary systems are likely to have a mixture of these approaches, with traditional authorities arriving at some decisions on behalf of all the community (often on the basis of consultation and discussion) and other decisions requiring the involvement of some or all of the community.

### Considerations for Village Land Committees/ Councils (VLCs)

- Is the VLC officially registered/ recognized by the Central State?
- What are the qualifications for VLC members?
- Are VLC positions voluntary or is there some form of compensation?
- Are VLC members elected, appointed or inherited?
- Are there minimal requirements for women/ minority membership?
- Can Village Head/ Village Committee members also be VLC members?
- How often do VLCs meet?
- Can general public attend VLC meetings?
- Do VLC decisions require approval from the community? If so, what is this process (majority vote, etc.)?
- Are VLC decisions/actions subject to regular review? By whom (community)? If so, how often?

The Village Land Committee/ Council has a number of key roles and responsibilities, some of which are outlined in the box below. An example of VLC regulations from a Thai community is listed in Appendix C, while an Tanzanian example is listed in Appendix E- IV. Of particular importance is the issuance of land titles/ certificates, and some of the key considerations for this procedure are listed in the box on the bottom left of this page. Whatever the local land administration structure, it is important that **the procedures that are used are clearly outlined, understood, and approved by the community members to ensure accountability to all community members.**

At the points where the Central State Land Administrative bodies interact with local communities, It is also essential that people can access, understand and use the systems and procedures. Ensuring accessibility of Central State administrative institutions includes consideration of:

- **Location:** Communities must be able to travel easily to where the institutions are located and where procedures will take place.
- **Language:** Information and procedures must be in the language of all communities, expressed in a way that they can readily understand.
- **Cost:** Communities must be able to access the mechanisms and procedures necessary to implement and enforce their rights at no cost or at a minimal cost that is affordable to all.
- **Familiarity:** Communities are best able to understand processes, procedures and formats with which they are already familiar, rather than new kinds of procedures or processes imported from foreign systems.

#### **Basic rights requirements**

Failure for Local Land Committees and Village Councils to address these following would justify outside (Central Gov't) interventions:

- Minority rights/ representation
- Women's rights/ representation
- Environmental effects outside of community land
- Disputes with neighboring communities over land boundaries/ control/ usage
- Abuse of power/authority by local land administrators/ committees/ boards
- Violate "Principles of the State Constitution"

### ***Justice System Structures***

To protect community members' family/ individual rights, it is import to create a clear and easily accessible system of judicial appeal leading from the lowest level of local community conflict resolution all the way to the highest court in the country, with continued reference to the customary rules of evidence and procedures that applied in the original customary forum. State courts have a particular role in ensuring that customary decision makers comply with core principles. The two types of land disputes that need to be addressed are (1) internal disputes within the community and (2) external disputes with other communities or outside actors (governments, military, companies, etc.).

**Customary institutions** which play an essential role in managing and resolving customary land disputes, take various forms. They include hereditary chiefs, designated land chiefs, village councils, respected elders, local influential persons, and ritual or spiritual authorities. In all countries, **customary institutions play an initial role in resolving customary land disputes**. No country prohibits resolution of land disputes by customary institutions, but few countries have developed systems for resolving land disputes that combine those institutions and their formal institutions. An example of a Customary Dispute Settlement structure from Tanzania can be found in Appendix E- V.

Major advantages of customary judicial institutions over Centralized State judicial systems include<sup>6</sup>:

- Can hear a dispute more quickly than the formal court system;
- Are usually are conducted in the language that local people speak;
- Give greater weight to relevant local evidence and culture;
- Address conflicts holistically and arrive at compromises that allow both parties to a conflict to go on living near the other (rather than ruling in favor of one party at the expense of the other);
- Are generally less expensive and more easily accessed by the rural poor than the formal systems?

In cases where the formal justice system is not able to provide justice for community members (due to corruption and influence of outside powers), there will still be a need for **alternative paths for justice**. Knight states that "...it may be worth establishing a special review panel

#### **Key Considerations for Issuance of Land Deeds/Titles/Certificates**

- Do communities/families have land rights before they possess the actual land deeds?
- Are communal customary land deeds registered in the name of the community/ trust/ association/ or some other formal structure?
- Can communal titles/deeds/certificates be transformed into individual deeds?
- Which body/agency is responsible for the issuance of deeds?
- Are local leader's/ land board chair's signatures needed on the deeds?
- Do deeds have to be renewed?
- What language (local and/or official National) are deeds issued in?

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<sup>6</sup> Knight, p.40.

with authority to review and adjudicate land tenure issues and decisions. Such a **panel should comprise representatives of all key stakeholders, including civil society and customary communities as well as the State**, to help ensure that decisions are balanced and fair.”<sup>7</sup>

In some countries, the most effective method to achieve State recognition and respect for enforcement of Customary Land Law, is to win a prominent court case- a **‘precedent’ or ‘landmark’ decision**. In today’s increasingly connected world, it is possible to gain a large amount of public sentiment and awareness of court cases with a clearly identifiable victims/communities suffering from gross injustices. But, even more significantly, some of these cases can clear a path for others under similar circumstances to attain justice. Landmark Supreme Court decisions in favor of indigenous communities’ rights to administer land in their customary practice in Malaysia, Canada, New Zealand, the United States and Australia (all under common law systems) have provided legal grounds for other communities to seek justice.

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<sup>7</sup> Ibid, p.40.

## **Section 3: Customary Land Law Implementation around the world**

### ***Comparisons of 8 countries' Customary Land Laws***

The Tables on the next three pages are summaries of the mechanisms used in countries that have formally recognized Customary Land Management Practices and the major strengths and weaknesses of their implementation. The countries were chosen for this comparison because they represent a wide range of approaches resulting in different strengths and weaknesses in implementing a fair, participatory customary land management system. By selecting the 'best' parts of each countries approach, it is hoped that better, more successful customary land law systems and mechanisms can be attained.

In Table 1, the basic frameworks, foundations, and administrative mechanisms for each country's customary land law are outlined, including:

- Constitutional recognition of Customary Rights,
- The relationship between Statutory and Customary Land Laws,
- The type of land tenureship available (full land ownership or only land use rights)
- Who is land vested in (who the state formally interacts with for Land Management)
- Local Land Administration Authority
- Who is the ultimate possessor of the land deed (individuals, families, communities, etc.)

Table 2, meanwhile, highlights the strengths and weaknesses of each countries customary land laws. There are many more points that could have been added for each country, but these Tables have been added to only provide a rough outline of some different approaches to customary land management structures, with the hope of providing some discussion points about how Burma will be able to produce the most effective land management structures for the benefit of its communities.

Table 1: Comparison of eight countries' Customary Land Laws

Region	Country	Legal Foundation of Customary Law	Relation to Statutory Land Law	Local Land Administration Authority	Land Vested in	Type of Land Tenureship	Land Title/Certificate Holder
		<i>Constitutional, Legislated?</i>	<i>Integrated, Separate but equal?</i>	<i>Land Board, Trust, Village Chief, Village Committee?</i>	<i>State, Land Boards, Communities, Trusts, Incorporated Entities, Citizens?</i>	<i>Usage rights, Ownership rights?</i>	<i>Community/Group, Individual/Household, Both?</i>
Africa	Botswana	Legislated (Tribal Lands Act, 1968 (amended 1986, 1993))	Partially integrated	Joint Land Board	Joint Land Boards (on behalf of citizens)		Individual and Household
Africa	Tanzania	Legislated (Land Act (1999) and Village Land Act (1995))	Partially integrated	Village councils	State	Usage only	Both (under Certificate of Customary Rights of Occupancy-CCRO)
Africa	Mozambique	1990 Constitution, 1997 Land Law	Separate but equal	Provincial Land Admin Services	State	Usage only	Community
Pacific Islands	Solomon Islands	1978 Constitution, Land and Titles Act, Customary Land Records Act (1994)	Separate but equal	Trust (maximum five members who are joint owners)	Caretakers (Trustees)	Usage only	Community



<b>Latin America</b>	<b>Costa Rica</b>	Indigenous Law of Costa Rica (1977), Also signatories to ILO 169	Separate but equal	Associations for Integral Indigenous Development (ADII)	Indigenous communities (Supreme Court decisions)	Ownership	Community or Groups of Communities
<b>Asia</b>	<b>Philippines</b>	1987 Constitution Article 8, Section 5) Legislated (Indigenous Peoples Rights Act (IPRA) 1997)	According to law, separate but equal, but in practice, statutory law is higher	Community elders	Communities (Indigenous Cultural Communities held in trust by community elders)	Ownership Rights (According to Supreme Court Decision)	Indigenous Cultural Communities
<b>Asia</b>	<b>Cambodia</b>	Legislated (Land Law 2001), Sub-decree on the Procedure for Registering Indigenous Community Land 2009	Separate but equal (one of 5 types of official classifications of land)	No procedure for administration has been established yet	Communities (which must be first registered before title can be granted)	Ownership Rights after registration, State Land prior to registration	Both (Initially Community, then possible to transfer to Individuals)
<b>Asia</b>	<b>Malaysia</b>	Constitutional (Article 160) Legislated (Sarawak Land Code of 1958, Sabah Land Ordinance 1930, Sabah Land Use Policy 2010, Aboriginal Peoples Act 1954)	Separate but equal in law, but customary tenure is still looked down on and considered inferior by State officials	Village committees	Native Customary Land Administrators, Konsep Baru or 'New Concept': a joint venture between native landowners, the government and large corporations.	Usage	Both (State encourages individual and banks accept individual as collateral for loans)

**Table 2: Major Strengths and Weaknesses of eight countries' Customary Land Laws**

<b>Region</b>	<b>Country</b>	<b>Major Strengths</b>	<b>Major Weaknesses</b>
<b>Africa</b>	<b>Botswana</b>	Tribal Land Boards membership was set up as 1/3 government, 1/3 traditional chiefs, and 1/3 local citizens. This system is designed to gradually move customary practices to statutory law over time, therefore increasing its legitimacy and official recognition.	Tribal Land Board membership composition has been changed from original arrangement to one guaranteeing Central State control. Lack of technical expertise of Land Board members and not enough compensation for time needed to spend on board's work. Some land boards located too far from communities they oversee.
<b>Africa</b>	<b>Tanzania</b>	The elected village government is the lawful controller and manager of registered lands. The land and forest laws also make it possible for National Parks and Reserves to be owned by communities. Under Tanzania's Village Land Act, women's land rights are protected not only in processes of application for land, divorce and widowhood, but also in the sale, transfer or surrender of land.	The law is too vague in providing grounds upon which a community's land area (Village Area, or Village Land) maybe defined -with confusion and conflict sometimes resulting. There are too many forms (50) for the Village Executive Officer and Council to use. The law is not very accessible, having originally been written in traditionally legal language, and with insufficient interpretation of terms.
<b>Africa</b>	<b>Mozambique</b>	Formalization of land rights at the community level reduces the heavy administrative burdens on the state's land administration system, especially since communities are not required to have their lands delimited to enjoy full legal protection of their rights. The Law allows customary forms of proof for land claims, including the oral testimony of community members.	Increasing demands for land by foreign investors and local elites has made unregistered lands vulnerable to confiscation. Many communities and local land admin offices lack awareness of the law. Other problems include the high cost of surveying and demarcating land, and the poor equipment and limited capacity available for these services in the rural provinces.
<b>Pacific Islands</b>	<b>Solomon Islands</b>	Over 80% of land is under customary tenure. Uses a separate "Customary Land Courts" system for land cases (parties unhappy with the decision of native courts can appeal to the CLC). The Constitution emphasises the importance of custom in relation to land and this is given practical application by the Land and Titles Act.	No transparent method for election of caretaker /trustee positions. Local courts to deal with land disputes have been established in only five locations, and all five of these have ceased to function during the last two years for lack of finance. There is no bridge from the customary system into the formal system, which leaves many villagers without any access to leasing or mortgaging.

<b>Latin America</b>	<b>Costa Rica</b>	Strong legal customary tenure security with no apparent contradictions with other land laws. Customary Rights defended by the National Commission for Indigenous Affairs (CONAI), which is comprised of the President of the Republic, different universities, ministries, and representatives of the indigenous communities, and is set up to “guarantee respect for the rights of indigenous minorities, ensuring that the state enforces the individual and collective land rights of the Indians.”	Disputes in indigenous territory occur when reserves have their land invaded by people from outside the communities (Non-indigenous persons illegally occupy more than 43 percent of the total lands), in the event of illegal logging and the construction of hydroelectric dams, or by national parks that fail to adequately respect their rights. The ADIs are viewed as State agencies imposed on the communities and not as institutions which truly represent indigenous people.
<b>Asia</b>	<b>Philippines</b>	The IPRA states that indigenous peoples have the right to “free and a priori informed consent” on projects directly affecting them. The IPRA recognizes indigenous peoples’ rights to their ancestral lands and their right to self-governance, as well as specifically setting forth the indigenous concept of ownership.	Implementation has been incomplete because of bureaucratic and expensive titling procedures that place the burden of proof on indigenous people; conflicting laws and overlapping jurisdiction; lack of mechanisms for conversion of existing titles; and ineffectiveness of titles in affording protection of indigenous property rights
<b>Asia</b>	<b>Cambodia</b>	Indigenous land rights protection clearly written in Land Law and Sub-Decrees.	Time consuming and heavily bureaucratic registration process. Must register as an “Indigenous Community” before can begin process to register CLT. Indigenous Land Rights have been constantly subjugated to government’s demands for land confiscation in the name of economic development. Only 8 Indigenous Community Lands have been officially registered and recognized by State.
<b>Asia</b>	<b>Malaysia</b>	Decentralized land authority, especially Sarawak and Sabah. Native authorities and courts are officially recognised in Sarawak and continue to administer community affairs and deliver local justice. High Court decisions from the 1950s on have held that customary lands were inalienable.	Lack of rights recognition/protection in areas declared to be forests or protected areas. Registration procedures are extremely complicated and take a very long time. Maps of NCR areas have been suppressed. Large amounts of NCR land haven’t been mapped, but the gov’t has not revealed where such lands are. Native courts have been discouraged and native chiefs gradually co-opted into supporting political parties which promotes logging, plantations and rapid industrialization.

## ***Best practices: Tanzania***

There are several factors which allow the Tanzanian system to stand out for its recognition and respect for customary rights:<sup>8</sup> (Details of some guidelines/ regulations as well as administrative and judicial bodies that have been established in Tanzania are listed in the Appendices at the end of this document)

Its land laws enable customary landholders to register their land as it currently exists and protects those rights **even if they remain unregistered**.

These rights apply **to all categories of property** within the community, whether designated for the purpose of a shop, a house, a family farm, a community forest, pasture or marshland, or water source area, or simply spare land within the community land area.

By creating a very strong construct of community land area (“Village Land Area” or VLA) every one of the country’s 12,000+ rural communities may secure their overall resources at relative speed, by agreeing and mapping the perimeter boundary of their domain with neighboring villages, and having this VLA registered at district level.

Longstanding provision has been made for Tanzanian villages to elect their own governments (“Village Councils”) and these democratic bodies are made the legal manager of all land matters within the VLA, subject to the ultimate authority of the community itself; this includes being able to make by-laws as to land tenure and land use, and which the courts must uphold. It also includes being able to control land titling itself, through Village Land Registers. That is, only the community can decide who gets title and on what grounds, guidelines provided in the law

District, regional, and national bodies have advisory oversight over the decisions and operations of the Village Land Managers, not authority.

The village assembly must vote on all land allocations in the village, and should community members disagree with actions or decisions taken by the village council (a minimum of 100 villagers), they may lodge a complaint with the district council on the grounds “that the village council is not exercising the func-

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<sup>8</sup> Wily (2012), pp. 13-14.

tion of managing village land in accordance with this act ... or with due regard to the principles applicable to the duties of a trustee”.

Collective properties are given special protection; **no community may proceed to issue titles over individual or family lands until the community has agreed which resources are rightfully communal**, owned by all members of the communities. Description of these common properties is to be registered in the Village Land Register.

Customary land rights, whether registered or not, are given **equal legal force and effect** to rights obtained through statutory grant or purchase.

Communities may petition to have classified forests and wildlife areas (Parks and Reserves) returned to their tenure, although no community has sought to do so yet.

Because customary rights are upheld as full private property rights (and whether owned by individuals or communities), when the state wants these lands for other purposes, it must buy these at open market rates from the community and pay compensation for other losses incurred through that purchase; this acts as a major disincentive to willful appropriation without strong cause.

#### Advocacy for and Challenges of Implementation of Customary Land Rights

**Advocacy for Customary Land Rights** should emphasize the positive benefits that recognition of customary land management practices will bring to both the Central State and the local communities:

#### **Main Advantages for Central State to adopt Customary Tenure Model:**

- Saves Central State time/ budget/ staffing for land administration agencies.
- Builds on existing land management policies that have been developed over a long period of time.
- Supporting local communities' initiatives will bring about more political support/ understanding from these communities.

#### **Main Advantages for local communities to adopt Customary Tenure Model:**

- Allows more local control/ 'say' in land management policies and regulations.

- Can lessen/prevent selling of land to outsiders and eventually losing control over land and natural resources.
- Can lead to stronger/more united communities that are able to protect land and natural resources from outsiders more effectively.
- Flexible and able to adapt to changing reality/circumstances more easily than Statutory Law.

When advocating for customary land rights, it is important to keep in mind the **practices of the people** with the **objectives of the state** and arrives at solutions that will:

- be used, adopted and **successfully implemented** on the ground;
- advance **Central State** interests;
- advance **community** interests;
- advance individual/ family interests.

Customary Land Rights have never been gained without a committed movement from those who have been suffering from injustices. Some of the more successful advocacy campaign strategies have included:

- Establishing **model/ pilot communities** that clearly demonstrate effective customary land and natural resource management practices and, whenever possible, bringing influential persons to visit these communities to observe/ learn firsthand.
- Highlighting areas where the **environment** has been preserved while under customary land management
- Demonstrating the **economic feasibility and agricultural production** that can be achieved in areas under customary land management.
- Gaining support and resources from a wide range of local, national, and international individuals, networks, organizations.

The two case studies summarized in the boxes on the following pages offer examples of participatory customary land rights advocacy campaigns- one that ended in success and one that did not lead to policy changes (although in the second case from Thailand, the struggles and challenges actually strengthened the land rights movement and has led to campaigns for new types of communal land ownership policies).

**Implementation:** Even after well-written policies and laws have been adopted, there is no guarantee that the rights they protect will be attained by community members. The following boxes contain examples from the Philippines and Costa Rica of how seemingly well-constructed policies/laws have been abused or circumvented by Central State and Corporate agencies and actors.

**Mozambique's successful drafting of a land law after comprehensive consultation with public**

When Mozambique needed to draft new land laws in 1996, the Mozambique 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.

A massive effort was made to involve the public in the 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. 15,000 volunteers from over 200 NGOs, church associations, and cooperatives were trained to bring the key principles of the new law to 114 of Mozambique's 128 districts. 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. Seminars and conferences were organised with civil society, public servants working on land issues and international experts to encourage policy debate. These gatherings were openly covered by the media. This process contributed to a strong sense of national ownership and to the implementation of a law that was well suited to Mozambique's situation. When the bill finally passed into law, it maintained in full form a majority of the items that civil society had lobbied for.

### **Thailand's long and eventually unsuccessful Community Forest Bill campaign**

The movement for the passage of a Community Forest Bill in Thailand to protect customary land practices in Forestry Department controlled lands began in 1989. Beginning at that time, grassroots networks were strengthened in order to collect 50,000 signatures needed to introduce a "People's Bill" into the Thai Legislature. While the communities worked together with academics and NGOs to draft a bill which would support their needs, other versions were also drawn up by both political parties and the Forestry Department. Finally after extensive campaigning and advocacy work, the "Community Version" was passed in the Lower House in 2001, but it did not pass in Senate. After many rounds of negotiations, forums, and discussions, a 'watered down' version of the Community Forest Bill was finally passed by the Senate in 2007. Supporters of the original bill say that sections 25 and 35 deprived many communities of the right to utilise forests which they have been protecting for centuries. In the end, however, the details of the Community Forest Bill did not matter as the Constitution Court later ruled that since less than half of the assembly members voted to approve the bill it had to be dropped.

### **Philippines: Failure to issue titles due to lack of capacity and will**

In the Philippines, the Indigenous Peoples' Rights Act (IPRA) was well-designed to preserve ancestral land of indigenous communities and protect it as a cultural and social (and not only an economic) asset. Despite this law's advancements towards equity in dually recognizing 'modern' and 'traditional' practices, the Philippines' reforms have failed to achieve notable success due to failures of implementation. As of 2010, only slightly more than 250 Ancestral Land Certificates had been issued by the Government. The failure to issue more certificates is due a number of factors, including institutional weaknesses, ill-defined responsibilities, and lack of funds for implementation. Specifically related to the IPRA, implementation was incomplete because of bureaucratic and expensive titling procedures that place the burden of proof on indigenous people; conflicting laws and overlapping jurisdiction; lack of mechanisms for conversion of existing titles; and ineffectiveness of titles in affording protection of indigenous property rights, broadly. The lesson learnt is that even though a solid legal framework can be designed to protect the land rights of minorities; it also requires institutional capacity and political will to be effective. Indigenous land titling must also come with unbiased institutional support, legal training and capacity building to enable communities to select the appropriate title, manage their lands and make decisions in ways that ensure genuine consent.



### **Costa Rica's "protected" indigenous areas being taken over**

There are eight indigenous peoples in Costa Rica with a population of 104,143 persons, mostly living in 24 legally recognised and titled indigenous territories. The 1977 Indigenous Persons Law states that indigenous territories are "inalienable" and "exclusive" to indigenous peoples and that non-indigenous "persons cannot rent, lease, purchase or acquire by any other means" lands therein. In direct contravention of this law, studies reveal non-indigenous persons illegally occupy more than 43 percent of the total lands in the 24 titled indigenous territories. Domestic remedies to address illegal occupation are ill-defined, unfunded and ineffective.

Given the absence of effective judicial and other remedies to address invasion and expropriation of their lands, indigenous peoples have sought to correct this situation through the legislature. This led to the drafting, over a seven year-long period, of *The Bill for Autonomous Development of Indigenous Peoples* ("Autonomy Bill"), which was first submitted for debate in the Congress in 1995. It still has not been adopted due to opposition from powerful vested interests, some of whom illegally occupy lands in indigenous territories, as well as from the government, which perceives the Bill to be a threat to its national development initiatives. This has essentially paralyzed the legislative process for the past 17 years and today the Bill is in danger of being completely withdrawn from consideration.

## Section 4: Conclusions and Recommendations

In summary, the creating and drafting of land laws that will successfully balance the needs of the Central Government, the local community, and the individual families/persons, while simultaneously and seamlessly elevating customary land tenure rights up into the formal legal system is an exceptionally difficult task. Each country will have its own path and systems based on their backgrounds and approaches to addressing the land issues. Below is a list of ‘best practices’ that have also been prioritized in order of importance.

### *NATIONAL LEVEL*

#### Policy Advocacy

- Analyze and acknowledge the needs/desires/motives of the Central State as well as your own, in order to be able to negotiate most effectively.
- Insist on an approach to land tenure reform based on an understanding and acceptance of legal pluralism that will integrate customary law, national (statutory) law and international human rights law.
- Build networks among peoples’ groups (community, environmental, farmers, women and youth) local NGOs, international NGOs, academics, UN agencies, etc., in order to share information/ experiences and strengthen the movement for customary land rights.

#### Customary Land Law Mechanisms

- Build on existing structures/ procedures/ regulations instead of ‘re-inventing the wheel’.
- Flexibility to accommodate a wide range of customary practices, but fixed enough to prevent abuse by powerful actors/investors. Avoid ‘codifying’ regulations, while ensuring the customary practices are subject to a regular review from stakeholders.
- Need to construct pro-active (instead of reactive/ad-hoc) structures and regulations to protect against land grabs/confiscations (including a clear/fair/transparent appeals process).
- Ensure that community members can access, understand and use land administration systems. Accessibility includes consideration of location, language, and costs.

### *COMMUNITY LEVEL*

- **Documentation** of existing land and natural resource management practices.
- Select pilot communities that have already established clear land and natural

resource management practices and use these as ‘learning centers’ to give concrete examples of how customary land law can work.

- Produce a community natural resource management plan.

### Land Registration

- Register/ delineate/ map/ recognize holdings as a COMMUNITY first- BEFORE determining individual plots/claims/holdings. This documentation will help prevent land grabs/ confiscations.
- Make sure to denote/ identify “communal lands” including fallow lands or community forests, as these areas are usually identified as ‘vacant and ownerless’ by the state.
- Ensure transparency and participatory procedures for every step of land demarcation and registration (See Appendix D for an ‘best case’ example of Mozambique’s approach)
- Keep registration process as simple and transparent as possible.

### Land Management Bodies

- Create systems of checks (to prove accountability to community members and to State and Central State Administrators) for both land administrative bodies/ Village Land Councils.
- Need to balance between Central Gov’t, Local Gov’t, and local citizen’s representation on Joint Land Boards/ Village Land Councils.
- Need to ensure women and minority rights/representation on Local Village Committees/ Councils.
- And last, but most importantly- without enough support for these issues from persons/organizations representing all levels of the society- even the most ‘well-thought-out’, participatory, sustainable, perfectly drawn-up law and regulation will ultimately fail.

“...any sustainable resolution of the current urgent situation facing indigenous peoples and their rights in Costa Rica is ultimately a matter of political will. Costa Rica has the legislative tools at hand and sufficient resources, financial, human and technical, to fully address this substantial blemish on its otherwise largely positive human rights record. However, it has yet to show the will to correct this major problem despite substantial and sustained international criticism. Indigenous peoples have made numerous good faith efforts to work with the state without result and have been forced to seek redress outside of the country.”<sup>9</sup>

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<sup>9</sup> Garro and MacKay, p. 51

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## Appendices

### ***A: Points to consider to ensure community and individual interests in land laws<sup>10</sup>:***

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

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

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

1. Guarantee individual and family land tenure security;
2. Ensure equal access to land and natural resource rights by all community members, by establishing and enforcing the land rights of women, the elderly, widows, children, pastoralists, indigenous peoples, and other marginalized populations;
3. Increase potential for the realization of greater family prosperity, allowing land to be used in a way that the family believes will maximize its value;

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<sup>10</sup> Knight, p. 11-12

4. Protect against land grabbing, forced dispossession, or unconscionable contracts perpetrated by more powerful community members against more vulnerable members, or by one family member without the knowledge of the rest of the family;
5. Provide increased freedom regarding options to rent, transfer or sell one's land claims according to family need;
6. Allow families and individuals to sustainably access and use communal areas;
7. Reduce land-related conflicts with neighbours;
8. Increase the ability to expand and grow holdings if possible or necessary, including elasticity for shifting cultivation patterns; and
9. Increase inter- and intra-family cohesion and sense of place and feeling of community.

### ***B: When is a customary land management law a 'good law'?*<sup>11</sup>**

Customary land interests are respected in national laws if they are:

- treated as equivalent in legal force to land interests obtained through non-customary (usually introduced statutory) regimes; that is, accepted as an equitable form of private property,
- able to be certified or registered without first being converted into non-customary forms of landholding,
- bound to be upheld as private property by government and the courts, even if they are not formally certified or registered,
- respected to equal degree as property whether owned by families, spouses, groups, or whole communities, not just individuals,
- understood in the law as expressible in different bundles of rights, including, for example, the seasonal rights of pastoralists,
- respected where they refer to unfarmed and unsettled lands such as forests, rangelands, and marshlands,
- acknowledged as including rights to above-ground resources such as trees and wildlife, and also to local streams and ponds, coastal beaches, and surface minerals that have been extracted traditionally for centuries (e.g. iron and gold),
- given primacy over non-customary commercial investment purposes seeking rights to the same land,

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<sup>11</sup> Wily (2012), p. 2-3.

- recognized as requiring legal support for community-based, democratically formed land administration to be successfully and fairly regulated,
- supported by the creation of local-level dispute resolution bodies, whose decisions carry force and whose rulings rely on just customary practices,
- reined in legally where customary norms are unjust to ordinary community members (e.g. as a result of undue chiefly privilege) or to vulnerable sectors such as women, orphans, the disabled, hunter-gatherers, pastoralists, immigrants, and former slave communities,
- given the same protection as statutorily derived private properties when required for public purposes, as indicated by the extent to which the law requires the same levels of compensation to be paid and the same conditions to both forms of property to apply,
- recognized as existing even where forest and wildlife reserves have been overlaid on customary lands, so that due separation is made between land ownership and the protection status of those lands, and
- provided for in such a way that officials, courts and especially customary land holders may easily understand and apply supporting provisions in law.

### ***C: Example of community land management regulations from Thailand:***

#### Land Regulations of Rai Dong Village<sup>12</sup> (Lamphun Province)

1. The Committee (Community Land Committee) shall keep accounts of income and expenditures from money collected from the villagers
2. If a committee member is corrupt, their land will be confiscated and they will no longer have rights to land.
3. The Committee will organize villagers and coordinate with related officials.
4. Committee members and all general members should join all events and pay dues for the common fund.
5. Outside of family members, it is prohibited to hire outside persons to work on the land. It is also prohibited to use a third persons' name for land utilization. If these regulations are not adhered to, the land will be confiscated.
6. If a committee member or general member cannot join an event because of a good reason, he/she must explain the reason to the committee in advance and get approval.

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<sup>12</sup> Rai Dong village is a community which took over private illegally owned land and distributed it to poor and landless families in November 2000.

7. If a committee member or general member could not join the event and did not have a good reason, he/she must pay a 150 Baht fine, which will put into the common fund.
8. It is strictly prohibited to sell and buy land without approval from the committee. Persons who disobey this will have their land confiscated and donated to the commons.
9. If someone has a good reason for selling the land, he/she would only be able to sell it to Rai Dong villagers after the committee approved the transaction.
10. One family has the right to receive only one land plot.
11. If there are more than one family in a household and they are poor, they can receive one land plot per family as the committee approves.

(Regulations approved by community on 9 November, 2000)

The reasons we have allocated and cultivated this land are:

- Villagers are poor and many of them do not have their own land, or do not have enough land for farming.
- There were no declared landowners for this land. The land was uncultivated and left idle for many decades.

### ***D: Mozambique's approach to community land demarcating, registration and titling<sup>13</sup>***

Regulations detailing how Mozambique's land law will be implemented state: 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. (Land Law Regulations, Art. 9.3) The technical annex to the land law sets out the procedures a community must complete before receiving an official delimitation certificate (technical annex, art. 5.1).

***First, an advisory 'working group' must be established*** to coordinate and lead the community through each step of the delimitation process. The working group should 'include a technician with basic knowledge of topography and who shall have the information contained in the Cadastral Atlas' (technical annex, art. 11(2)). Also, to ensure that the results of the delimitation process are equitable,

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<sup>13</sup> Lesniewska et. al., p. 47-49.



just and representative of the community as a whole, the working group must ‘work with men and women and with different socioeconomic and age groups within local communities’ and ensure that they arrive at decisions ‘through consensus’ (technical annex, art. 5.2).

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

- its history, culture and social organisation;
- the use of the land and other natural resources and the mechanisms for its management;
- spatial occupation; population dynamics;
- and 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 organisation, current use of land and natural resources 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 formalisation of customary markers.

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.

***Fifth***, State technical staff then ***compile the two (or more) maps*** into one computer-generated cartogram, to which a ‘sketch plan’ and accompanying ‘descriptive report’ are attached. The sketch plan is a transcription of the community-generated maps into terms that enable it to be located on the cadastral maps, including geo-referencing points and boundary lines. The ‘descriptive report’ is derived from the community’s participatory appraisal exercises and may include the community’s structure and history, specification of the community’s natural resources, communal areas, sacred spaces and important community infrastructure, and 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). 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. Once registered formally the community holds a single right of land use and benefit and, as a title holder, it also acquires legal ‘personhood’ and can thereafter enter into contracts with investors and undertake other legal actions. 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.

## ***E: Examples from Tanzanian Land Law***<sup>14</sup>

### **I. Purposes of the Tanzanian Village Land Act**

#### General purposes

- To foster a decentralised and democratic system for majority land rights
- To protect the existing land rights of the majority and to assist in clarifying and securing these in law

#### Specific purposes

- To empower villagers to **MANAGE** their land
- To set up the **PROCEDURES** and make them fair, transparent and inclusive
- To **RESTRUCTURE** the role of government and district councils as advisers and watchdogs
- To give **FULL LEGAL WEIGHT** to customary land rights
- To help communities to **SECURE** their Village Area as their own property
- To enable land rights to be **REGISTERED** and **TITLED**
- To enable land rights to be **SOLD**
- To **LIMIT** the power of Government to take village land
- To include **COMMON PROPERTIES** as legal land right
- To set up community level **LAND DISPUTE** services

### **II. The principles of the Tanzanian Village Land Act**

1. Land dispute systems to be independent
2. Distinction made between owning the land and owning rights over land
3. President owns the soil, on behalf of the nation. People can own land rights: the right to occupy and use land
4. As a trustee landowner only, President cannot behave like landlord. He may only take land in public interest and must pay full compensation
5. Customary rights are considered private property rights, made registrable
6. Law protects existing and unregistered rights
7. Main purpose of law is to help people register their land rights
8. Customary rights and granted rights have same legal status and effect

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<sup>14</sup> Adapted from Wily, 2003.

9. Spouses, families, clans, groups, villages may own land and be registered as owners
10. Common properties given new respect in the law
11. Management of land is devolved for most of the land ["Village Land"]
12. Village Councils now managers, NOT owners
13. High respect for women's rights, pastoralist rights, disabled, landless and rights of urban poor
14. Equal access to land encouraged: ceilings, condition of occupation and use
15. Land right may be sold, and at open market values
16. Villages to manage land in accordance with customary law
17. Customary law is the accepted majority local norms, can be modern norms.

### **III. Tanzania Village land management institutions**

- Village Land Manager [VC] elected directly by the village assembly
- Village Land Officer (Village Registrar) appointed by the elected Village Council, on the basis of nominations from the District Council
- Village Land Committee appointed by the elected Village Council
- Adjudication Committee elected directly by the Village Assembly
- Adjudication Officer appointed by the elected Village Council
- Village Land Council nominated by the elected Village Council for Village Assembly approval

### **IV. Roles and Responsibilities of Tanzania Village Council**

- 'manage the land in accordance with customary law of the area;
- protect the environment;
- protect rights of way;
- maintain the perimeter boundary of the village area;
- keep secure the certificate of village land which is given when it is made Land Manager;
- report alterations in the boundary to the Commissioner for endorsement on the certificate;
- issue certificates of customary title, and –
- maintain a register

## **V. Tanzania Dispute Settlement Structure**

### The Adjudication Committee

- Made up of no more than nine villagers
- At least four must be women
- Elected by the Village Assembly for a 3 year term
- May be elected for one further term
- The committee has power to hear evidence
- May issue summonses, notices and orders requiring attendance or production of documents

### The Adjudication Adviser

- Is appointed by the Village Council
- Is a respected and competent person
- Need not be a villager (could be an official, magistrate etc.)
- Is directly responsible to the Adjudication Committee as its adviser
- Serves as its Executive Officer, keeping records
- Carries out investigations relating to rights as directed by the Committee

