

Forests for People

Community Rights and Forest Tenure Reform

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From Discourse to Policy: The Practical Interface of Statutory and Customary Land and Forest Rights

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We drove along the winding road, surrounded by grassy hills in the foreground, forests in the distance, struck by the poignancy of the situation. Many in the Lao-PDR government were trying to manage the area in such a way as to improve people's livelihoods. But formal government policy was tied to an 18th century political philosophy of human social evolution that hid from them the complex agroforestry and governance systems which local peoples had evolved to organize and sustain themselves over the millennia. The government's forest reform involved managing the forests and communities across the land in a uniform way, designed from an office in the capitol – an approach deemed easiest to implement. The policies involved uprooting peoples from remote areas where their forest gardens flourish with mature trees from which they harvest fruits, bark and wood, and around which carefully tended swiddens and gardens provide food, medicines, spices and herbs for their families and their community. Resettlement would establish family clusters along the road, in small areas of land according to pre-set formulae. Age old forms of customary practice, leadership and laws were cast aside, as the government ignored the wealth of cultural diversity and appropriate local governance, resulting in an uprooted people, a damaged landscape, sad disempowerment. (Colfer's personal observations on the Land and Forest Allocation Program, March 2008)

Land and forest policies in many countries, including Lao-PDR, are formalizing recognition of local peoples' rights, especially to provide them with opportunities that improve their livelihoods. However, as observed by Cousins (2007b, p291), 'these policies must take cognisance of the complexities and realities of current regimes of claims, rights and their governance, i.e. how "actually-existing" tenure systems operate in practice'. Customary tenure systems, by definition,¹ have evolved over long periods of time in response to location-specific conditions (World Bank, 2003). In the process of recognition, such customary systems have been ignored, subordinated or, at times, effectively accommodated (Tahamana, 2007; see also Elbow et al, 1998, cited in Diaw, 2005).

The scholarly debate on whether to accept one legal system as superior to others, or what their respective weights should be, continues. There is a call for a paradigm shift from legal pluralism, which recognizes parallel systems, to legal integration, which would mesh them. Integration would require understanding the major constitutive elements of each system (Diaw, personal communication), in each national context, as well as the ways in which they have been accommodated or subverted, in order to design an effective negotiation that aims at combining their strengths. It would require maintenance of the widely acknowledged flexibility and responsiveness characteristic of customary systems. In the context of this book, the goal would be to better secure forest tenure rights, especially for marginalized peoples.

Tenure norms and rights are embedded in the institutions and laws that govern the entire sphere of human activity. Their integration, therefore, is far more complex than can be addressed by the consideration of tenure rights alone. Although an in-depth proposal for legal integration is beyond the scope of this chapter, it is important to understand how statutory and customary laws within specific socio-political settings interplay and have coexisted. Based on studies in Ghana, Burkina Faso, Indonesia and the highlands in Guatemala, this chapter examines the relationship between statutory and customary land and forest tenure, the models by which customary laws have been recognized and the extent to which statutory law has accommodated or subverted customary systems.

The chapter proceeds with a brief elaboration of the conceptual issues related to the interface between customary and formal tenure regimes. Descriptions of the four cases follow. Finally, the cases are briefly synthesized to draw out the cross-cutting lessons and highlight some challenges in the move from legal pluralism to legal integration.

Tenure rights as a legally pluralistic phenomenon

'In today's world, constructions of rights are conspicuously rooted in normative schemes generated by the institutions of the state and refined and elaborated by the doctrines of legal and political science' (von Benda-Beckman, 1997, p1). These state-generated normative schemes have come to be conventionally referred to as law. The literature on the law-state nexus is rich, with law

deriving from notions of sovereignty and the state's monopoly of legitimate use of power and violence (see Faulks, 1999; Weber, 1968). The state's ultimate legal authority is based on 'the normative notions of internal and external sovereignty which comprise the state's authority to exercise exclusive control over the population that inhabits a territory and the wealth and resources that exist within the territory' (von Benda-Beckman, 1997, p4).

Nevertheless, in contemporary human societies, one often finds other substate political organizations with their own normative constructions, which may contradict those of the state.² Such normative orders may be based on so-called folk, customary or religious systems (von Benda-Beckman, 1997; von Benda-Beckman and von Benda-Beckman, 2002). Von Benda Beckman (1997) observed that 'where state law officially makes matters of social and ethnic origin irrelevant and allocates economic and political rights and duties on the basis of abstract equality, village law may do just the contrary'. He emphasized that whether one is seen as having the right of participation in decision-making or access to natural resources, as a citizen or a stranger, depends on the specific normative construction chosen.

Diaw (2005) has made a start at defining important characteristics of customary systems of land and forest tenure in Africa, features that are also important in many Asian and Latin American sites. Recognizing site variability, he identifies the following four features of land tenure among forest-dwelling groups:

- 1 'collective property', or the territories held or claimed by groups of people (e.g. communities, tribes);
- 2 'open access' property, where anyone passing through can harvest plants or animals at will;
- 3 'common property', in which products or areas are open to group members but denied to outsiders without special permission; and
- 4 'private holdings', portions of the 'common property' that are managed and in some sense 'owned' by individuals or families.

These are hierarchical, in that there are typically both open access and common property areas within a group's territory, and private holdings tend to be drawn from common property. Another crucial element of such customary systems is their basis in kinship, which often defines group membership (Agbosu, 2000; Diaw, 2005).

So long as these other non-state normative orders are used as legitimate resources in social conflicts and claims, as observed by von Benda-Beckman (1997, p6), 'some construction of the interrelationships between these systems becomes necessary, in which the respective scope of validity of the systems and their position in the political organisation is circumscribed'. The definition of this relationship creates a hierarchy of laws, usually acknowledging one's normative order as 'dominant' and interpreting the others as subject to it. The analytical notion that has been used to explore the social practice of law is legal pluralism, defined as the coexistence and interaction of multiple legal orders

(Meinzen-Dick and Pradhan, 2001) or different legal mechanisms applicable to the same situation (Vanderlinden, 1989).

These situations create conflicts and multiple sources of legitimizing claims over tenure rights, leading to ‘forum shopping and shopping forums’ (von Benda-Beckmann, 1981), where actors seek and use the legal system that best supports their interests. In natural resource management specifically, it leads to what Onibon et al (1999) call a ‘sterile dualism’, whereby the state imposes laws and regulations that are simply impractical and incompatible with local practices – hence the rules are simply ignored, while local people’s behaviour is criminalized (Benjamin, 2008).

Alden Wily (2008, p46) argues that ‘pursuance of statutory or customary legal regimes is not an either/or’ proposition. Rather, there is a dynamic interplay among ‘state authority, local power relations and inter-group resource competition’ (Fitzpatrick, 2005, p454). Alden Wily (2008, p46) further observes:

...the customary rights of the majority, including common property rights, depend profoundly upon the support of statutes – i.e. national or state laws deriving from acts of elected parliaments. Assurance that customary regimes may operate in designated spheres and that the rights they deliver will be upheld as private property rights needs constitutional or at the very least modern land law support.

Hence the call for integration.³

In the four cases discussed below, customary law is given some form of recognition by the state. Ghana’s constitution recognizes customary law as one of the laws of the land. In Burkina, though the Land Act does not give explicit recognition, the constitution acknowledges customary rights. In Guatemala, the state pledged to recognize customary rights in the Peace Accords in 1996. Indonesia is the least clear on this issue, particularly with regard to forestland – though there *is* recognition of the existence and importance of *adat* (custom). Legal pluralism is a social reality in these contexts, but its practice has been characterized by a variety of problems and conflicts.

Before moving towards integration, it is important to understand the social practice of land and forest tenure laws and their interaction. This chapter uses two types of analysis. First, Tahamana (2007), cited in Benjamin (2008), has identified three main ways in which states typically approach competing normative orders, such as customary institutions: ambivalence, absorption and suppression.⁴ The first refers to taking a neutral position or no formal repressive action; the second refers to recognition and support, and the third refers to aggressive attempts to repress or replace customary systems. Though all the cases studied here involve recognition of customary systems to some degree, the overall intention or goals of the state may not be to accept, support or integrate customary systems.

Second, Fitzpatrick (2005) presents four models by which customary lands have been recognized, each implying increasing degrees of state intervention. He argues that the central factor in defining which model to use should be the source of tenure insecurity affecting the community. He also cautions that these models assume a relatively benign state (an assumption that is not always justified in forested contexts). Each is discussed in turn. (It has not been possible to maintain the distinction between land and forest tenure, as described in Chapter 2, because customary systems often refer to both simultaneously.)

The *minimalist method* is the situation where the state merely recognizes customary lands and local norms, establishes a land registry and does not intervene in the internal matters of the community. This would involve, for example, drawing lines on a map and, at most, protecting the borders from outside intervention. According to Fitzpatrick, this model would be most appropriate when threats to security arise from outside the group. This model has few disadvantages, though the failure to promote any kind of integration with the rest of society or formal legal systems is likely to have some drawbacks except in the increasingly rare cases of communities that have had little or no contact with outside societies.

The second is the *agency method*, where state intervention is limited to identifying an agent who then represents the customary group. This was a common colonial solution to dealing with local groups, used in British colonial Africa for example. This approach simplifies matters for the state: it deals with the representative only and plays no role in the internal affairs of the group. This model, however, has the serious disadvantage of empowering the agents, who then may not act in the interests of the group or be accountable to the group for their decisions (see Ribot, 1999; Marfo, 2004; Oyono et al, 2008; Ribot et al, 2008). Today, no sub-Saharan African countries continue to use pure agency models and most are moving towards the land board model, described below (Fitzpatrick, 2005).

The third method is *group incorporation*, whereby a customary group incorporates into a recognized entity with legal standing, such as a cooperative, enterprise or other corporate structure. This involves the writing of by-laws and internal rules of procedure that help guarantee clarity regarding decision-making, recourse for inappropriate behaviour and conflict resolution. Fitzpatrick argues that this model is particularly useful if a community is to enter into agreements (such as logging contracts) with outsiders because it guarantees the legality of such agreements before the state. It also provides a mechanism for limiting the power of the group's leaders and ensuring more equitable decision-making within the group. This model raises other issues, however. In the cases studied in this research, for example, the models available to communities sometimes differed from the ways in which they were used to organize or make decisions (see Larson and Mendoza-Lewis, 2009; Larson et al, 2008). In the francophone areas of Cameroon and in Indonesian villages, such corporate entities may totally bypass customary institutions (Diaw, personal communication, 2009; see also Oyono et al, 2008).

A fourth approach to recognizing and managing customary tenure, adopted by some countries in Africa, is to establish a decentralized system of *land boards*. Here, the authority of traditional leaders is transferred by law to boards, which typically include both elected and appointed members, sometimes with traditional leaders as *ex officio* members. The boards are charged with holding the land in trust for the benefit of local communities or tribespeople, as well as for outsiders. This model represents the greatest degree of state intervention and includes characteristics that deal more effectively with outsiders' interests in customary lands than the previous types. The risks, however, include failure of the boards to allocate rights fairly and be accountable and the possible breakdown of customary systems (Fitzpatrick, 2005). The land board model also includes village councils, which are similar to boards except that members are elected locally; in Burkina Faso, such boards remain under the authority of local government, which has the decision-making power.

Each country discussed below was colonized by a different colonial power: Ghana by England, Burkina Faso by France, Indonesia by The Netherlands, and Guatemala by Spain. Although this implies different patterns, the similarities in forested contexts are perhaps more striking. In all four cases, there is a history of colonial usurpation of customary forests, beginning with their classification as empty or vacant and thus available for state or private colonial uses. Unsophisticated forest peoples were often tricked by the state and private companies (see for example Agbosu, 2000 on Ghana), a process that continues to this day in Indonesia (Colchester et al, 2006). None of the four colonial powers recognized the importance of swidden fallows or the existence of complex customary systems. And all gave primacy to private lands, ideally proven by title. The remains of this colonial pattern remain visible, to a varying degree, in the policies of independent nations.

Here, for Ghana, Burkina Faso, Indonesia and the Guatemalan Highlands, we discuss the definition of tenure rights by statutory and customary laws and the ways in which statutory systems have accommodated or subverted customary systems.

Ghana

In Ghana, the highest statutory law, the constitution, recognizes customary law as a legitimate legal order. Article 11(3) states that “customary law” means the rules of law which by custom are applicable to particular communities in Ghana’. The recognition of customary law gives Ghana dual legal political entities, where issues of rights can be contested on the basis of both statutory and customary law. This by no means suggests that Ghana has a well-codified system of customary laws, however. In fact, the content and meaning of customary laws have often been disputed, and in these cases, ‘the courts have relied on witnesses acquainted with native customs until particular customs, by frequent proof in the courts, become so notorious that the courts take judicial notice of them’ (Woodman, 1996, p40). The courts have also looked to previous trends as authoritative precedents. Thus, J. A. Sowah, quoted by

Woodman (1996, p43), held that ‘Whatever be the content of a custom, if it becomes an issue in litigation and the courts are invited to pronounce thereon, any declaration made by the courts supersedes the custom however ancient and becomes law obligatory upon those who come within its confines.’

Therefore, despite the formal recognition of customary laws, the content of custom, when in doubt, is taken as a question of law and not of fact. Boni (2005, p9), writing about Ghana, observed that ‘while legal studies examine land tenure as “traditional” and therefore largely static or not subject to legislative innovations, land rights practices have in fact been subject to profound alterations and have undergone a continuous process of redefinition’.

Suffice it to say that both the courts and the customary system in Ghana have elegantly evolved to deal with land-related issues using interpretations of the same customary law.

Statutory recognition of customary land tenure rights

Community lands in Ghana are held by various stools,⁵ or families or clans. The highest title in land recognized by law is known as the allodial title and in many traditional areas is acknowledged as being vested in their stools only. Hence the occupants of these stools are usually referred to as landowners. The only way one can acquire the allodial title is by discovery, that is, as the first hunter who identified the land and by subsequent settlement and use. The state, however, can acquire lands (which become public lands) from traditional allodial holders in two main ways. First, it can acquire land through compulsory acquisition in the public interest (Act 125), in which case all previous interests are extinguished; both the legal and beneficial titles are vested in the president, and lump-sum compensation is paid to the victims of expropriation (Kasanga and Kotey, 2001). Second, it can acquire land that has been vested in the president (‘vested lands’), in trust for a landholding community (Act 123). In this case the legal title is transferred to the state but beneficial interests still rest with the community; here the government does not pay any compensation.

The customary right of ownership has been observed by the state since colonial days, when permanent forest reserves were created (see Agbosu, 2000). Land and forests have continued to be the property of the community even while the government manages them for the collective good. All benefit-sharing arrangements for revenue accruing from forest exploitation, defined in the 1992 Constitution, are based on this principle: lands belong to communities, and even if they are vested lands, communities are still entitled to benefits.

The state also recognizes the customary freehold. As a right and by virtue of membership in a community with allodial title, individuals hold a customary freehold to a portion of the land that they cultivate first or that is allotted to them by the community. The holder has the right of occupation, which may be passed down to successors (Da Rocha and Lodoh, 1999). Many native peoples in forest-fringe communities have such a customary freehold interest in their farmlands that has been passed on from their ancestors. This right is recognized and statutory laws on timber rights allocation require that farmers

and landowners be consulted and their consent obtained before any timber operation can take place on their land (Legal Instrument [LI] 1949). Even during the creation of forest reserves, portions that were under settlement or cultivation were demarcated as ‘admitted farms’, and these lands have been cultivated to this day.

All formal titling must follow statutory procedures, which require evidence of possession of the specific right. This evidence is usually in the form of an allocation letter provided by the original rights holder, usually by the community or stool land chief.

State recognition

The situation in Ghana fits squarely into Fitzpatrick’s agency model of state recognition, since statutory law recognizes chiefs as traditional authorities who represent community interests exercising their customary rights in land. This representation is complex: within the community traditional system are multiple layers of authority that claim control and hold some rights or interests over specific community lands (see Chapter 5). For example, even though the allodial title over a parcel is vested in specific stools, *de facto*, such lands cannot be alienated without the consent of a higher traditional authority (the paramount chief).⁶ Customarily, all the land in a traditional area is under the paramount stool. In some areas, such as the Ashanti region, a person cannot process a lease title to land that has been purchased from a community without the express consent of the paramount chief; only with his consent will the Lands Commission even receive such applications.

Both customarily and in practice, paramount chiefs do not have absolute rights over all stool land (see Owusu, 1996; Berry, 2001). Yet paramount chiefs have been recognized by the state as legitimate custodians of stool land and forests. This is because chiefs have legal recognition as ‘landowners’, though they are required to act as fiduciaries (1992 Constitution). In the management of forestland, even within national forest reserves, the state recognizes chiefs as agents for community representation. In practice, chiefs have acted as both negotiators and signatories to almost all management negotiations, even when they are not explicitly named. For example, a study on community–contractor negotiations of social responsibility agreements in one forest district noted that chiefs dominated the representation of communities, acting as plenipotentiaries in the negotiation, while other non-customary leaders were mere observers (Marfo, 2001, 2004). In practice, chiefs, especially paramount chiefs, have endorsed community consent forms for the granting of timber rights and receive forest revenue (royalties) ‘on behalf of communities’, as stated in the constitution.

In summary, Ghana has adopted customary law into the formal legal system more so than any of the other cases, to the extent that custom has largely informed the definition of tenure rights and dominates rural land and natural resource allocation. The state has chosen the agency method to recognize customary rights. In practice, the state has empowered chiefs – paramount chiefs in particular – but has failed to enforce the constitutional provision that

chiefs act as fiduciaries. The predicted disadvantages of the agency method are apparent, however, and hence the recognition of customary rights has not resulted in an effective integration of formal and customary law.

Burkina Faso

Burkina Faso's natural resources management system reflects the influence of French colonization in its approach to customary law and the civil code. During the colonial period in Africa, France adhered to the principle of transferring lands considered to be 'without owners' to the state. Two kinds of ownership of traditional lands were defined (a titled system for the French and one that recognized remaining customary lands for local people); the powers of traditional authorities were recognized, reinforced and to some extent, coopted. Independence from France was won in 1960. During the revolutionary period beginning in 1983, all customary rights were denied, customary authorities' legitimacy was suppressed so that land could be developed and all private land titles were cancelled. The state was recognized as the only owner of land, including forest.

Since 1991, the need to consider both customary practices and private land titles has been addressed. The 1991 Constitution prescribed respect for customary practices and, in an amendment in 1997, a procedure to harmonize statutory law and customary law. The process of harmonization began in 1996. The decentralization process launched in 1998 has also contributed to this process and the first local governments were established only very recently, in 2006; hence change is still very much in process. The current situation demonstrates that customary systems still have not been integrated with formal law, though there has been some progress.

Tenure rights in statutory and customary laws

Customary and statutory tenure rights have varying degrees of application depending on location. Though classifications overlap, in general, customary tenure rights are dominant and more effective in the rural areas not specifically managed by the state ('non-managed rural areas'). In contrast, in managed lands and urban areas, statutory law is more seriously applied.

The customary rights of communities apply to forested and unforested lands. These lands belong to groups that settled as communities during an earlier period. Prior to colonization, land was the property of different lineages and families. Today, with demographic growth and monetization of land transactions, customary law has evolved to adopt many forms. Generally, tenure arrangements are now shifting from gifts and long-term property loans to rentals and short-term property loans.

Under statutory law, rights depend on administrative title. In rural areas, existing titles include: landownership title, land allocation certificate (*arrêté d'affectation*), occupancy permit (*permis d'occuper*), land-use permit (*permis d'exploiter*) and lease (*bail*).

Reintegration of customary systems of tenure

Burkina Faso's 1991 Constitution grants the state the power to define the process for harmonizing customs with the fundamental principles of the constitution (Art. 101). It also guarantees people the freedom to exercise their customary practices and for this reason several laws recognize customary rights expressly or implicitly. For example, the 1996 Agrarian and Land Recognition Act states that 'the occupation and the exploitation of non managed rural lands in order to provide housing and food needs to the occupant and his/her family, are not subordinated to the possession of an administrative title' (Art. 52).

The state is practicing a kind of essential pragmatism. In the areas where the government is managing land, it tries to maintain control. Where it has no possible control – that is, in the non-managed rural lands – it implicitly allows customary practice to be applied and does not condemn the use of customary rules. This strategy is compatible with poverty reduction objectives. The lack of state intervention also reinforces customary authorities' legitimacy in landownership and management in these areas.

At the same time, the state does not recognize customary landownership in these areas, since the customary landowner now has 'occupier rights' but not ownership rights. Act 031-2003/AN, the mining code, for example, recognizes traditional or customary occupier rights to land when this land is exploited or when the entry on this land causes damage (Art. 65). Traditional pastoralist rights are recognized as well: 'pastoral areas are equally considered as territories reserved for pastures, or *traditional rural spaces* with the object of local operations to preserve or make use of pastoral plans, within the framework of actions pertaining to management of space and of natural resources' (Act 034-2002, Art. 3 [author's emphasis]).

Compatibility in state intervention models

In managed areas, contracts are the principal way that state institutions harmonize statutory and customary laws. In forest management areas, the state uses concession contracts to devolve rights to communities. These concessions benefit village residents who organize into associations or cooperatives, which then have use, withdrawal, management and exclusion rights. Through this devolution, the communities can continue their customary practices as long as they do not contradict statutory law, which means that customary land rights are not recognized. In the forest management areas of Nakambé, for instance, the communities with the concession were applying both statutory law and their customary practices in their efforts to protect non-timber forest products like Shea butter trees. In the classified forest and partial reserve of Comoé-Léraba, the village cluster organized to harmonize statutory rules with customary rights by integrating traditional hunters (*Bozo*) into the management, exploitation and protection of their forest reserve.

In non-managed areas, recognition is mainly through village development councils, which are public entities, unlike the associations and cooperatives formed for concessions.⁷ Council members are selected through consensus or

election by village inhabitants; two seats are reserved for women. They are under the authority of the local government and are accountable to both the local government and the village population. The council has the authority to allocate land, which allows it to identify customary lands and owners and establish, with them, management rules, with decisions subject to the approval of local government. Formally, then, the council competes with customary authorities. But in practice, customary rules of forest management normally apply.

On the ground, tools used to help promote greater integration of customary rights include the *proces verbal de palabres* and the rural land scheme. The *proces verbal de palabres* helps validate the rights of the owner or user of the land through a public declaration of the rights of customary authorities in the presence of the local administrative authorities. The rural land scheme is a document elaborated through collective research that involves registering, village by village, the customary rights without conflict and on which there is consensus, such that these can then be assimilated into a registry of customary rights. Unfortunately, its use so far has generated conflicts.

In summary, Burkina Faso had a policy of non-integration until village boards were created since 1996. The village boards represented a local land regulation framework, which first became village commissions of non-managed land areas and are now village development councils. The decentralized land board or village council model is used pragmatically by the state in non-managed areas, where customary rights are currently stronger. In forest management areas, the group incorporation model is used to grant concessions to intervillage associations or cooperatives, which can then integrate customary rules for access and withdrawal and forest protection that comply with statutory law.

Indonesia

Dutch hegemony ended after 350 years in 1945. Although Dutch colonialism could be harsh in many forested areas (Peluso, 1990, 1992), the colonial presence was hardly felt in many areas, particularly outside Java, and customary tenure systems functioned with little day-to-day interference. In the postcolonial era, however, the state has shifted from this minimalist model to one of greater intervention, at least where it has the capacity to do so.

Postcolonial phases of statutory law

The Indonesian Constitution states that 'land and water and natural resources wealth are controlled by the state and used for the sake of people's welfare'. In 1960, the Basic Agrarian Law No. 5, developed with Java in mind, recognized traditional tenure systems but required people to register their land – something very few people in the Outer Islands (i.e. outside Java and Bali), where most natural forests are located, were able to do. Many of the law's provisions were also developed, as in many areas of Africa, with permanent, not shifting, cultivation in mind. Indeed, shifting cultivation has been illegal since Dutch

times because of its use of fire to clear land. Nevertheless, agrarian law continues to recognize that customary land belongs to customary communities, in contradiction with forestry law (van Noordwijk et al, 2008).

The Basic Forestry Law of 1967 has been more problematic for forest peoples. It stated that ‘all forests within the territory of the Republic of Indonesia, including the natural resources they contain, are taken charge of by the State’ (Art. 5, Para. 1). During the 1980s and 1990s, under Soeharto’s 30-year ‘New Order’ government, the state classified more than 75 per cent of Indonesian land as state forest, with that figure surpassing 90 per cent for the Outer Islands (Lynch and Harwell, 2002, pxxvii). Soeharto distributed these lands to reward political supporters. Vast areas were allocated first to timber companies, later to industrial timber plantations, followed by transmigration sites, and finally, most recently, oil palm and rubber plantations.

Another national law that interfered significantly with customary management of forests was the Village Governance Law, which mandated at least superficial adherence to a standardized form of local governance across the nation, thus undermining the authority of customary leadership. Bennett (2002, p60) describes this law as intended to ‘subvert traditional forms of governance’.

In 1999, the Basic Forestry Law was revised, with more provision for local management. The existence of customary communities, cultures and forests, for instance, was recognized. Communities were granted the rights to help determine the size of their forest area, collaborate in monitoring, be protected by the government from pollution and deforestation caused by others, and more. Wollenberg and Kartodihardjo (2002, p88) note, ‘Scattered throughout the law are references that suggest that forests should be managed according to principles of social equity, empowerment of customary communities, fairness, property, and sustainability.’ But these authors also see ‘escape clauses’ that leave ultimate power with the state. Van Noordwijk et al (2008) note that no communities have yet managed to obtain formal recognition of their customary forests.

Also in 1999, the country embarked on a decentralization process (Barr et al, 2006). A new law (UU No. 22) delegated governance authority to autonomous regions (provinces, districts and municipalities) and granted districts and municipalities authority and responsibilities that explicitly included agriculture, environment and land. But the following year, Regulation No. 25/2000 defined the mechanism by which the central government could resume authority when autonomous regions were deemed incapable of carrying out their tasks, thereby reaffirming the Ministry of Forestry’s dominant role in forestry policy and planning (McCarthy et al, 2006).

Over the past decade, there has been an ongoing tug of war between the central government and the districts on forest management authority. Different districts have opted for different strategies, both in their interactions with the centre and in their chosen trajectory for the future. Some districts in Jambi, for instance, have taken a conciliatory attitude towards renewed state control; those in West Sumatra have been more intransigent about keeping the rights

they gained in the original decentralization law. Districts in both provinces have opted to rejuvenate their customary systems (*nagari* in West Sumatra, Raharjo et al, 2004; and *rio* in Jambi, Hasan et al, 2008).

Diversity of customary law: Two cases

Indonesia, an archipelago of some 17,000 islands spread over 1.9 million km², is probably the most ethnically diverse country in the world, with some 742 languages⁸ and 283 million people representing more than 300 ethnic groups.⁹ The customary tenure systems in forested areas are correspondingly varied. We have chosen to describe two briefly.

The first is the Uma' Jalan Kenyah of Long Segar, a group of *dayaks* (indigenous people of Borneo) living in the centre of East Kalimantan. They are bilateral swidden agriculturalists,¹⁰ originating in Long Ampung near the Malaysian border. When Long Ampung's population grew to about 1000, the community split and some members headed for a new area (consistent with general Bornean custom in this sparsely populated area). In Long Segar, the migrants discussed land availability with the few people already there and determined an area – marked by rivers – that all agreed the migrants could claim as their community territory.

Each family then began clearing primary forest for rice fields and that land became theirs to use and pass on to their descendants. Their rights to the land are not, however, absolute. When a family moves away and there is no direct descendant of the original migrant in the community, the rights return to the community for distribution. Community members can also claim rights to individual plants and trees in unclaimed community forest by marking them as their own; anyone who plants something has the right to harvest it, even if it is on someone else's land, and people who pass by and feel hungry have the right to harvest anyone's plants to assuage their hunger. Men have a tradition of expedition making (*tai selai*) and are often away from home, leaving women to manage the farm (Colfer, 1985a, 1985b).

Community leaders have the right to make agreements with outsiders about land use, though they usually discuss such arrangements with community elders and also with the community at large, resulting in consensual decisions. One source of persistent conflict within Kenyah communities is suspicion of leaders and their ability to capture illicit rents from such interactions – which often happens. Notably, the state has subverted customary rights by granting two timber concessions and promoting a resettlement scheme on Kenyah lands over the past several years.

In rural West Sumatra, among the Minangkabau living in the 'frontier' (*rantau*) with the neighbouring province of Jambi, there is a quite different system.¹¹ The Minangkabau of Pulai are organized into three matrilineal clans (Ghana's Ashanti represent another matrilineal group). Again, newcomer clans had to ask permission from the long-settled clan members to settle there and the newcomers were allocated certain lands. The local system depended on paddy rice, which was owned and transmitted via the matrilineal clans,

with control primarily in the hands of the men (brothers) in that clan, though women were the primary rice cultivators. These lands were inherited by the clan sisters' children. Upland fields, which belonged to the men who cut them from the forests, were typically owned by the nuclear families of those men and passed on to their own children. These upland fields were first planted with rice and then with rubber during the 1980s. Such upland fields, unlike the clan lands, could also be alienated by the men who cleared them, via sale or rent. Sharecropping arrangements for rubber tapping (with a third of the harvest typically going to the owner) were also common in the 1980s. In response to market demand, this rubber was later converted to vast fields of oil palm; the paddy rice remains and those who can are returning to their swiddens now that the oil palm price has fallen drastically (late 2008).

Alienating clan lands required agreement of every member of the clan, something almost impossible to obtain, since Minang men, like Uma' Jalan men, are famous for making expeditions (*merantau*) and are often away. Clan lands have, however, routinely been alienated by the central government, which in this area established a transmigration site of several hundred thousand ha, beginning in the late 1970s, which completely surrounds Pulau; Kerinci Seblat National Park was established on lands belonging to related clans.

Though both of these once-isolated communities have maintained many of their customary practices, in general Indonesia is moving away from Fitzpatrick's minimalist approach. There are conflicting pressures, respectively political and economic, towards the agency model and the group incorporation model. Government personnel tend to deal with the formal leader of villages in a manner that is consistent with the agency model, while mechanisms exist for formalizing community groups into corporate entities (cooperatives) specifically for interaction with industry, such as logging and plantation companies. Overall, statutory law, which previously denied all customary rights in forestry, has opened some tentative opportunities for legal integration, but in general the Indonesian state appears to have little interest in pursuing this option.

Guatemalan Highlands

In Guatemala, the state's commitment to recognizing customary law or finding effective ways to integrate customary and formal systems appears relatively limited. Highland communal forests in particular have been highly vulnerable to external threats, including threats from the state itself – unless communities have been able to obtain formal land titles.

Social construction of tenure rights

Rights to tenure and natural resources in Guatemala have been shaped by five historical developments. First, community rights arise from the permanence of indigenous peoples on the lands that they occupy today and manage through deeply rooted customary norms. Second, colonial agrarian policies reorganized tenure rights by usurping lands from original peoples, generating administrative

disorder; this continues to be the primary cause of agrarian conflict in the country, even though colonialism ended in 1821.

Third was the creation, at the turn of the 20th century, of modern institutions intended to secure tenure rights, above all for large property holders, and resolve the administrative disorder. This involved the creation of a property registry and the Civil Code, through which the state obtained greater fiscal control over property but at the same time legitimated and facilitated the seizure and usurpation of indigenous peoples' communal lands. The fourth development involves land struggles, which began with a failed agrarian reform attempt in 1952 and continued with colonization programmes in the northern lowlands after 1960, the evacuation and following resettlement of the population affected by armed conflict and the creation of land access programmes. The fifth development is the territorial conflicts of the past 15 years, related to the state's redefinition of tenure rights in favour of mining, energy, agricultural and conservation projects.

Today, tenure rights have distinct meanings depending on whether they are private, communal or state. On the one hand, private property is guaranteed by Article 39 of the constitution as an inherent human right that the state is obliged to recognize. Under this mandate the idea that private property is absolute has spread. Communal lands, on the other hand – though they have special state protection and the possession of communal lands is guaranteed by the constitution – are, in practice, legally precarious. This is because communal lands have no specific normative framework, even though this was also mandated by the constitution. In contrast with the discourse surrounding private property, the idea that communal lands and forests are open access resources is widespread in Guatemalan society. Public policies privilege private property and exert pressure for the dissolution and transformation of communal tenure. Nevertheless, in the highlands, communal tenure is deeply rooted in several land types: communal lands, municipal lands, cooperatives and *parcialidades* (a form of communal tenure defined by kinship).

Communal forests, in particular, may be formally owned by communities but are more likely to be state lands, under municipal governments. State lands are those for which rights are the least defined and delimited, since they have traditionally been considered open access resources, or because they overlap with forms of communal tenure.

Making rights matter: Formal and customary norms

The bundle of rights for access, use, management, exclusion and alienation of lands and forests has been constructed through two parallel principles. On the one hand, large landholders and those with means mobilize the legal and institutional apparatus of the state for the exercise and formal recognition of rights. On the other hand, customary mechanisms are still in force for the exercise of tenure rights at the local level, whereby communities organize individually and collectively, as well as distribute harvest quotas and responsibilities among their members.

Communal tenure includes collective rights that correspond to the community as a whole, such as access to forests, water sources, sacred places and pasture. The rules for access and harvest are distributed exclusively among group members, who are easily recognized by their sense of belonging, through mechanisms based on collective responsibility and participation. For example, to have rights to obtain forest products, individuals must have contributed to the tasks and duties of their community. Individual rights to communal lands are assigned and recognized according to local norms.

From the point of view of the state, rights can be exercised and claimed only according to formal laws. In practice, these two mechanisms for the exercise of rights are not isolated but rather are closely related – not because of state recognition policies but because of community adaptations. For example, communities that have registered their properties have a greater possibility of exercising their customary rights than those that have not. Similarly, community organizations that have formalized their existence, as subjects of rights by obtaining legal standing (*personería jurídica*), have a greater possibility of exercising their collective rights.

Struggle for recognition of customary rights

In 1996, in peace accords that put an end to more than three decades of armed conflict, the state promised to recognize customary rights. To this end, the Municipal Code was reformed and laws for participation, decentralization and development councils were passed. The Accord on Identity and Rights of Indigenous Peoples recognized the participation of community authorities and extended the application of customary norms to rights relating to land and conflict resolution.

Despite some progress in the application of indigenous rights, the state continues to promote or tolerate actions that infringe on community tenure rights, such as the authorization of mining licences in indigenous territories and the failure to recognize the binding nature of community consultations. In 2007, a proposal by environmental groups to create a water law was rejected by highlands indigenous communities for failing to recognize existing customary norms.

Though forest management is governed by the Forestry Law, in practice communities have established their own norms. Conflicts have arisen between community authorities and the Institute of Forests in this regard. These are mainly related to requirements for licences for resource use, particularly timber and firewood. The forest agency has insisted that communities obtain permits in accordance with formal regulations and has facilitated the creation of municipal forestry offices to make this easier; it considers all other forest use illegal. Conflicts arise because not all forest users obtain these licences, mainly because they are low-volume harvesters and are often authorized or tolerated by community authorities. In other cases, the municipal forest office grants licences to communal forests without the consent of community authorities. Some communal forests have been converted into protected areas,

where customary norms have been replaced by official conservation norms and management plans. The resulting limitations on traditional use hurt the poorest families, who depend most on forest resources.

Overall, the Guatemalan state has done little to recognize customary rights despite the constitutional provision protecting communal lands; hence it is not possible to identify a model of recognition. For their part, and partly to defend their rights, some highlands communities have sought to incorporate as formal organizations or seek other ways to register their properties formally. This has allowed them greater margin for traditional practices, though forest management remains highly regulated.

Both communities and some state entities, however, are making efforts to obtain greater complementarity between formal and customary norms. For example, several communities have obtained access to forest incentives and created communal forestry offices. Progress has also been made regarding the formulation of a strategy for conservation and management in communal lands, which proposes the recognition of individual and collective rights and local systems of organization and governance. Another proposal includes the reformulation of current categories of protected areas to make them more relevant to communal lands and the rights of indigenous peoples.

Challenge of integration: Analysis of cases

All the cases have demonstrated that the boundary of what has been called customary land law is fluid and evolving from what might be termed its historical traditional practice. And each shows some level of legal integration in the governance of tenure, but with wide variation in models and interests of the state.

The Ghana case most clearly represents Fitzpatrick's agency model, with substantial state recognition of and engagement with community representatives, in this case chiefs. Overall, efforts appear aimed at accommodating customary law, rather than ignoring or subverting it. The challenge for policy innovation in realizing the constitutional provisions of this recognition is how to ensure accountability by 'compelling' these representatives to act indeed as fiduciaries.

Burkina Faso represents the group incorporation model in state managed forests but with the land board or village council model outside formal management areas. After a period characterized by the suppression of rights under the revolutionary government, the constitution today calls for harmonization, and certainly some efforts appear to have been made in that regard. In general, the state still demonstrates ambivalence towards, and perhaps some ongoing attempts to suppress, customary land rights (at least until recently) but is receptive to accommodating local forest practices.

Indonesia represents a complex mix of minimalist, agency and group incorporation models. In part because of the nature of the country and the population, the situation is confusing: the decentralization process has given rise to a multiplicity of approaches. This is also the case in Cameroon (Diaw et

al, 2008; Oyono et al, 2008). In general, however, as in Guatemala, the state shows little interest in accommodating customary law and land or forest rights, with a tendency towards suppression to the extent that the state is present in a particular region.

Guatemala has not, in practice, recognized customary rights to land and forests and demonstrates efforts at accommodation or integration only on a small scale or through specific state entities or actors in some communities. It remains to be seen whether the pending national proposals will progress beyond the idea stage. For their part, communities have sought to defend their rights by adopting formal institutions, through group incorporation for example, and by obtaining land titles.

Although Fitzpatrick emphasizes the importance of the source of land tenure insecurity in defining the model, this aspect does not appear to have played any role in the choices made in each country. Rather, they appear to have been made by default, or perhaps to meet the state's needs. For example, the minimalist approach is used in Indonesia – as we suspect in many other countries – only where the state is unable to enforce its will, rather than because this is the best way to secure tenure rights for these communities. The agency method almost by definition is primarily advantageous to the state rather than the community, at least without mechanisms for downwards accountability. Other options appear to have arisen, as in Guatemala, mainly as a defence mechanism, sometimes against the actions of the state itself.

The group incorporation method appears particularly relevant for outside contracts, especially for logging and other forest management activities, at least in Indonesia and Guatemala. In Burkina Faso, however, the group incorporation model is used to give formal concessions to community organizations for forests they have used traditionally – without recognizing land rights; in contrast, the land board or village council model is used where the central government has less reach, and here the model has more potential for integrating customary land rights.

In summary then, the choice of model – and, therefore, more or less state intervention – does little to suggest greater or lesser commitment to supporting and integrating customary rights. That is, the model of recognition itself does not suggest whether the state's overall approach is ambivalence, accommodation or suppression. On the other hand, the two countries with the most suppressive policies, Indonesia and Guatemala, have been the most effective at avoiding any commitment to a particular model of recognition. In the former, multiple models abound in different spheres, as they are found convenient or expedient for the issue at hand; in the latter, communities have largely adapted to statutory law to find ways to maintain customary rights and practices.

One aspect that may provide greater insight into governments' commitment to customary forest rights is the question of exclusion. Only in Ghana do communities have *de jure* exclusion rights, through their customary authorities (in Burkina Faso, customary authorities have *de facto* exclusion rights, and even the state generally asks for their consent before making forest-related

decisions). The granting of exclusion rights may not always be straightforward and can be difficult to address in situations of multiple users or overlapping claims; for example, granting one community exclusion rights often results in the exclusion of other customary users, especially temporary or seasonal users such as pastoralists (see Chapter 9). Exclusion also raises issues about authority and representation (see Chapter 5). Nevertheless, the right to exclude logging companies or concessions that enter forests with state authorization would appear essential. In Burkina Faso, Indonesia and Guatemala, the consent of the community is not required for the state to authorize licences to others in these same forests. This makes it much more difficult for communities to protect their forests and any effective forest tenure reform to benefit communities should, at a minimum, require the state to obtain the prior consent of the community before issuing permits.

The cases also provide a glimpse of the complexity of integrating statutory and customary systems. Customary tenure rights to, and practices in, forests are embedded in rights to land and shaped by social and cultural relations defining group membership (among other things) and governed by customary authorities. Different ethnic groups and communities give rise to different sets of rights and practices, hence in countries with greater social diversity, like Indonesia, customary laws are also very diverse. The five spheres constituting the bundle of rights provide additional dimensions upon which rights can be allocated – whether shared or divided. Statutory systems are only somewhat less complex, at times (or even frequently) promoting contradictory policies, as in the case of the recognition of customary rights in Indonesia's agrarian versus forest sectors.

In all the cases we find some level of statutory recognition of customary rights and in some cases the substantive practices of tenure rights have been informed by customary law. For example, in Ghana, all the rights that can exist in land as recognized by the state had previously been customary laws. Today, customary rights are invoked even in the courts in addressing land-related disputes. In Burkina Faso and Indonesia, even though the state has *de facto* ownership of land, the daily uses to which forests are put have relied largely on customary practices – except in the increasing number of cases in Indonesia where large concessions are given to private enterprises, which then have the right to usurp local lands and forests. Even in Guatemala, where indigenous communal lands have historically been usurped by the state and private interests, and state forestry law has criminalized many local practices, creative innovations continue to arise to accommodate customary practices.

In their critical review, Kasanga and Kotey (2001) endorsed the pluralistic path of the tenure systems existing in Ghana observing, for instance, that completely overturning the customary system is impractical and unworkable. The other cases appear to support this view, given the simple staying power of customary practice, the revitalization of customary systems under decentralization and the common *de facto*, if not always *de jure*, recognition of local land management.

Thus the argument that policy innovations should focus on legal integration, to ensure the positive elements of both systems are married, is well supported here. In theory, legal integration would exist when the elements of the two systems either reinforce each other or perform complementary functions valued by local people. The interest in integrating formal and customary forest tenure systems derives from the difficulties that plague forest-dwelling people who have had to struggle with the incompatibilities between their own customs and the requirements of their formal governments. In this struggle, they have often been the losers.

Despite its theoretical appeal, however, how to achieve integration in policy and practice is unclear. A particular challenge is how to give material meaning to the form that the legal integration of forest tenure will take in practice and the extent to which it can be empirically delineated to stand on its own as a model. The four models of recognition examined here remain inadequate.

One point of departure is when statutory recognition has moved from discourse to practice and is clearly aimed at accommodation and integration, rather than suppression. The lack of political will to pursue integration can be a major obstacle and the lesson of the highlands in Guatemala is a good example. Given the power of the state, it remains to be seen how an integrated system can be built to protect local rights, particularly over high-value resources. The cases suggest that a state that leans towards suppressing customary systems, as in Indonesia and Guatemala, could adapt a model of recognition or integration to promote this goal instead.

At the same time, the lack of political will for integration may come from customary actors themselves, especially if integration will shake the power and economic interests of local elites. For example, pursuing full recognition of customary land law in Ghana may necessitate new procedures for benefit sharing of forest revenue and require chiefs to act as fiduciaries and not private landlords. This raises issues regarding the kind and degree of state intervention that is acceptable or appropriate when customary practices are inequitable, discriminatory or undemocratic – for example, when women's right to inheritance and downwards accountability are not built into traditional structures or practices.

Other challenges include the very complexity of customary systems of practice themselves. Most customary laws are not codified, leading to a large plurality of interpretations and applications. The extent to which the state can recognize customary laws and integrate them will depend on how easily such rules are organized. Though some call for codification of these laws, others argue that this would interfere with the essential fluidity and adaptability that characterizes customary law over time.

Finally, in this chapter, we have dealt mainly with communities whose members share a customary system. In fact, residential groups or villages are increasingly likely to comprise several ethnic groups or 'communities', each with its own customary rules. The interests of minorities must be taken into account in crafting any integration of customary and formal forest tenure systems. Stakeholder negotiation becomes particularly important in such contexts.

Notes

1. Central concepts are defined in Chapter 1.
2. Indeed, the state itself often includes self-contradictory components.
3. At the same time, we see a potential land mine in her call for 'designated spheres' and her emphasis on 'private property', in light of the socially embedded nature of customary systems as summarized above.
4. Elbow et al (1998), cited in Diaw (2005, p51), uses a different framework for organizing policies in 22 African countries: (1) non-recognition or abolition; (2) neutral recognition; (3) recognition aimed at replacement; and (4) zoning recognition.
5. 'Stool' refers to the seat of a chief of an indigenous state and represents the source of his (rarely her) authority.
6. Traditional areas consist of several communities, which may have their own stool lands and chiefs. The various community chiefs in the traditional area, in addition to the paramount chief, constitute the traditional council, which is presided over by the paramount chief. Chiefs are male but are accompanied by a female queen mother, who in rare cases may occupy the stool and thus act as chief.
7. Village development councils may also play a role in managed forests that are not classified forests and are hence under communal rather than state domain. If the managed area is under concession, the council's role is more limited, but if it is not under concession it will be assigned to the council.
8. The determination of what is a language and what is a dialect remains an issue in Indonesia (www.ethnologue.com/show_country.asp?name=id) (last accessed September 2009)
9. See http://en.wikipedia.org/wiki/Demographics_of_Indonesia (last accessed May 2009)
10. In bilateral peoples, descent is traced through both the father and the mother.
11. See Colfer (1991) and Colfer et al (1988, 1989) for this particular setting.