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# 'Best Practice' Options for the Legal Recognition of Customary Tenure

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## ABSTRACT

Is there a 'best practice' model for the legal recognition of customary tenure? If not, is it possible to identify the circumstances in which a particular model would be most appropriate? This article considers these questions in the light of economic theories of property rights, particularly as illustrated by the World Bank's 2003 land policy report. While these theories have their flaws, the underlying concept of tenure security allows a typological framework for developing legal responses to customary tenure. In particular, this article suggests that the nature and degree of State legal intervention in a customary land system should be determined by reference to the nature and causes of any tenure insecurity. This hypothesis is discussed by reference to a wide variety of legal examples from Africa, Papua New Guinea and the South Pacific. The objective is not to suggest that law determines resource governance outcomes in pluralist normative environments, but to improve the quality of legal interventions in order to assist customary groups to negotiate better forms of tenure security and access to resources.

## INTRODUCTION

Is there a 'best practice' model for recognizing customary forms of tenure, and if not, is it possible to identify the circumstances in which a particular model would be most appropriate? These questions are relevant because of an apparent change in official attitudes towards customary tenure. Not only does it now receive formal recognition in many parts of Africa, Southeast Asia and Latin America, but even developmental economists have concluded that in certain circumstances it can provide an optimal system of land administration. Thus, for example, the recent World Bank Policy Review Report on land policy (2003: 53) states that: 'customary systems of land tenure have evolved over long periods of time in response to location-specific conditions. In many cases they constitute a way of managing land relations that is more flexible and more adapted to location-specific conditions than would be possible under a more centralised

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approach'. The same report goes on to conclude (*ibid.*: 76): 'in a number of cases, for example, for indigenous groups, herders, and marginal agriculturalists, definition of property rights at the level of the group, together with a process for adjusting the property rights system to changed circumstances where needed, can help to significantly reduce the danger of encroachment by outsiders while ensuring sufficient security to individuals'.

This 'new' approach towards customary tenure poses significant practical challenges to lawyers and policy-makers. How can traditional property rights be recognized 'at the level of the group'? Is there an appropriate process by which the rights of group members can be adjusted to changed circumstances? To what extent should the State regulate dealings or conflicts between outsiders and customary groups? How should the State intervene in matters internal to the group, particularly in relation to conflict-resolution and the prevention of discrimination?

Those jurisdictions that recognize customary tenure provide a great variety of answers to these questions. Some systems adopt a minimalist approach, in which customary groups are recognized without a great deal of intervention in their internal or external affairs. Other systems seek to transform the institutions that recognize and manage customary land relations, either by empowering traditional leaders or establishing decentralized 'land boards' and/or elected village councils. Others again allow customary groups to incorporate and establish a written constitution for the governance of their affairs. In all these cases, some form of record-keeping arrangements may also be established to complement the legal model in question.

This article tentatively considers whether any one of these models may be identified as 'best practice' and, if the diversity of circumstances is such that no standard model may be recommended, whether the circumstances dictating the choice of a particular model may be identified and assessed. Its methodology is not classically legal, in that it does not focus on narrow issues of legislative clarity and consistency. Rather, it adopts an interdisciplinary 'law and economics' approach, tempered with references to anthropological literature, and drawing especially on examples from Africa, Papua New Guinea and the South Pacific.

## **THE LAW AND ECONOMICS OF CUSTOMARY TENURE: A BRIEF OVERVIEW**

Current economic models of customary tenure argue that, in certain circumstances, communal forms of customary tenure are optimal arrangements because they provide tenure security to group members at a relatively low cost (World Bank, 2003: 54). This argument needs to be analysed in order to determine its relevance to legal mechanisms for the recognition of customary tenure. The focus here will thus be on tenure security rather than the related issue of common property natural resource management.

The World Bank's qualified support for customary tenure rests on a conception of property rights as institutions which evolve in response to social and economic circumstances (Demsetz, 1967; World Bank, 2003: 9–10). This conception begins with the question: where land is plentiful, what is the need for precise property rights? A cultivator can simply use a piece of land until its fertility is exhausted and then move to another plot for further cultivation. Hence, an individual has no need to 'own' a piece of land, at least in the Western sense of that term. All he or she requires is a sense of group 'ownership', to exclude outsiders and indicate the boundaries in which shifting cultivation can take place, and a system of temporary use rights to protect short term investments in particular plots (World Bank, 2003: 9–10).

What, then, if land increases in its underlying resource value? Here the evolutionary model suggests that tenure institutions will evolve to encourage the investment required to unlock that underlying value (Demsetz, 1967). And, indeed, many studies of customary tenure find that investment in observable land improvements — building houses, planting economic trees, fencing off plots — is rewarded with strong and often heritable individual land rights (Bruce, 1998: 33; Otsuka and Place, 2001: 16–7; World Bank, 2003: 47). Hence traditional tenure systems often distinguish broadly between housing and agricultural land, where the investment of effort means that 'rights' are more likely to be vested in individuals or household heads; and pastoral, woodland, forest, water and maritime resources where communal forms of access are more likely to be the dominant property arrangement. To clarify this distinction, this article generally uses the expression collective tenure to describe the overarching community right of control over traditional lands, including family houses and gardens, and common property regime to describe joint use and access by community members of common pool resources (Otsuka and Place, 2001: 12).

Customary tenure systems also appear to evolve as land scarcity leads to further intensification in agricultural use, for example the development of cash crops or commercial ranching techniques, and again the duration of the investment tends to be matched by the duration of the property right (Boserup, 1965; Bruce and Migot-Adholla, 1994; Ward, 1997: 28). These tenurial changes are then supported by improved communication and transport, both by allowing the assertion of rights over much larger areas than previously possible (Croccombe, 1971: 2–3), and by increasing the economic value of land close to transportation routes and sites for market activity. Over time these changes mean that land itself becomes a commodity, with the important result that under certain conditions markets for land will develop in customary tenure systems with or without the assistance of the formal legal system (Bruce, 1986: 38, 40).

In short, the evolutionary model of property rights envisages a transition from relatively imprecise community-based arrangements to well-defined, often individualized rights that may be inherited and traded. The key

determinants of this transition are land scarcity, investment options and the underlying resource value of land. In some circumstances, of course, this process will be obstructed or affected by 'path-dependent' political factors, including the control and manipulation of tenurial institutions by agrarian elites or the State itself (Platteau, 1992: 31, 147–50), the opportunistic use of parallel institutions by local stakeholders (Lavigne-Delville, 2000: 102) and the possibility that institutions to facilitate tenurial changes will not emerge due to conflict, social instability or environmental degradation (Otsuka and Place, 2001: 17; Platteau, 2000: 70; World Bank, 2003: 10, 32, 47). It is fair to say that these important issues have yet to be fully incorporated into the evolutionary model of property rights.

Equally, in certain circumstances the prohibitive costs and inherent unpredictability of privatization and individualization may in fact encourage retention of collective tenure or common property regimes (notwithstanding increasing land scarcity), and indeed in some cases may induce collectivization of previously individualized systems (Baland and Platteau, 1998: 646; Otsuka and Place, 2001: 5; Platteau, 1992: 29). To speak therefore of the 'evolution' of property rights can be misleading: not only may collective tenure institutions be maintained in the face of economic factors that encourage individualization, but economic issues of cost and risk-diversification may in fact induce the introduction or re-introduction of collective forms of tenure.

Nevertheless, for current purposes an important conclusion of the evolutionary model of property rights is that, because most customary tenure systems allow individuals to obtain heritable long-term rights through the input of time and effort, and because dealings with outsiders tend to develop as the resource value of land increases, no necessary disincentive to investment is created by the overarching collective nature of customary land tenure (Platteau, 2000: 58). Just as long-term leases can generate substantial investment in Western economies, so too can traditional usufructuary rights encourage investments that are appropriate and available in the circumstances (World Bank, 2003: 29, 53). In other words, while in the long run individual Western-style ownership may provide the ideal environment for economic investment, this does not mean that customary structures cannot (1) encourage many if not all of the investment options available to group members; and (2) evolve in response to pressure for new forms of investment.

### **Customary Tenure as a Low Cost Alternative to State Land Administration**

In determining whether or not to recognize the tenure arrangements of a customary group, a further issue concerns the costs of replacement. What are the alternatives to existing customary tenure arrangements? What are the costs and disadvantages of a transition to more formal arrangements?

What, indeed, are the costs and disadvantages of not recognizing customary tenure at all? Taken together these questions highlight a fundamental point: while customary tenure arrangements may sometimes be less than ideal in social, economic and/or environmental terms, the fact that they are fundamentally embedded in complex social processes means that any attempt to change or replace them may itself involve prohibitive costs and risks (Benda-Beckmann, 1995; Binswanger et al., 1993). A failure to recognize this point underscores the erroneous and misconceived conclusion that the evolutionary nature of property rights always necessitates introduction of individualized State-enforced land titles (Platteau, 1992: 30–1, 41–2, 64, 232–44).

For example, while systematic land titling programmes may be useful in urban and peri-urban areas, there is substantial evidence that in places subject to customary tenure they commonly fail to achieve their objectives of increased certainty and reduced conflict (Bruce, 1993: 50–1; Knetsch and Trebilcock, 1981: 32–3). In many cases, for example, titling programmes have allowed wealthier and more powerful groups to acquire rights at the expense of poor, displaced and/or female land occupiers (Binswanger et al., 1993; Lastaria-Cornhiel, 1997: 1317–34; Platteau, 1996: 40–4; Platteau, 2000: 62, 66, 68; Toulmin and Quan, 2000: 218–9). In other cases, they have increased conflict by applying simplistic legal categories of ‘owner’ and ‘user’ to complex and fluctuating interrelationships (Fitzpatrick, 1997: 184; Knetsch and Trebilcock, 1981: 40; Lavigne-Delville, 2000: 108; Simpson, 1976: 236; Toulmin and Quan, 2000: 219). In yet other cases they have increased uncertainty by overlaying formal institutions on informal arrangements, with the results that (1) disputants are given the opportunity to manipulate overlapping normative orders through ‘legal institution shopping’ (Bruce, 1998; Platteau, 1996: 41–6; Toulmin et al., 2002: 13), and (2) the register loses value over time as an accurate record of local land relations (McAuslan, 1998: 540; Okoth-Ogendo, 2000: 125–8).

In other words, the fact that individualized State-enforced property rights may be both an ideal source of security for economic investment, and an evolutionary product of increased land scarcity and resource value, does not necessarily mean that regulatory interventions to introduce these rights will be either effective or appropriate (Platteau, 1992: 102–3). In some circumstances, customary systems will be providing sufficient tenure security at low cost to encourage available forms of investment. What then is the justification for State intervention? In other circumstances customary systems may well be deficient, and yet regulatory intervention will simply serve to dispossess vulnerable groups and enhance uncertainty by creating parallel systems. Above all, therefore, it is necessary to jettison the ‘one size fits all’ approach to property rights regulation in areas subject to customary forms of tenure. Individual rights may indeed arise through evolutionary processes, and may well require State intervention and enforcement to optimize their benefits; yet that does not preclude the need for informed decisions as

to whether intervention is necessary in the first instance, and, if so, what type of intervention will best facilitate tenure security without generating injustice or further uncertainty.

### **Legal Implications**

What legal implications, then, may be derived from the evolutionary conception of property rights? First, it is necessary to address the question of definition. Some commentators prefer to avoid the term 'customary tenure' in favour of broad concepts of community and non-State land relations. They argue that 'customary tenure' suggests an inappropriately static distinction between 'custom' and 'the State', in circumstances where most post-colonial land relations are characterized by a dynamic interplay between State authority, local power relations and inter-group resource competition (see, for example, Lavigne-Delville, 2000: 102). While acknowledging the strength of this argument, this article continues to use the expression for the purposes of broad typology rather than precise definition. In particular, it adopts it as shorthand for property arrangements which are characterized generally by the following elements: overarching ritual and cosmological relations with traditional lands; community 'rights' of control over land disposal (sometimes delegated to traditional leaders); kinship or territory-based criteria for land access; community-based restrictions on dealings in land with outsiders; and principles of reversion of unused land to community control.

Second, although economic models suggest that initial anthropological inquiries must focus on the ability of a customary group to provide tenure security to its members, formal law must also provide for situations where the group is unable to provide sufficient security in relation to land it controls. This may be because of a high level of conflict within the group, perhaps due to tenure individualization processes or opportunistic behaviour by leaders; or it may be because of a high level of dealings with or encroachments by outsiders (including the State itself). While the inherent risks of regulatory intervention are acknowledged, it is emphasized that not all customary systems manage their land affairs in an effective manner; and, where this is the case, it is important that the causes of the tenure insecurity influence the legal policy response. If, for example, the problem is internal conflict, strengthening conflict-resolution and mediation institutions may be the appropriate response. Where tenure insecurity is caused by encroachment by outsiders and/or interaction with State officials, the best approach may be to recognize the internal authority of the group, demarcate group boundaries and provide reliable enforcement mechanisms against trespass. Where the source of insecurity is the emergence of dealings with outsiders, the best approach may be to provide for simple standard form agreements and/or decentralized systems to record the dealings in question. In other

words, it is in the targeting of specific causes of tenure insecurity that the seeds of a typology for legal policy intervention may be found. Economic models of evolving property rights are useful, in this regard, because they highlight the different stages and transformations of collective tenure systems, and the relationship with different types of tenure insecurity.

Third, it is important that the formal legal order should not unduly restrict or freeze changes in customary tenure systems themselves. Custom is in a constant state of reinterpretation and renegotiation by all parties concerned, including the State itself (Toulmin et al., 2002: 8). Experience suggests that what may be new and controversial today may well become 'traditional' in the future (Ward, 1997: 24–5). Hence, to grant wide-ranging powers to customary leaders on the basis of their assertion of tradition, as has occurred in some parts of Africa and the South Pacific, may well be to grant them more authority than in pre-colonial times (Chand and Duncan, 1997: 41; Platteau, 1992: 102–3; Toulmin and Quan, 2000: 209; Ward, 1997: 24–5). Equally, to apply 'customary' prohibitions on the transfer of rights to traditional land, which also has occurred in many parts of Africa and the South Pacific, may well lead to uncertainty and conflict in circumstances where informal markets in land have developed under the influence of economic changes (Platteau, 1992: 100–2; Ward, 1997: 29).

Fourth, if the formal legal order is to allow for dynamic changes within a customary tenure system, a central issue concerns the challenges of tenure individualization. This phenomenon begins with internal processes of recognition — for example, where land has been improved by observable investments. It then tends to continue and accelerate as contacts with outsiders grow, a cash economy develops and/or competition for land intensifies. Because some form of social conflict often accompanies this process (Platteau, 1992: 147–50), the State may well need to intervene to strengthen or create effective dispute-resolution mechanisms; and, in this regard, experience suggests that care is needed to ensure that any such intervention does not increase uncertainty by creating parallel institutions and the potential for legal institution shopping (Platteau, 1992: 151–63; Lavigne-Delville, 2000: 97–100). Hence an important focus of policy interventions should be to clearly define the jurisdiction and hierarchy of legally competent arbitration authorities (Cousins, 2002: 73–6; Toulmin et al., 2002: 12, 20). The complex question of how this is to be done lies largely beyond the scope of this article.

Conversely, State intervention may also be required to facilitate tenure individualization whenever it is occurring naturally in response to social and economic pressures. This is an important corollary of the evolutionary model of property rights. Thus, for example, the World Bank (2003: 32, 53) recommends legal mechanisms for members to exit group tenures, should that be desired; and yet this deceptively simple recommendation hides a range of contentious issues. In particular, a fundamentally difficult question will be whether the customary group itself should agree to the

individualization in question; and, if so, whether unanimity or majority approval should be the appropriate benchmark for any such agreement. In this regard, much greater understanding is required of the circumstances in which individualization fails to occur despite supportive economic conditions, perhaps due to entrenched social distrust, institutional inertia or the effect of State policies and laws themselves (Baland and Platteau, 1998; Otsuka and Place, 2001: 17; Platteau, 2000: 70; World Bank, 2003: 10, 32, 47).

Fifth, and leaving aside the question of tenure individualization, there will be circumstances where the State should intervene in relation to dealings with outsiders that involve collectively held lands. Because they deserve to be facilitated where they offer the potential for beneficial development, and are desired by the group itself, the high transaction costs associated with dealings in collective land will need to be mitigated by formal law and institutions. These transaction costs arise from the nature of collective tenure and include the costs of identifying group members, reaching agreement with every group member, and preventing subsequent disputes from affecting the validity of the transaction itself (Knetsch and Trebilcock, 1981: 71–6).

On the other side of the ledger, the potential for dealings involving collective lands to cause intra-group conflict may also require an appropriate legal response. A sudden influx of monetary benefits, for example as a result of a resource development, can cause conflict over distribution; in the case of Bougainville Island in Papua New Guinea, it led to open warfare within the group itself (Connell, 1991). In other words, it should not be assumed that traditional societies can adapt successfully to rapid economic change without external assistance; and so the extent to which law should mandate the internal consequences of dealings between customary groups and outsiders will also be an important issue for legislators and policy-makers.

Sixth, any legal recognition of customary tenure may need to include provisions to protect the property rights of women and other less powerful members of a customary group. These rights may be at risk due to patrilineal or other hierarchical structures within the group, or because processes of tenure individualization have favoured more powerful members of the group. In either case, the issues for policy-makers will be whether to intervene and, if so, what form that intervention may most effectively take (McAuslan, 1998: 541; Platteau, 1996: 40–1).

Seventh, the modern circumstances of customary tenure are such that considerable attention must be paid to resolving or minimizing inter-community conflicts. In many parts of the developing world, these conflicts have increased as a result of over-population, environmental degradation, competition for resources and increased migration by peoples fleeing from conflict or failed States (Platteau, 1992: 121–2). Hence, it is crucial that the overall legal framework for customary land management include measures to strengthen those local institutions which promote co-operation

between different user groups (Toulmin et al., 2002: 12). Commonly, this will also include measures to protect the interests of migrant or displaced groups living on traditional lands (see, for example, South Africa's Interim Protection of Informal Land Rights Act 1996). This difficult issue will not be considered in the relatively short compass of this article.

Lastly, it is acknowledged that law in Third World circumstances rarely exhibits the autonomous and hegemonic characteristics that are so central to Western legal mythology (Falk Moore, 1973). In relation to land, law is simply one factor in a process of strategic interaction between and among private land users and the State itself (in all its myriad, decentralized and at times rapacious forms). These interactions take place in an often bewildering context of legal, normative and institutional pluralism. This context can leave such categories and terms as 'community', 'custom' and 'law' inadequate to describe the overlapping, contested and dynamic social fields that produce different resource governance results (Benda-Beckmann, 1999; Juul and Lund, 2002). Thus the discussion of law presented here is not intended to suggest that law alone can and will define the social status and effects of customary tenure, or that legal change of its nature produces predictable social change in the field of customary land relations. Rather, the aim is to describe a tentative typology for legal policy development that will improve legal interventions and thereby assist customary groups and their members, whether well-defined or not, to negotiate enhanced forms of tenure security in pluralist normative and institutional environments.

These brief comments serve as an introduction to the complex legal issues involved in recognizing customary tenure. What now follows is a discussion of these issues as they apply to specific legal options, namely (1) a minimalist approach, (2) the 'agency' method, (3) incorporation of customary groups, and (4) land boards. At the outset, it is noted that these different issues and approaches are not necessarily exclusive, are often directed at different ends, and may in some circumstances serve to complement each other. It is also noted that the options in question assume a relatively benign and effective State. While it is acknowledged that this is often not the case, additional measures and issues involved in restraining predatory State officials, enhancing the capacity of weak State institutions, or tracing the interpretation of law by various State agencies, also lie beyond the scope of this article.

## **SOME LEGAL OPTIONS FOR RECOGNIZING AND REGULATING CUSTOMARY TENURE**

### **A Minimalist Approach Towards Customary Tenure**

It is useful to begin by discussing a minimalist approach which would simply state that 'customary rights to land are recognized'. Certain areas would

then be described in land registry maps as 'customary land'. There would be no attempt to define which groups held what customary land, and no legal intrusion into areas governed by customary law. All issues — internal and external — would be determined by customary authorities utilizing customary processes, and so the only involvement of the State would be in establishing and enforcing the external boundaries of customary land. For the purposes of formal law, the result would be a 'tenurial shell' in which internal property issues were left beyond the reach of State law, both for the purposes of registration and record-keeping (Ankersen and Barnes, 2002: 1; Simpson, 1976: 233).

This approach would place relatively few demands on resources and institutional capacity. It would recognize the risks of regulatory intervention and support those customary systems which retained strong internal structures. It would allow customary rights to evolve over time in response to population changes and economic needs, without undue restriction or imposition by a formal legal regime. Indeed, it may be a politically palatable first step towards recognizing customary tenure, one which postpones the difficult questions of State intervention discussed below. Finally, and perhaps most importantly, it could act as a targeted answer to the problem of encroachment by outsiders, particularly in circumstances where that constitutes the primary cause of local tenure insecurity. Conversely, it would not be appropriate where tenure insecurity arose from matters internal to the group — as, for example, where conflicts are caused by discriminatory processes or individual dealings with outsiders.

Thus, for example, a minimalist approach appears to be most appropriate in relation to indigenous or 'traditional' forest user groups, where the issues are not intra-community conflicts or the emergence of a market in land but rather cultural survival, resource degradation and encroachment by outsiders (including by the State itself). Generally speaking in such cases, the focus should be on demarcation and enforcement of group boundaries, ideally with the assistance of the group itself, and internal issues should only be regulated to the extent of conservation plans for natural resource management. Examples of this type of approach may be found in Ecuador, Columbia and Panama (Hvalkof and Plant, 2000: 41–52).

Another minimalist example is provided by Mozambique, where the 1997 Land Law proposes a broad demarcation of customary areas while leaving land issues within those areas subject to unregulated customary processes (Tanner, 2002: 23–4, 28; Toulmin and Quan, 2000: 223). This approach was influenced by three factors: that traditional authorities still functioned and had proved remarkably effective in settling disputes caused by post-conflict processes of mass return; that the prime source of tenure insecurity was outsider encroachment in the form of rights granted by State authorities to 'unused' land; and that strong political suspicion of customary structures meant that more complex options were unlikely to receive governmental approval (Tanner, 2002: 11–13, 19, 21, 33, 35). While these issues support a

minimalist approach, in practice the Mozambique law may fail the tenure security test because it continues to allow the State to grant property rights in customary areas, with a right of consultation vested in customary groups but no necessary right to compensation or veto (Alden Wily, 2003a: 12).

### **The Agency Method**

Further State intervention may take the form of identifying agents to represent their customary groups. This approach was common in a number of British colonies in Africa: for example, the Registered Land Act 1965 for the Federal Territory of Lagos (as it was then) provided for family representatives to be appointed in order to enable registration of 'family land'. The Act further provided that *bona fide* purchasers could deal with family representatives as though they were in effect the owners of the land, with the result that any disputes within the family as to the dealing would not affect the validity of the dealing itself. Hence, any claim within the family could only be a claim to damages rather than rescission of the agreement and/or restitution of the interest in the land (ss 12, 124, 126). The only formal obligation imposed on the representative was that he or she sign a statutory declaration stating that the family had been consulted and that a majority of its members supported the deal (s 56).

A similar approach was adopted in the Solomon Islands in the South Pacific, where the 1968 Land and Titles Ordinance provides for up to five named trustees to hold legal title to land on behalf of their customary group, with the power to deal in that land subject to their signing a statutory declaration that those entitled to a major portion of the beneficial interest in the land consented to the deal in question (Larmour, 1986: 16). Similar laws were proposed in 1971 in Papua New Guinea, but were withdrawn after criticism of, amongst other things, their potential for abuse by traditional leaders (Knetsch and Trebilcock, 1981: 11; Larmour, 1986: 11–16).

The major advantage of this agency approach towards recognizing customary tenure, and allowing limited dealings in customary lands, lies in its relative simplicity. In external terms outsiders can deal with group representatives with formal legal confidence that any agreement with the representative is binding on the group. As a result, any abuse of authority by the representative can be deemed to have internal consequences alone. Similarly, in terms of internal conflict-resolution, the State can simply confirm the authority of a group leader to resolve disputes, while providing for rights of appeal in specific circumstances. Thus a common colonial solution to conflict-resolution in customary areas was to recognize the authority of group leaders in the first instance, whilst providing for rights of appeal wherever their decisions offended 'conscience, justice and equity' (Seidman and Seidman, 1994: 11).

This said, the agency method of recognizing customary tenure has considerable disadvantages, particularly arising from the fact that representatives may not always be trusted to act in the interests of their group. This phenomenon is well-known in institutional economics literature as ‘agency cost’; the analytical utility of agency cost analysis derives from the insight that principals will adopt different legal or normative means to minimize the risk of their agent acting other than in their best interests. This insight is relevant to the current discussion in two particular respects. First, traditional forms of obligation, based as they are on ties of kinship and ritual, may well prove ineffectual when new external elements — such as money or formal legal authority — are thrust suddenly into the hands of a customary group leader (see, for example, Burton, 1997: 117, 132). Second, in these circumstances tried and tested external models for reducing agency risk — such as democratic elections or the corporate form — may prove to be necessary elements of any legal recognition of customary tenure. Thus it is, for example, that no sub-Saharan African countries now retain colonial mechanisms based on unalloyed agency models. Most are now moving towards land boards or village committees on which traditional chiefs may (or may not) sit in an *ex officio* capacity (Alden Wily, 2003a).

### **Group Incorporation**

The best-known institutional method for reducing agency risks is to allow principals and agents to combine in an incorporated legal entity. At first glance this is an elegant solution for customary groups because it enhances certainty while reducing the potential for exploitation. Thus, a corporate structure grants formal legal identity to a traditional group, which allows it — should it so wish — to enter into legally secure transactions with outside investors. Because any such agreement is between two formal legal entities, any subsequent dispute between group members remains internal to the group and does not affect the formal validity of the agreement itself. Conversely, a corporate structure also allows for certain constitutional provisions, particularly relating to fairness of decision-making and distribution of benefits, to be made mandatory; and in this sense it goes at least some way to helping prevent internal abuses of power. In particular, any decision by the management board of the incorporated group could be void or subject to challenge if it failed to follow mandatory provisions relating to disclosure of information, member approval of certain important transactions, and the manner of distribution of benefits.

Thus, for example, Papua New Guinea’s Land Group Incorporation Act 1974 allows a customary group to incorporate as a formal legal entity with the capacity to hold, manage and deal with land in its own right. In order to incorporate, the group must prepare a written constitution which sets out the qualifications for membership, the nature of its controlling body, the

nature of its dispute-settlement authority, the way in which the corporation will act and the manner in which those acts will be evidenced (*s* 8[1]). Internal disputes are to be resolved in the first instance by the stipulated dispute-settlement authority (*ss* 21, 23), which must act generally in accordance with custom, and must also seek to do ‘substantial justice’ to the claims of the disputants (*ss* 8[1], 24). Highly limited rights of appeal are available to local Village Courts in cases where the dispute-settlement authority considers that it cannot settle the dispute satisfactorily, and that a Court may be able to do so (*s* 23). The governing law of the appeal will also be ‘custom’, which is to be evidenced through procedures established under the Customs Recognition Act (see the Village Courts Act, *s* 57). Outsiders are not subject to the jurisdiction of the dispute-settlement authority unless they have agreed to be bound by its decisions (*s* 20).

In terms of external relations, outsiders may enter into land-related dealings with the incorporated group, and generally speaking that dealing will be valid where there has been compliance with relevant provisions in the group’s constitution (*ss* 8[2], 13[2], 14). In other words, where there has been compliance with the constitution, the owner is entitled to assume that the agreement has been entered into with sufficient legal authority. Under applicable principles of general law, that assumption will not be available where there has been fraud or lack of good faith on the part of the outsider. Because of the social significance of land sales, it is also excluded by the statute in relation to the sale of customary land to outsiders (*s* 8[2]).

A similar scheme to allow traditional land holding groups to incorporate is set out in South Africa’s Communal Property Associations Act 1996. It also allows customary groups to incorporate, with a view to acquiring, holding and managing property in accordance with an agreed written constitution. However, this Act intervenes in the internal processes of a group to a greater extent than the PNG legislation, particularly in relation to the risk of abuse of power by powerful group members. It thus requires that internal procedures in the corporation be based on democratic, equitable and non-discriminatory principles, and to this end it incorporates the following mandatory principles into each association’s constitution: fair and inclusive decision-making processes; equality and non-discrimination in relation to membership; democratic processes; fair access to the property of the association; and accountability and transparency (*s* 9). Each of these principles is given specific content in the Act.

Which is a better option for incorporating customary groups: the PNG or South African legislation? Leaving aside minor differences concerning relations with outsiders, the major difference is the extent of State intervention in the internal processes of the group. Clearly, there are strong policy arguments for such intervention where there is a high risk of abuse of power, either through appropriation of benefits or denial of rights to women and other less powerful members of the group. Moreover, the corporate form provides a useful vehicle for intervention because its

template processes are already designed to constrain the actions of its controlling body (its board of directors or management group equivalent). Thus, in theory, ordinary rights to voting and information should give members a degree of control over management decisions. Alternatively, 'supermajority' voting approval may be mandated for decisions which are particularly susceptible to management fraud or appropriation, or for decisions which are fundamental to the group's livelihood (such as the sale of land). Alternatively again, as in South Africa, certain 'bright line' prohibitions may be introduced into the corporate constitution in order to protect the rights of women or other less powerful members of the group. The law could then provide that any act or transaction breaching these provisions is void and without legal effect. In short, in all these ways the corporate form could provide a useful means by which the State can intervene in the internal processes of customary groups.

This said, however, any effort to impose different rules and processes on customary groups inevitably runs up against a socio-legal problem, namely the limits of formal law as an instrument of social policy. Fingleton, a lawyer with considerable practical experience of this issue, argues that the process of incorporating customary groups should make as little change as possible to internal customary processes (1998: 34–5). This argument arises, first, because the ultimate policy goal of incorporation legislation involves recognizing an existing entity, not forcing social change within that entity or subordinating it to an external legal order; and second because, while some form of change inevitably results from incorporation, the greater the degree and novelty of mandatory intervention the more likely that it will be ignored in practice. Hence Fingleton comments (*ibid.*: 35) that a law which makes 'special and demanding requirements about such things as membership, meetings and decisions . . . invites illegality by its unrealistic and inappropriate demands'.

Similar arguments are put by Cousins and Hornby (*n.d.*: 3, 5), commentators with considerable practical experience of South Africa's Communal Property Associations Act. They assert that prescriptive elements in the South African legislation are having little practical impact, in general because of the limits of law as an instrument of social change, and more particularly because of resistance from traditional chiefs and disassociation from local practices (see also Toulmin and Quan, 2000: 224–5). Thus they recommend a community-level process of negotiation as 'an approach that enables groups to articulate current procedures and institutions . . . [so as to] achieve gradual adaptation towards greater equity' (Cousins and Hornby, *n.d.*: 24).

## **Land Boards**

A different approach to recognizing and managing customary tenure, adopted by a number of countries in Africa, is to establish a decentralized

system of Land Boards. The best-known example is Botswana, where authority over traditional land was transferred from tribal chiefs to district and sub-district Land Boards by the Tribal Land Act 1968. These Land Boards hold the 'right and title of the chiefs and tribes on trust for the benefit and advantage of the tribesmen of that area and for the purpose of promoting economic and social development of all the peoples of Botswana' (s 10[i]). The primary duties of each Land Board are to allocate land within its jurisdiction, adjudicate disputes, implement policies for land use and planning, and collect leasehold rents (ss 13, 15). Although originally membership included the tribal chief or his deputy in an *ex officio* capacity, it now consists of five elected members, and up to seven members appointed from various government departments (Quan, 2000: 200).

One advantage of the Botswana system is its potential to grant tenure security to both insiders and outsiders. Thus, land may be allocated by the Land Boards for residential, agricultural, grazing, industrial and commercial use. Such allocations may be made on application to a local land occupier, in which case security is theoretically provided by demarcation of the site and either the issue of a certificate of 'customary land grant' or, increasingly, the grant of a statutory lease (ss 16, 20; Quan, 2000: 199). Importantly, allocations may also be made to outsiders and, where the allocation has a commercial purpose, it will take the form of a statutory lease and its holder must pay rents (s 20). In theory, of course, this grants State-sanctioned security of tenure to outsiders whilst avoiding the transaction costs of direct dealings with customary groups. Indeed, some commentators suggest that Botswana's Land Boards offer the potential for customary land holdings to be given greater protection in formal law and practice through gradual conversion into a statutory system of leaseholds (Adams et al., 2000: 137, 147–8).

A similar approach may be found in Lesotho, where under the Land Act 1979 non-urban land is administered by a large number of decentralized Land Committees (Adams et al., 2000: 146–7). The powers of each Land Committee include land allocations and implementation of government land use policies (s 12). Again, this allows the potential for increased tenure security for both insiders and outsiders. Thus, a local land occupier can apply for a formal leasehold title which may range in term from thirty to ninety years depending on the type of use. This lease may be transferred, sub-leased and encumbered, which suggests considerable potential for tenure individualization (Bruce, 1985: 28). Similarly, outsiders may also receive direct grants of leasehold rights from the local Land Committee (Part V). However, agricultural land cannot be allocated; and, where non-agricultural land is allocated for commercial or industrial purposes, the relevant Minister must give his consent and rents will be payable (s 12).

The disadvantages of the Botswana and Lesotho systems include the agency cost implications of separating authority over land decisions from the customary rights-holders themselves. These implications potentially

arise in a number of ways. First, there are the familiar issues of potential exploitation and inappropriate State intervention (Quan, 2000: 198–9). Thus, for example, one problem in Botswana is the way in which the Land Board system has been used to deny rights to indigenous groups such as the Basarwa (San or Bushmen), often ironically on the basis of the assertion that other ‘customary’ rights apply in the area. Another criticism has been that Land Board decisions have tended to favour elite groups, most particularly large cattle owners (Quan, 2000: 201).

A second and related issue is the possibility that granting statutory leases in customary tenure areas, whether to insiders or outsiders, will encounter the same premature formalization problems experienced by more centralized title registration programmes. Because leases are usually held by individual holders, and include the concept of exclusive possession, their grant may give rise to familiar risks of dispossession of subsidiary rights-holders, legal institution shopping by wealthier and more knowledgeable individuals, disintegration of customary forms of social insurance and general disassociation between State Law and local practice. The mere fact that Land Boards are decentralized may not of itself be enough to offset these risks.

Third and finally, there are ever-present problems of institutional capacity and information asymmetry (Quan, 2000: 200). Thus, one lands officer in Botswana notes that many Land Boards are often ignorant of who owns how much land, whether that land is effectively used, and how much land is left for allocation. In the event this has led substantial numbers of commercial land allocations to be withdrawn because they have subsequently been found to have infringed on existing customary rights (Machacha, 1986). Far worse problems are reported in Lesotho, where in many areas formal land administration is barely functional. This highlights, of course, the fundamental risk of policy over-reach, and the need to ensure that any decentralized system of land administration receives adequate funding (Okoth-Ogendo, 2000: 133).

To what extent would democratic structures ameliorate these potential disadvantages of the decentralized Land Board systems in Botswana and Lesotho? Notably, both jurisdictions have introduced a requirement for some members of the Land Board to be nominated or elected by their local communities (Bruce, 1985: 30). While this approach does offer the potential for a measure of accountability, and undoubtedly requires further study, democratic processes are not of themselves particularly effective responses to agency cost problems, especially by comparison to the corporate form. In particular, democratic models involve ‘one-shot’ requirements for periodic election and, unlike the corporate form, do not include formal provision for the sharing of information, regular monitoring of decisions or the submission of extraordinary decisions to elector approval. In Botswana, for example, the Land Boards have reporting obligations to the government but not to their communities (Alden Wily, 2003a: 20).

Similar to the Land Board system, but constituted at village rather than district and sub-district levels, are the village land councils of Tanzania (also proposed in Malawi and Swaziland). In Tanzania, approximately 11,000 village councils have been established under the Village Land Act 1999. All council members are elected by village members over eighteen years of age; at least a quarter must be women. In a formal improvement on the Land Boards of Botswana and Lesotho, various obligations relating to equality of access and distribution, environmental protection, reporting to village members and consistency with customary law are set out in the Act (ss 3, 8, 20). Subject to these obligations, village councils may pass bylaws relating to resource management on village land, which is usually defined broadly to include common property resources. As will be seen, village councils may also grant individualized rights of customary occupation that may be bought and sold in certain circumstances (Alden Wily, 2003b).

#### **THE ROLE OF RECORD-KEEPING: REGISTERING TITLES AND/OR TRANSACTIONS**

Because registration of titles and/or transactions is often mentioned in the context of Third World property administration (see, for example, Hanstad, 1998), it is appropriate to summarize what form and role it may have in relation to the recognition of customary tenure. The topic is enormous and the following discussion can only briefly sketch some of the law and policy issues involved.

#### **Group and/or Individual Titles?**

It has been seen that the systematic imposition of individualized statutory titles in areas subject to customary tenure has generally failed to increase certainty and reduce conflict. This article has discussed an alternative, recommended in certain circumstances by the World Bank's recent land policy report, which involves recognition of tenurial rights at the level of the customary group. One way to support this recognition is to allow for the registration of group rights to land, and again the nature and form of this registration largely turns on issues of tenure security and the policy objectives of the legal recognition in question.

Where the primary source of tenure insecurity is outsider encroachment, the best legal response is to recognize and enforce local group rights, and (where it does not cause undue conflict) to demarcate and record certain lands in the name of that group. In other words, where direct dealings with outsiders are uncommon and intra-group relations provide sufficient certainty and equity for group members, it may not be necessary for State intervention inside the 'tenurial shell', particularly in relation to recording

information on such issues as individually-held customary rights to land, or the exact nature of membership of the group itself. This is an important point because often the process of ascertaining this information can cause greater conflict and entail greater expense than justified by any potential benefits, particularly when — as often occurs — the customary tenure arrangements consist of complex layered relationships between families, sub-clans, clans, villagers and tribes (Crocombe, 1971: 7; Lavigne-Delville, 2000: 110–11; Ward, 1997: 32–3).

If this be the case, the primary registration issue will be to define in broad terms the form the landholding entity in question takes. Thus, where landholding relations are based on kinship it is logical to register in the name of the kinship or lineage group. Where land relations are based on territoriality, it may be enough to register in the name of the local village or its equivalent. Where land relations involve a combination of territoriality and kinship, or vary greatly as a result of conflict and population displacement, it may be sensible to ascribe legal landholding status to a broadly defined common interest community. An example of this approach may be found in Mozambique's 1997 Land Law (*s* 1[1]). Another interesting example is provided by South Africa's draft Land Rights Bill, which in certain circumstances seeks to avoid a precise determination of group membership and boundaries, in favour of obligations to consult persons affected by particular proposals (see Cousins, 2002: 88–90).

### **Registration of Individual Customary Rights**

To what extent should individual customary interests be registered? In many customary tenure systems, registering individual customary interests will not be warranted because of the probabilities that (1) submerged conflicts will crystallize as a result of the 'once and for all' nature of the adjudication process; (2) subsidiary rights-holders such as occasional users or transhumant groups will be excluded from registered plots; and (3) opportunistic group members will engage in legal institution shopping so as to manipulate the register for their own benefit (see above). Additionally, of course, the very act of creating and maintaining a register will require a certain degree of funding and institutional capacity. Broadly speaking therefore, only where there is considerable tenure insecurity within a group, particularly as a result of individualization tensions and/or the emergence of dealings with outsiders, would the benefits of recording individual interests potentially outweigh the considerable costs and risks of the recording process.

This said, a number of African jurisdictions do allow for the issue of certificates of individual customary rights to land, including Botswana, Lesotho, Tanzania, Malawi, Namibia, Swaziland and Uganda (see Alden Wily, 2003a: 40–3; Toulmin and Quan, 2000; Toulmin et al., 2002: 16–7). As noted, in Tanzania under the Land Act 1999 and Village Land Act 1999,

rights of customary occupancy can be issued to individuals by the village council. This heritable right can be assigned to village members, and non-village entities that make the village its main place of business, so long as it does not seriously disadvantage smallholders or pastoralists (s 3, Village Land Act 1999). Disputes relating to the underlying right or its assignment are to be resolved by the village council (McAuslan, 1998: 529, 532). In making its decisions the council is guided by customary law, as qualified by certain legislative principles relating to fairness and equality (ss 8, 20, Village Land Act 1999).

### **Partition of Group Titles**

A further issue arising from group-based title registration concerns the way in which the group itself may agree to individualize its collective holding. Allowing for such individualization is an important corollary of the evolutionary model of property rights, particularly in terms of ensuring that group title registration does not unduly restrict or freeze tenurial changes within the customary system itself. Yet, a review of the literature suggests that it is very rare for a customary group to agree in a formal sense to partition its collective holdings into exclusionary individual titles. One reason for this appears to be the point made by Baland and Platteau (1998: 648), that dividing common property resources threatens the existing social balance to such an extent that community decisions tend to favour the *status quo*, even when this may entrench unsustainable resource degradation or endemic levels of conflict.

It seems clear that a principle of unanimity for partition decisions will encounter too many collective action problems and create inappropriate incentives for holdouts. Yet, even a lesser majority requirement may not overcome community fears of the distributional consequences of partition, even when partition itself is justified on environmental and economic grounds. Conversely, setting the bar even lower still (perhaps at a bare majority) raises the possibility that opportunists will seek to divide collective or common property resources in order to increase their take at the expense of other members of the group, or to the detriment of resource conservation measures. Perhaps all that can be said is that environmental, economic and social circumstances will differ from group to group, and so a uniform consent rule for partition cannot be recommended. Moreover, in many cases approval by an external agency, particularly in relation to environmental issues, would appear to be an appropriate requirement for any partition process.

### **Recording Dealings in Customary Lands**

To what extent should transactions involving customary lands be recorded in the official lands register? This question also goes to the heart of the

individualization issue, particularly as the emergence of dealings in customary lands can herald a weakening in internal group structures.

### *Recording Dealings after Titles have been Registered*

Generally speaking, the options in relation to recording dealings after title registration has occurred include: (1) making no provision for the recording of subsequent dealings; (2) allowing optional recording of dealings with the proviso that (in the absence of fraud or notice) registered dealings take priority over unregistered dealings; and (3) requiring compulsory recording of dealings, perhaps with a requirement that this is necessary to give legal effect to the transaction itself. As in so many matters involving customary tenure, choosing the most appropriate option turns on a careful assessment of the circumstances. No provision for recording dealings may be appropriate in situations where dealings are rare and customary authority is strong, or where customary methods of recording transactions are providing sufficient certainty for actual and prospective land users. Optional registration of dealings may be appropriate where dealings have increased to the point where some form of enhanced formal certainty is necessary but compulsory registration is impractical due to institutional or funding constraints. Compulsory registration of dealings is the ideal as it maintains the accuracy of the register. By definition, however, it assumes a sufficient degree of institutional funding and capacity, and a situation where confidence in the register is such that local titleholders will in fact seek to record their transactions.

A useful example of a law that envisages registration of group-based dealings in land is the 1987 Land Act and Customary Land Registration Act in the East Sepik province of Papua New Guinea. In combination, these Acts allow customary groups to register their collective ownership rights to identified lands. Where this registration has occurred systematically in priority Customary Land Registration (CLR) areas, it operates as conclusive evidence of the facts stated in the registration instrument (that is, as to boundaries, definition of landholding group and so forth). Outside CLR areas, the fact of registration only operates as *prima facie* evidence of the facts stated in the registration instrument, and therefore may be defeated by any valid concurrent claim based on custom. In either case the registered ownership rights may then be sold, leased or charged subject to (and conditional upon) approval by relevant administrative agencies. Importantly, the resulting interests may themselves be registered and, where they fall within a CLR area, the registered instrument also operates as conclusive evidence of the facts contained therein. In this way, a customary group may grant a lease or charge which if registered will be free of any concurrent claim based on custom, without having to pursue the relatively

complex and expensive group incorporation processes discussed above (see also Fingleton, 1991: 197–218).

### *Registering Dealings as an Alternative to Registering Titles*

Registering dealings as an alternative to registering titles is an attractive policy option in circumstances where a titles registration procedure is likely to involve conflict or unsustainable levels of funding. It also focuses attention on the stage when customary tenure systems are most likely to need external assistance to maintain tenure security, namely when individualized dealings with outsiders have emerged and multiplied. Indeed Knetsch and Trebilcock (1981: 62–5) argue, in the context of customary tenure systems in Papua New Guinea, that a system of registered dealings would produce many of the benefits of registered titles without incurring the conflicts engendered by adjudication processes. In particular, they suggest that dealings in customary land to which outsiders are a party, or which take a form not contemplated by customary law, may be recorded by a local Magistrate who must first review the dealing in order to ensure its fairness. A recorded dealing would take priority over an unrecorded one, in the absence of issues of fraud or lack of good faith. The form of the recorded dealing would also be sufficiently standardized so as to yield useful information both in a decentralized registry, and in duplicate in a centralized filing system.

### *Standard Form Documentation*

A final point in relation to recording transactions concerns the use of standard form agreements, both as a form of standardized documentation and a way of minimizing the potential for contractual disputes (McAuslan, 2000: 83). Generally speaking, these agreements should reflect the wide variety of informal validation techniques, including written instruments, which tend to develop in communities in response to local demands for transactional certainty (Lund, 2000: 26). More particularly, they could call the attention of the parties to contingencies that could cause conflict (Cooter, 1989: 4). Thus, for example, Duncan and Duncan (1997) suggest that standard clauses could (1) reduce information asymmetries in relation to future profits, particularly by creating mechanisms for sharing information in relation to costs and revenues; (2) provide an agreed means for re-negotiating terms, particularly so as to reduce pressure for extra-legal attempts at renegotiation; and (3) establish a series of agreed responses to foreseeable contingencies, such as fluctuations in the world commodity prices.

*The Legal Nature and Content of Registered Rights or Transactions*

Once rights or transactions are registered, what system should govern their nature and content: custom or the formal legal order? At one extreme, registration could simply involve a form of 'social mapping', in which traditional rights, transactions and procedures are recorded without changing their nature or content, and without necessarily attributing legal force to the recording itself (Burton, 1991). Examples of this approach may be found in Benin, Ghana, and Guinea (Lavigne-Delville, 2000: 110; McAuslan, 2000: 89; Toulmin et al., 2002: 16–7). At the other extreme registration could automatically convert the customary interest into a creature of statute and general law. An example of this approach may be found in the Selected Agricultural areas of Lesotho (Bruce, 1985: 28).

Between these two policy extremes lies a range of different options. In Tanzania, for example, customary law continues to apply to village land subject to principles established in the Village Land Act 1999 to ensure fairness and non-discrimination in land matters (see, for example, ss 8, 20[2], 30[4][b], 33[1][d], and 36). In Uganda under the Land Act 1998, customary law continues to govern lands subject to certificates of customary ownership (s 9[1]); however, certificate-holders have the *prima facie* right to mortgage, pledge, subdivide, lease or sell their land (s 9[2]). The resulting potential for dispossession of subsidiary rights-holders is mitigated to some extent by the qualification that these transactional rights are subject to third party interests endorsed on the certificate at the time of the grant (ss 6, 7[6]).

In South Africa, test cases conducted by the Department of Land Affairs revealed substantial difficulties in transferring statutory forms of ownership to customary landholding groups. These difficulties included problems in defining the relevant group, disagreements within groups as to the adoption of traditional or 'democratic' corporate structures, and the resource-intensive nature of case-by-case ownership transfers. As a result the draft Land Rights Bill establishes a category of 'protected rights', which involves recognition of individual rights to use, occupy or access land in 'communal' areas, subject to majority (and democratic) decisions by the relevant group. The content of these rights is 'customary', in the sense that they protect existing forms of occupation, use and access, and do not rely for their legal efficacy on a State grant or the fact of registration itself. However, they may be elevated into more defined creatures of statute, including rights to sell, mortgage and bequeath, following local processes of confirmation and allocation. These local processes may also result in limitations on the individualized rights to sell, mortgage or bequeath (Cousins, 2002: 90–5).

Of these examples, which is the best option for regulating the nature and status of registered customary interests? In one sense, the answer involves the familiar refrain of distinguishing the circumstances and identifying the causes of the tenure insecurity in question. Thus social mapping exercises, in which interests are recorded without changing their nature and content, may

be useful in circumstances where land dealings are relatively uncommon, internal customary procedures are strong, and the primary aim is to recognize systems for the purposes of preventing outsider encroachments. Conversely, unitary laws and documentation will be valuable where the relevant landholding unit may be precisely defined, there is a relatively high degree of land dealings, including transactions with outsiders, and/or customary procedures have proved incapable of effectively recording these dealings or minimizing conflict relating to their nature or operation.

This said, an additional thread in this legal policy dilemma is that laws and procedures must harmonize with community practices if official land registers are to maintain their accuracy over time. This, as McAuslan (2000: 83) has pointed out, is one of the fundamental lessons to be derived from land registration experiences in post-colonial Africa. In other words, even where unitary rules and procedures are applied to registered customary interests, those rules and procedures must be adapted in order to facilitate community acceptance. In brief, this would mean that relatively simple forms of transfer and inheritance documentation should be developed for registration purposes, and that rules relating to the creation of interest, and the modalities of their transfer, should be as consistent as possible with local community norms (Lavigne-Delville, 2000: 115). The extent to which this process would require codification of customary rules, and the advantages and disadvantages of such an approach, lies beyond the scope of this article (but see Cousins, 2002: 72–5).

## **CONCLUSION**

We can now return to the questions posed at the beginning of this article. Clearly there is no single ‘best practice’ model for recognizing customary tenure. Nevertheless, it does appear possible to identify the circumstances which dictate the choice of a particular model, especially through a typology based on the evolutionary theory of property rights and its key analytical concept of tenure security. Put in very broad terms, this typology builds on the proposition that it is the causes and nature of tenure insecurity which dictate the appropriate legal policy response.

Where, for example, land access for all customary group members is relatively secure and equitable, available forms of investment are recognized and protected, local land conflicts are infrequent, environmental resources are abundant and outside encroachment does not threaten cultural survival or livelihood security, there is little need for State intervention or regulation because the policy objectives of that regulation — social justice, economic security, environmental conservation — are being satisfied by customary structures themselves.

Where internal customary structures are sufficiently strong to promote tenure security and minimize conflict, but the group itself is at risk from

outsider encroachment, the appropriate form of State intervention is simply to recognize and enforce group rights, and — where possible — to demarcate and record group boundaries. No other intervention inside the ‘tenurial shell’ may be necessary, other than that required by any State-sponsored resource management regime. In this case also, measures may be required to protect the legitimate interests of outsiders living on the traditional lands in question.

Where the group itself wishes to enter into land dealings with outside investors, some form of regulation will commonly be required to reduce the high level of formal uncertainty associated with such dealings, and ensure that the resulting distribution of benefits does not cause undue conflict between group members. One option discussed here for such regulation is that of group incorporation. This possibility also has the advantage of allowing mandatory internal rules and procedures to seek fair distribution of benefits and to ameliorate any discrimination against women and other less powerful members of the group. Its disadvantages largely arise from the difficulties of defining group membership and boundaries in complex customary circumstances.

Finally, where a customary group is unable to provide sufficient tenure security for its own members, perhaps due to individualization tensions or the presence of multiple arbitration authorities, further State intervention inside the ‘tenurial shell’ may also be required. Importantly, this intervention should not take the form of premature or quick-fix attempts to impose formalized titles on fluid customary interests. Rather, there is a range of options and issues to be considered, including decentralized Land Boards and the appropriate role for recording customary titles or transactions. In discussing these options, the aim of this article has not been to deny the value of other disciplinary perspectives, including the importance of anthropological techniques for analysing different normative orders. Instead, the aim has been to describe a tentative typology for legal policy development, particularly so as to improve existing and anticipated regulatory interventions relating to customary tenure systems.

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