



Navigating through Complex Legal Landscapes

A Legal Compass for VPAs

Feja Lesniewska and Janet Meissner Pritchard
with input from Lynette Omollo and Simon Mutagha Acha

April 2011

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

As legal experts working in the public interest, we act to strengthen the work of our partner organisations. Our work covers climate change and energy system transformation, protection of oceans, biodiversity and forests, and environmental justice.

ClientEarth is funded by the generous support of philanthropic foundations and engaged individuals and with operational support from the European Commission's Life+ programme.

www.clientearth.org

The Hothouse
274 Richmond Road
London E8 3QW
t +44 (0)20 7749 5970
f +44 (0)20 7729 4568

Avenue de Tervueren 36
1040 Brussels
t +32 (0)2 808 34 65
f +32 (0)2 733 05 27

50 avenue de Ségur
75015 Paris
t +44 (0)20 3030 5957

Aleje Ujazdowskie 39/4
00-540 Warszawa
t +48 22 3070190

info@clientearth.org
www.clientearth.org

This report was written by Feja Lesniewska and Janet Meissner Pritchard for ClientEarth, with input from Lynette Omollo and Simon Mutagha Acha. It was commissioned by the European Forest Institute's EU FLEGT Facility which is funded by the European Union, the Governments of Finland, France, Germany, the Netherlands and the United Kingdom, and EFI. The report was finalised in April 2011.

Table of Content

1.	Introduction	3
2.	Legal Pluralism	6
3.	Customary Law and the State	8
3.1	General Characteristics of Customary Law	8
3.2	The Challenge of Ascertaining Customary Rights	9
3.3	Colonization and its Legacy	10
3.4	Government Intervention in Customary Law Systems	11
3.5	Public Regulation of Private Rights	13
4.	Statutory Law: Two Traditions Becoming One	14
4.1	Civil Law	15
4.2	Common Law	19
4.3	The Convergence of Statutory Legal Traditions	21
5.	The State and Legal Pluralism	24
6.	Dispute Settlement	26
7.	Legal Influences Beyond the State	32
7.1	Human Rights Law	33
7.2	Indigenous Peoples Law	33
7.3	Economic Law	35
7.4	Environmental Law	37
7.5	Global Administrative Law	38
8.	VPA Navigation in a Legal Pluralist Environment	40
9.	Conclusion	42

1. Introduction

Voluntary Partnership Agreements (VPAs) negotiated by the European Union (EU) and partner countries commit the EU and its partners to trade only in legal wood. As noted in the European Forest Institute's Policy Brief on VPAs, to achieve this 'it is necessary for each party to have a clear understanding of what legal production [of wood] in a partner country involves.'¹ The relevant areas of law to be considered include the law governing property rights, particularly those of communities who depend on forests for their livelihoods.

VPAs negotiated so far have sought to identify the statutes and regulations governing forest land and use rights to comprise a working definition of the legal production of wood. In the course of doing so, however, some stakeholders have identified the need for further clarification of forest tenure and use rights, particularly with regard to the rights of indigenous peoples and other forest communities over forest lands and resources. In the case of Ghana, for example, the VPA ratified in 2009 recognises that existing statutory law provisions² in Ghana need to undergo 'significant reforms' to address 'existing inadequacies' and to ensure good governance.³ Areas in need of policy and legal reforms include 'affirmation of local forest tenure and of different stakeholder rights.'⁴ Likewise, the VPA concluded for the Republic of Congo is conditioned on the adoption and implementation of law reforms including, among other things, a 'law promoting and protecting the rights of indigenous peoples in the Republic of Congo' and a 'framework decree laying down conditions for joint and participative forest management . . . covering in particular: the terms of involvement of local, indigenous populations and civil society in the process of classifying and declassifying forests [and] involvement of resident populations and civil society in the management of forest concessions.'⁵

Civil society stakeholders in Ghana note that recognition of the tenure rights of forest communities, by clarifying and securing the rights of communities to sustainably exploit and manage their forest resources, will contribute to the understanding of legal wood in Ghana.⁶ The law reforms upon which the Congo VPA is conditioned are likewise expected to recognise and strengthen communities' rights of forest ownership and use.⁷ In Malaysia, also, civil society stakeholders have asserted that

¹ European Forest Institute, EU FLEGT Facility, 'EFI Policy Brief 3: What is a Voluntary Partnership Agreement? – the European Union Approach' (Joensuu, Finland 2009).

² The term "statutory law" references the system of law adopted and enforced by the state through its executive, legislative, and judicial institutions.

³ Voluntary Partnership Agreement between the European Community and the Republic of Ghana on Forest Law Enforcement, Governance and Trade in Timber Products into the Community (signed 20 November 2009) at Annex II/en 15.

⁴ *Ibid.* at Annex II/en 17.

⁵ Voluntary Partnership Agreement Between the European Union and the Republic of the Congo on Forest Law Enforcement, Governance and Trade in Timber and Derived Products to the European Union (FLEGT) (signed 17 May 2010) at Annex IX at 146-47 (English version).

⁶ Forest watch Ghana and FERN, 'A civil society counter-brief on the Republic of Ghana-EU VPA,' (June 2010) at p7 <www.loggingoff.info> accessed 7 December 2010.

⁷ Observatoire Congolais de Droits de l'Homme (OCDH) and FERN, 'A civil society counter-brief on the Republic of Congo-EU VPA' (March 2010) <www.loggingoff.info> accessed 7 December 2010.

recognition of native customary rights, including unwritten practices, must be resolved before a VPA can be signed.⁸ Notably, these stakeholders are not calling for the creation of new rights, but rather for the recognition of *existing rights* which, to date, have not been adequately acknowledged or protected by the statutory law systems operative in their respective countries.

The existing legal landscape of most VPA countries is complex. In most countries, the statutory law system, whether based upon a civil or common law model, does not adequately reflect or address the country's existing customary laws. This is particularly true with regard to forest law and resource rights. But what is the relationship between a country's statutory law and customary law? And what does this relationship imply for how VPA countries can arrive at a legitimate and workable definition of 'legal wood?' To be able to answer these questions, it is necessary to look beyond the statutory law system and examine the relevant issues through the lens of *legal pluralism*.

Legal pluralism counters the concept of 'legal centrism,' the idea that 'law is and should be of the law of the state, uniform of all persons, exclusive of all other law.' Within such a centrist legal system, all other laws—religious, family, community and indigenous law, for example—are considered to be subordinate to the law and institutions of the state. The result is that there is a chronic inability to see the legal reality within which the modern state operates, a reality which is not at all tidy, consistent and nicely captured in the common identification of a 'legal system' but one which is rather an unsystematic collage of inconsistent and overlapping parts. This complexity is compounded in former colonies where 'primitive' law⁹ suffered, and continues to do so in many cases, from false comparisons with the idealised picture of law in 'modern' society. Acknowledging legal pluralism can be an important pragmatic step in improving governance within a country.¹⁰

Fresh efforts towards promoting an intricate balancing of various levels of law making are needed.¹¹ The originality and vigour of legal systems lies in their legal pluralism. The challenge of the 21st century for post-colonial legal systems will be that of inventing a genuine personality influenced both by the modernity of the international legal order and the strength of traditions adapted to the rapidly changing realities of these societies. This challenge is applicable to all legal systems to varying degrees depending on their historical, cultural and social context. VPA processes provide a platform for VPA partner countries to successfully address this challenge. This is because VPAs are linked to the demands of the international legal order, in that they must be able to define the legal production of timber in a manner

⁸ FERN, 'Forest Watch Special – VPA Update October 2010' <http://www.fern.org/sites/fern.org/files/VPA%20Update%20October%202010_0.pdf> accessed 7 December 2010.

⁹ See Box 1 for a discussion of the connotations ascribed to 'primitive law'.

¹⁰ J. Griffiths, 'What is Legal Pluralism?', *Journal of Legal Pluralism and Unofficial Law*, Vol. 24 (1986) at 1.

¹¹ J. Fremont, 'Legal Pluralism, Customary Law and Human Rights in Francophone African Countries,' *Victoria University of Wellington Law Review*, Vol. 40 (2009) Issue 1 at 166.

that can be recognized as legal by trading partners. Also, the multi-stakeholder processes through which VPAs must be negotiated provide an avenue through which the legal claims of various stakeholders can be aired and addressed.

Box 1: Primitive Law: Origins and Connotations

Throughout the colonial period European nations perceived laws in colonised countries as 'primitive' in comparison to their own 'civilised' legal systems. This sentiment continued into the twentieth century with the establishment of the organs of international justice. In 1921, the Statute of the International Court of Justice encouraged the court to apply 'general principles of law recognised by civilised nations'. The same phrasing was included in the Statute of the International Court of Justice 1949. Within former colonial countries, the discrimination towards 'primitive legal systems' was, and to varying degrees continues to be, perpetuated. Also the idea of the 'civilising mission' of European colonial powers remains part of the international law and governance agendas. A reflexive approach to legal pluralism which seeks to understand the normative value of all legal systems will be a significant contribution to redressing this historical legacy of discrimination towards the 'other.'

Navigating such a complex landscape requires skill and nuanced navigational tools. Legal pluralists concern themselves with both ideological normative concerns, such as distribution of power, fairness, and access to justice within and between legal systems, as well as practical problems that face policy-makers, judges, legislators and other participants in diverse legal processes.¹² As such, they have employed and developed a series of legal tools.¹³ While legal pluralism is not limited to the post-colonial situation, this is certainly where it is best recognised.¹⁴ Analysis of legal pluralism in post-colonial settings is highly relevant to the ongoing processes, agendas, and effective implementation of FLEGT VPAs.

This report provides readers with an understanding of the limitations of many existing statutory legal instruments. It proposes that VPA partner countries can learn lessons from legal pluralists to develop effective tools to navigate the interlegality of the contemporary globalised world.

¹² W. Twining, 'Normative and Legal Pluralism—A Global Perspective,' *Duke Journal of Comparative and International Law*, Vol. 20 (2010) at 474.

¹³ See Box 2 for a list of proposed tools for a legal pluralist approach VPA negotiation.

¹⁴ For an analysis of legal pluralism within the EU, see Mireille Delmas-Marty and Naomi Norberg, *Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism* (2002) Cambridge University Press.

2. Legal Pluralism

Legal pluralism is the natural state of law in the world. All dominant legal systems have emerged from complex pluralistic legal environments. Hooker notes that 'legal systems typically combine in themselves ideas, principles, rules, and procedures originating from a variety of sources,' adding that 'both in the contemporary world and historically the law manifests itself in a variety of forms and a variety of levels.'¹⁵ Legal pluralism as a concept of law seeks to elucidate the relationship of the dominant legal system to other recognised and unofficial legal systems. It asserts that these relationships have important ramifications for both the development of laws and policies and their effective implementation.

The richness of the normative diversity which exists, particularly in post-colonial settings, should be drawn upon to realise more effective rules and policies. Following efforts to harmonise laws into one dominant legal culture, the theory of legal pluralism is emerging as an important concept to create effective governance frameworks for the management of finite natural resources. Indeed, governments, investors and civil society increasingly understand that working within the multi-varied legal landscapes found in all countries, especially former colonies, is necessary for achieving legitimate (in the broad sense) governance of natural resources which will realise greater compliance across the entire population. Achieving these outcomes is in no way easy as legal pluralist advocates do not provide 'off the peg' solutions for complex legal and governance problems such as the reduction of illegal timber harvesting and trade. The challenges to realising substantive and procedural developments through a working plural legal world are significant.¹⁶ Notwithstanding the controversy and complexity entailed by legal pluralism, however, it should not be overlooked as a framework through which to analyse such problems. Indeed, it is absolutely necessary that challenges are confronted on all levels and in all fields of law to move away from a monistic legal world view which is certainly no longer, if it ever was, fit for purpose. Legal pluralist analysis can provide valuable insights as to how real solutions to these problems might be advanced to ensure both legitimacy and compliance.

The following sections provide an overview of various legal systems within the context of a legal pluralist narrative. Firstly customary law is discussed followed by an introduction to the origins, influence and institutional structures of the 'traditional' statutory legal systems of civil law and common law. We then discuss the relationship of statutory law to other legal systems within a plural legal environment. Finally, we examine the emergence of a transnational legal pluralism.

Box 2 lists key attributes of a legal pluralist approach to VPA negotiation. VPA processes require negotiators to navigate complex legal landscapes. These processes

¹⁵ M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (1975) (Clarendon, Oxford 1975) at 1.

¹⁶T. Twining, *Globalisation and Legal Theory* (Cambridge University Press, Cambridge, 2000) at 17.

also provide opportunities to chart new paths within these landscapes in pursuit of not only an agreed and workable definition of legality, but also towards broader goals of sustainability and justice. We urge those engaged in VPA processes to keep these legal pluralist tools in mind as they work together to discover and define these paths.

Box 2: Legal Pluralist Navigational Tool Box for VPA Negotiators

- Ground the communication and understand diverse normative approaches.
- Develop a shared understanding of law and legality amongst all stakeholders.
- Draw on in-country/region experiences.
- Democratise legal reform: Create forums where legalities can communicate in a self-reflective and mutually critical manner. This needs to be done with the consent of all stakeholders. Respect existing hierarchy and cultural power structures where appropriate.
- Be open to shared normative experiences and how these are framed by conceptions of time and space. Be conscious of the close interplay of the experience of these dimensions and people's normative commitments.
- Recognise from the outset that law needs to be determined and developed against a shared background and commitment of a specific community.
- Move beyond the internalist/externalist and normative/social binaries in our understanding of law.
- Understand that legal perspectives must be sensitive to the social settings in which they exist.
- Reflect on your legal perspectives own conditions of existence in society.
- Enable self-determination of customary law communities, especially in terms of determining geographical dimensions for the applicability of their laws.
- Develop judicial skills: Learn and use in practice the languages used by customary law users. Provide training for judicial staff of customary legal practices where agreed with representatives of those legal systems.
- Design legal reforms so that they do not undermine opportunities for some groups. For example, consider the requirements and process for providing evidence and proof of land tenure.
- Ensure that procedural rights are in place and designed in a way that enables fair and equitable use and access by all groups.
- Embed transnational legal commitments (e.g. UNDRIP, CERD and other human rights laws) into procedural and substantive law which support minority and customary law as well as women's rights.
- Ensure that various dispute settlement approaches are available and recognise those of customary legal practitioners.

3. Customary Law and the State

There is no accepted definition of customary law. In its broadest sense, customary law would include all legal traditions and normative behaviour. The two predominant statutory legal systems, civil and common law, emerged out of custom within a particular place and time, and continue to this day to manifest according to changing circumstances. Arguably, statutory law is a custom in itself which embeds the norm of the Westphalian sovereign state legal order currently within the architecture of the UN legal system.

In contemporary legal scholarship, however, the term 'customary law' is a term used to refer to indigenous peoples law and to varying degrees that of other minorities. It is also applied in some cases to religious law. Often these different customary legal systems are overlapping and a source of multiple norms and guidelines for individuals and groups.

It is not the aim of this report to either romanticize customary law or to critique the merits of any particular customary law system. Rather, we seek to elucidate the relationship between customary and statutory law, and to consider how continuing legal uncertainties and tensions in VPA countries might be reconciled through a legal pluralist approach.

3.1 General Characteristics of Customary Law

It is difficult to state generalities about customary law because, by its nature, each customary law system will be particular to the community and context in which it has evolved, responsive to the circumstances it is designed to govern. One characteristic that is generally true of customary law systems, however, is that access to land and resources is embedded in social relationships, based upon factors of status (nobles/commoners/captives; founders/allies/outside), age, and gender.¹⁷ Within this construct of social relationships, one function of customary land management institutions is to regulate access to land and resources and thus manage the tension between land security as an individual good (that is, the ability to produce and ensure one's livelihood) and land security as a common good (that is, the social reproduction of the group and the capacity of future generations to ensure their livelihood). This allows flexible access to land.¹⁸

Accordingly, 'customary "rights" to be secured are often not clearly defined legalistic entitlements of the sort articulated in modern liberal legal systems.¹⁹ Instead, customary rights are better understood as 'claims that evolve and are continuously renegotiated following changes in social relations.²⁰ This relates back to the nature

¹⁷ Philippe Lavigne Delville, 'Changes in "Customary" Land Management Institutions: Evidence from West Africa,' in Lorenzo Cotula (ed), *Changes in 'Customary' Land Tenure Systems in Africa* (IIED, 2007) at 36, available <<http://pubs.iied.org/12537IIED.html>>

¹⁸ *Ibid.* at 37.

¹⁹ Lorenzo Cotula and Camilla Toulmin, 'Conclusion,' in Cotula (ed.), *supra*, note 17, at 110.

²⁰ *Ibid.*

of customary law as embedded in social relations. As elaborated below in section 3.4, government interventions aimed at ‘freezing’ the content of customary law are unlikely to work in contexts characterized by social change.²¹ Indeed, efforts to do so can hardly secure customary rights. Rather, such efforts lose the very essence of customary law—its flexibility to respond to changes in circumstances, governed not by claims to static legal rights but by the overriding concern of regulating individual rights to livelihood against land security as a common good.

3.2 The Challenge of Ascertaining Customary Rights

Tracing customary law can be extremely challenging. Sources of customary law may often be held orally. Various components may be traditional knowledge which will not be shared with nonmembers (or even some members) of the customary group. For statutory legal systems predicated upon written sources, such forms of customary law, especially when evidence is required to demonstrate ownership to support land tenure claims either for registration or in court, are usually unacceptable or inadmissible. This obviously places those living under customary legal systems at a great disadvantage when seeking legal redress for past injustices such as the expropriation of lands and natural resources.

Moreover, it is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life.²² Customary systems are continually reinterpreted and readapted to fit changed economic, social, political, cultural, and environmental contexts and challenges.²³

As elaborated below in section 3.3, of all influences impacting on customary laws, colonisation has brought about the largest changes because it undermined the very logic behind customary territorial control. And customary law systems continue to evolve. Key influences include state intervention, market development (including monetarisation of the local economy as well as integration into global markets), demographic changes (including population growth and fragmentation of the extended family following developments such as increased urbanisation).²⁴ Over the past century, these various influences have not led to the collapse of customary systems, but rather have contributed to their evolution.

Thus, it is not enough to seek a descriptive account of perceived customary legal systems. It is necessary, instead, to try to understand the dynamic relationship of customary law with other legal systems including statutory law as well as transnational influences such as human rights law. Like any other system of law, customary law can be subject to differing interpretations and, in a given situation, different actors will each interpret the law in the manner that suits their competing

²¹ *Ibid.*

²² *Alexor Ltd v. The Richtersveld Community*, 14 October 2003, CCT 19/03 (Constitutional Court of South Africa), *cited in* L. Cotula, *supra*, note 17.

²³ Deville, *supra* note 17, at 37-38.

²⁴ *See generally*, Cotula (ed.), *supra* note 17.

claims. Conflicts can occur between the state and customary law as well as between customary laws held by different indigenous and/or religious communities.

3.3 Colonization and its Legacy

Throughout the colonial period, when many areas of the world were for the first time experiencing new alien legal orders in the form of common and/or civil law, a calculated strategic approach ensured that customary law was permitted to continue, albeit under new terms and conditions imposed by colonisers. As Lauren Benton argues:

Colonialism shaped a framework for the politics of legal pluralism, though particular patterns and outcomes varied. Wherever a group imposed law on newly acquired territories and sub-ordinate peoples, strategic decisions were made about the extent and nature of legal control. The strategies of rule included aggressive attempts to impose legal systems intact. More common though were conscious efforts to retain elements of existing institutions and limit legal change as a way of sustaining social order.²⁵

The strategies adopted by colonial powers, including various versions of indirect rule, not only varied depending on a territory's context but also on which area of law was being considered (for example, religious law, family law, property law). One area in which customary laws were often accommodated to a much lesser degree was over the control of natural resources. Control over natural resources was the driving force for most colonisation. This is clearly reflected in the more aggressive approach to establishing legal rights for the colonising agents over natural resources.

It is well documented that laws for natural resource extraction also created the foundations for the post-colonial state-controlled models which followed the end of colonial rule. As newly formed states sought rapid industrial development, extending control over natural resources came at a cost to previous concessions given to customary laws, both religious and those of indigenous populations and communities. Legal tools which were transplanted into former colonial states were often taken up by the new elites who controlled the state and/or military to establish absolute legal control over the state's natural resources in the name of all peoples in the country. This centralisation over natural resources often resulted in reduced rights, including over access and harvesting, for indigenous peoples and local communities.

In the past two decades, many former colonial countries have undertaken degrees of decentralisation over the management of certain natural resources. The motivations for this change in administrative and governance structure has less to do with recognition of customary rights for indigenous and local peoples than with reducing the costs and responsibilities of the central government, but not at the loss of any revenue.

²⁵ Lauren Benton, *Law and Colonial Cultures: Legal Regimes and World History 1400-1900* (Cambridge University Press, Cambridge, 2002) at 11.

Critics of existing practices have increasingly highlighted the need for secure tenure rights to ensure the sustainable management of natural resources at the local level. Often tenure rights are articulated as an individual or household right to be met by statutory legal reform. But for customary law practitioners where land tenure is an issue, a collective right over the land is often sought. A collective right over a territory, including natural resources, can be a challenge to state legal systems. The perception of loss of control hovers large, and the ogre of a weakened sovereign state can be threatening where autonomy is asserted. The primary concern is nearly always loss of natural resource wealth, however.

3.4 Government Intervention in Customary Law Systems

Beginning with colonisation and continuing post-independence, customary law systems have been extensively manipulated by governments. Thus, state policy has been a major driver of change in customary institutions. This is true both where government has relied on customary institutions and thereby reinforced their power, and where government has frequently sought to undermine customary law. It is true where governments have aimed to abolish customary laws—either through registration programmes aimed at replacing customary law with private ownership, or through legislation vesting law ownership and management responsibility with government agencies. It is also true where legislators have sought to codify customary laws.²⁶

Customary tenure is one of the foundational elements of the law governing land in all states around the globe which have undergone a period of colonization by European powers. It is important that customary tenure no longer is considered an add-on to post-colonial countries' existing statutory legal systems. A more progressive approach would be for these statutory legal systems to work with customary legal systems to develop more effective approaches to resolving natural resource governance issues.²⁷

Customary law is particularly geared towards achieving a regulatory balance between securing individual livelihood rights and ensuring land security as a common good in the long term, readapting to fit changed economic, social, political, cultural, and environmental contexts and challenges. Government interventions such as those listed above rarely succeed in replacing customary law systems—either by incorporating the perceived operative norms of customary law systems or effectively abolishing them—but they do influence their functioning, sometimes profoundly. One way that such interventions affect the effectiveness and legitimacy of customary institutions is by setting up competing governmental institutions to perform functions similar to those traditionally performed by customary law institutions. This typically

²⁶ Lorenzo Cotula and Bernardete Neves, 'The Drivers of Change,' in Cotula (ed), *supra* note 17, at 31-33.

²⁷ P. McAuslan, 'Legal Pluralism as a Policy Option: Is it Desirable? Is it Doable?' (Unknown date), available at <http://www.capri.cgiar.org/wp/..%5Cpdf%5Cbrieff_land-04.pdf> accessed 30 November 2010).

gives rise to ‘forum shopping’²⁸ which can, in turn, weaken customary institutions.²⁹ Attempts to codify customary law as static rights often fall short because statutory systems are less able to embrace the complexity of overlapping rights. Consequently, attempts at codification can result in the erosion of ‘secondary’ land rights, such as those of pastoralists.³⁰ There are also examples where statutory law has privileged selected customary legal groups at the expense of others.³¹

Box 3: Land Registration and Women’s Customary Rights in Kenya³²

In Kenya, land tenure reform to register customary rights and convert them into freehold was adopted by the colonial authority and continued by the post-independence government.

Although all land rights, including under customary law, had to be recorded during adjudication, adjudication committees lacked skills and time to do so. Registration was usually made to male heads of household, thereby undermining women’s unregistered secondary rights. In Kanyamkago, for instance, only 7% of the plots were registered to women as joint or exclusive right-holders, and 4% to women as exclusive owners. Although some judgements protected nonregistered right-holders by giving effect to or creating trusts, the dominant judicial interpretation is that registration extinguishes all nonregistered rights. Furthermore, in some areas consolidation of fragmented landholdings under the land tenure reform curtailed the relatively independent managerial control that women exercised over the dispersed family plots they cultivated.

Attempts by statutory courts to apply customary laws can have similar effects to attempts at codification of customary law, in that they may unwittingly promote a simplified and standardized version of geographically diverse customary legal systems. Moreover, such interventions can create confusion due to gaps between the ‘juristic’ re-elaboration of customary law used by lawyers and courts and the customary rules followed by resource users on the ground.³³

²⁸ ‘Forum shopping’ is the informal term used to describe the practice adopted by some litigants who seek to have their legal case heard in the court thought most likely to provide a favourable judgement.

²⁹ *Ibid.* at 32-33.

³⁰ *Ibid.*

³¹ See Lydia Nyati-Ramahobo, ‘Minority Tribes in Botswana: The Politics of Recognition,’ (December 2008) *Minority Rights Group International* (December 2008) (highlighting the frustrations of the non-Tswana tribes (approximately 38 tribes) who are not recognised under Constitutional Law and therefore face discrimination and lack access to resources) available at <<http://www.minorityrights.org/742/briefing-papers/briefing-papers.html>> accessed 30 November 2010.

³² Case study adopted from Lorenzo Cotula and Bernardete Neves, ‘The Drivers of Change,’ in Cotula (ed.), *supra* note 17, at 33 (citing Lorenzo Cotula, *Gender and Law: Women’s Rights in Agriculture* (FAO Legislative Study 76, Rome, 2002)).

³³ Cotula and Neyes, *supra* note 32, at 32. See also Lorenzo Cotula and Salmana Cissé, ‘A Case Study: Changes in “Customary” Resource Tenure Systems in the Inner Niger Delta, Mali,’ in Colula (ed.), *supra* note 17, at 97-98.

Box 4: The Role of Courts in Changing Customary Systems in Ghana³⁴

In Ghana, customary tenure systems have been much changed by decades of colonial and post-independence legislation. On the one hand, such legislation has restricted the land and natural resources management responsibilities of customary authorities, and regulated their internal functioning. On the other hand, it has entrenched customary powers. The Administration of the Stool Lands Act created a government agency responsible for collecting resource fees on behalf of the chiefs. This law also regulates the way those fees are then redistributed between different chiefs and local government bodies.

Parallel to these legislative developments, customary law has been reinterpreted and changed as a result of its application by statutory courts. Ordinance 1876 establishing a Supreme Court for the Gold Coast (as Ghana was then known) enabled the Court to apply customary law. As a result, formally trained lawyers have long handled customary law issues. Differences emerged between the customary law followed on the ground and that applied by courts, resulting in two tracks of so-called customary law.

In several occasions, court decisions “accompanied” a process of change that was taking place under customary law—on the one hand, taking note of ongoing changes as documented for specific sites, on the other promoting change by generalising site-specific evolutions to other parts of the country. In *Kotei v Asere Stool*, the Privy Council stated that “native law and custom in Ghana has progressed so far as to transform the usufructuary rights [...] into an estate or interest in the land” which an individual could sell “so long as he does not prejudice the right of the paramount Stool to its customary services.” In deciding this case, the Privy Council seconded a process of land tenure individualisation going on in parts of Ghana, with community members gaining more individualised rights over stool/skin lands.

3.5 Public Regulation of Private Rights

In many countries, the extent to which customary laws are recognized and upheld mirrors the demarcation between private and public law in the area of property law.

- ‘Private law’ is that realm in which the sole function of the law is the recognition and enforcement of property rights between competing private claimants to the property. The law governing private property rights is generally developed through case law in common law systems and as part of the comprehensive civil code in civil law systems. Alternatively, where there is deference to customary land tenure, either officially or unofficially, allocation of tenure and use rights within the local community will be determined in accordance with customary law and in deference to customary law authorities. This is consistent with the deference often shown to customary law in other ‘private’ realms such as marriage.³⁵

³⁴ Case study adopted from Lorenzo Cotula and Bernardete Neves, ‘The Drivers of Change,’ in Cotula (ed), *supra* note 17, at 32 (quoting Date-Bah, 1998:401).

³⁵ Deference is understood to be the act of yielding or submitting to the judgment or practice of customary law. The motivations behind acts of deference by the State vary from political,

- 'Public law' involves the effectuation of the public interest by state action and includes review of the legality of state administrative action as it affects private property rights. In statutory law systems, public law relating to property (including, for example, land-use regulation) will typically be comprised of legislation supplemented by constitutional and administrative law as well as judge-made norms that regulate the organization, powers, and function of public authorities and the relationship between public agencies and individual citizens.

VPA processes focus attention on the tension between the private law and public law treatment of property in many post-colonial countries because, for wood to receive a VPA license, it must first be recognized as legal by the state.

4. Statutory Law: Two Traditions Becoming One

Before proceeding to examine how the reconciliation of statutory and customary legal systems might be approached, a brief outline of the two legal traditions which form the foundations of most statutory legal systems—civil law and common law—will be provided. It is useful to have an understanding of these two legal systems as they often are the filters through which customary laws, as well as other legal systems (for example, religious law and international laws including environmental and human rights), are recognised and systematised into formal state legal documents. Both legal traditions have a significant legacy in the formation of legal systems within all countries where VPAs may be agreed. Increasingly, however, the differences between these legal systems in practice are reducing with the influence of international and transnational law, both public and private.

It is helpful to bear in mind when thinking about legal systems that the practitioners (i.e., lawyers and legal professionals) are trained in either of the two statutory legal traditions. At law colleges, trainee lawyers are educated regarding the various merits of the legal tradition in which they will be eventually acting as a practitioner. Very few lawyers currently have an appreciation for, or understanding of, legal pluralism and its role in the day-to-day functioning of law. This is deeply concerning as the complexity of law in reality for local, national, and international law and policy professionals is increasing with globalisation. As the importance of legal pluralism is increasingly acknowledged, the limitations of current legal education and training must also be recognised. Efforts must be made to provide the professional capacity for lawyers (and others) to navigate across the numerous normative legal boundaries which exist within the landscape where they may have to practice.

economic and/or social. Determining when and how deference occurs can only be surmised by in-situ socio-legal research.

Table 1: Key Features of Common and Civil Law Model Legal Systems

Features	Civil Law	Common Law
Sources of Law	Constitution and Codes	Legislature passes new laws and statutes
Evidence	Substantive rules	Procedure, evidence and execution superior to substantive rules
Interpretation of the Law	Scholars elaborate law not judges	Judges develop legal principles and interpretation through stare decisis/ precedent
Court System and Process	Judge-based court system	Jury-based court system
	Abstract legal rules dominate	Jurisprudence and case law dominate
	Inquisitorial	Accusatory
	Written	Oral

4.1 Civil Law

Civil Law is one of the oldest and most prevalent surviving legal systems in the world in which law-making is the exclusive task of legislative bodies. It exists in a number of forms in countries throughout Europe, Latin America, Asia, and Africa. Although civil law is ultimately traced back to the Roman Code of Justinian, comparative legal scholars have identified a number of subcategories of civil law which form four distinct groups:

- *Romanistic*: France, Belgium, Quebec (Canada), Italy, Spain, and their former colonies;
- *Germanic*: Germany, Austria, Switzerland, Greece, Brazil, Portugal, Turkey, Japan, South Korea, and Taiwan (Republic of China);
- *Scandinavian*: Denmark, Finland, Iceland, Norway, and Sweden; and
- *Chinese* (except Hong Kong).³⁶

The legacy of civil law in many countries is the result of colonialism across the world from the sixteenth century until the mid twentieth century.

³⁶ Chinese law is a mixture of civil law and socialist law. Hong Kong, although is a part of China, uses common law. The Basic Law of Hong Kong ensures the use and status of common law in Hong Kong.

The key feature of a classic civil law system is that laws are written into a collection, codified, and not determined by rulings of precedent. The primary source of law is the legal code, which is a compendium of statutes, arranged by subject matter in a specified order. Law codes are usually created by a legislature's enactment of a new statute that embodies all the old statutes relating to the subject and includes changes necessitated by court decisions. In some cases, the change results in a new statutory concept.

The principle of civil law is to provide all citizens with an accessible and written collection of the laws which apply to them and which judges must follow. The primary source of laws in every civil law country is a civil code. All countries' civil codes are founded on one of two foundation civil codes from the nineteenth century: either the German Code or the French Civil Code. The codes represent the rules relating to different departments of law in a systemic and comprehensive form including: civil code on private law issues (including law over property); penal code on criminal law; commercial code on business and contractual arrangements.³⁷ Procedural codes will clarify such issues as who deals with how rights and duties are enforced. So there will be, for example, a separate civil procedure code and a criminal procedure code to accompany their respective codes. The arguable value of codification is that it provides citizens with clear rules. Numerous conflicts exist between different codes and procedural codes, however, and numerous amendments over the years have led to a far from clear and comprehensive system of law in most civil law jurisdictions. In former colonial countries where legal pluralism is evident, this confusion is compounded by the continuation of customary laws, of which the people governed tend to have a better understanding and to which they have greater attachment, amidst the overlay of different civil codes.

Civil lawyers place a high value on ensuring that each rule is interpreted and applied so as to conform to the other provisions of the legal system. In civil law systems, the writings of legal scholars are regarded as being of considerable persuasive force in indicating how the laws comprising a system are best interpreted so as to further cohesion and unity in the system as a whole. Given the complexity of interpreting statutory law today within transnational and domestic plural legal environments, such scholarship is urgently needed. Scholarship on legal pluralism can help civil law countries cope with their legal pluralist reality by finding ways to ensure cohesion within a legal pluralist reality.

Civil law systems also have a written constitution. A constitution is a statement of rights and duties which belong to legal subjects as citizens and which the law is mandated to uphold, protect, and advance. All other laws are subordinate to the constitution and are required to conform to this basic law and derive their validity and their legitimacy from it. This means that their purpose is to carry the principles and policies of the constitution to effect. For example, if the constitution recognises the right of a person to own property, then the state must promote that right by

³⁷Thomas Glyn Watkin, *An Historical Introduction to Modern Civil Law*, (Dartmouth Pub, 1999) at 4.

supplying legal rules which allow its subjects to acquire property. These rules will be part of the civil code and will set out what ownership means, how it is acquired, how it is transferred from one person to another, and how it terminates. Therefore, the rules will provide the subject with a legal framework within which he or she may enjoy the fundamental right to property enshrined in the basic law—the constitution.

One of the key judicial bodies in civil law is the constitutional court. It is an expression of a principle set out in many civil law countries that the ultimate power within the state resides in the people, not in the government or in the legislature. The state has the function of protecting the interests of its subjects and cannot be allowed to offend against those interests. The constitutional court polices the work of the legislature to ensure that the people's interests are served.

It is important that, when a right is granted, there must also be a remedy available when the right is violated. This means that the rules must provide a mechanism to resolve disputes. In relation to property, for instance, these rules will often be found in the provisions of the civil procedure code, and the state will set out tribunals to hear and determine such disputes.³⁸ Other civil code procedures for natural resources may have to be consulted when considering property rights such as forest code procedures and water code procedures.

The civil code courts exist to enable all citizens to protect and enforce their rights. Therefore, the state should ideally provide courts and tribunals to its citizens and these must be convenient in terms of accessibility and location. The administration of justice is therefore decentralised in civil law countries, with courts available in every city and nearly every major town.

So, in considering the ability of courts in civil law countries to recognize, secure, and protect customary rights, it is important to distinguish the respective roles of constitutional and ordinary civil law courts. The civil code courts will apply the law as written and understood in the civil codes. If these codes do not incorporate customary rights, then such rights are unlikely to be recognized or protected by civil law courts. In those countries where the constitution provides recognition of customary laws and rights, however, the constitutional court may have a role in determining whether and how the legal system adequately secures these rights, and to ensure that the code is not interpreted in a manner that violates rights protected by the constitution.

While civil courts have the function of interpreting and applying the law, it is not part of their function to make any law. Law-making is a preserve of the legislature. In theory the civil court system is usually inquisitorial, unbound by precedent, and composed of specially trained judicial officers with a limited ability to interpret law. Civil law in practice proceeds from abstractions, formulated general principles, and distinguishes substantive rules from procedural rules. This is a principle that has been jealously guarded by the civil law system. Though in reality it is inevitable that,

³⁸ *Ibid.* at 7.

when courts interpret the law, they are bound to supply detail in legislative enactments that had not been foreseen by the legislature, the decisions of the court do not constitute a binding precedent as the decision of the courts in common law jurisdictions can. Rather, court decisions are understood as a secondary source of law bearing only persuasive force. They only illustrate how a legal rule is being applied and interpreted and show how consistency may be achieved, rather than justify why it should be applied or interpreted in a particular way. This is a doctrine of separation of powers and, when carried to an extreme, led to the conclusion that the courts should be denied any interpretive function and should be required to refer problems of statutory interpretation to the legislature for solution. The legislature would then provide an authoritative interpretation to guide the judge. In this way defects would be cured, courts would be prevented from interpreting the law, and the state would be protected from judicial tyranny.³⁹

In France, the legislature often found itself flooded with requests for interpretation and the work of responding to such requests became overwhelming. As a solution, a new governmental organ was created by the legislature and given power to quash incorrect interpretations by the court. Though it looked and acted like a court, the legislature preserved its appearance by calling it the Tribunal of Cessation.⁴⁰ In Germany, a Supreme Court was created with powers to review the decisions of the lower courts for legal correctness, quash incorrect decisions, indicate the correct answer, and 'revise' incorrect decisions accordingly.⁴¹

The evolution from compulsory referral to the legislature for interpretation, to referral to the legislative tribunal, to the emergence of a court, resulted in a gradual acceptance of the power of interpretation by the ordinary judiciary. This evolution has been accompanied by much discussion and writing, some to justify interpretation of statutes by courts, some to define the limits of courts' interpretive power, and some to specify how that power should be exercised. In effect, the mass of literature on interpretation of statutes reflects uneasiness that courts are interpreting statutes and anxiety that they will abuse the power of interpretation. Only a small amount of literature focuses on the actual process of interpretation by providing help to judges facing a particular problem of interpretation.

It is only in theory that the role of civil code courts is so very different from that of common law courts. Though civil code courts have no formal rule of the binding force of precedent, the practice of judges indicates that they are influenced by prior decisions. Judicial decisions are published in most civil law jurisdictions and lawyers, while preparing for their cases, search previous cases for relevant points and use them in their arguments. Likewise, civil law judges deciding cases often refer to

³⁹ John Henry Merryman, *The Civil Law Tradition: An introduction to the Legal System of Western Europe and Latin America* 40 (Stanford University Press, Stanford, California, 1969) at 41.

⁴⁰ It later came to be called the Court of Cessation.

⁴¹ John Henry Merryman, *supra* note 39, at 42.

previous judgements. Nevertheless, the folklore that judges only interpret the law is a characteristic of the civil law tradition.⁴²

4.2 Common Law

Common law is the alternative to civil law in the statutory law tradition. It is a legal system that developed in England after the conquest of 1066 and subsequently, due to colonialist expansion, it became the dominant legal system throughout the Commonwealth Empire. Today, common law is the statutory legal system in numerous former colonies in Asia and Africa, along with Canada, the United States, Australia and New Zealand. As such, common law is a significant institutional legal driver of normative change throughout the world.⁴³

Common law is theoretically derived from two sources only—precedents and statutes. In contrast to civil law, common law is a legal system which draws on judicial decisions (*stare decisis*) to develop legal principles and interpretations of statutes legislated by a government. The development of the law through judicial decisions is called 'jurisprudence.' Within common law systems, it is also referred to as 'case law,' a term that underscores the status of judicial precedents as part of the body of authoritative law. It is the duty of common law judges to interpret the written law and to declare the unwritten law, but not to make new law. In many instances, the law expressly gives judges discretion to deal with particular cases. But such discretion must be exercised judicially, and must be regulated by legal principles. Discretion, when applied in a court of justice, means sound discretion guided by law, it must be governed by rules and it must be legal and consistent, not arbitrary or vague.

The remit of common law judges to declare the unwritten law provides greater scope for common law courts to recognize customary law and take it into consideration when deciding cases, as compared to civil law courts who are limited to interpreting the compiled, written civil code.

A number of rules of interpretation help to ensure consistency in common law, including:

- *the literal rule*: adherence to the literal meaning of statutes as indicated by the judge's own statements in the decision
- *the golden rule* : departure from a word's normal meaning in order to avoid an absurd result
- *the purposive method*: recognition that interpretation is concerned with the meaning of publicly promulgated texts

⁴² *Ibid.* at 48.

⁴³ See J. Gilbert, 'Historical Indigenous Peoples Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title,' *International and Comparative Law Quarterly*, Vol.56 (July 2007) at 583-612.

- *interpretation acts*: statutory regulation of the mode of statutory interpretation in their respective jurisdictions

It is through these rules of interpretation that common law seeks to find a balance between restrictive and progressive justice. Arguably common law is a more open legal system than civil law because it is receptive to cultural changes. Common law is much easier to change through the courts, subject to certain considerations. Common law adjusts to shifts in the social realities through the emergence of new case facts requiring new rules.⁴⁴ Some argue that common law is by its very nature a more 'efficient' and 'economical' legal system than civil law.⁴⁵ However, the courts also consider the stability of the common law system in not changing the rules when the consequence to the common law is yet to be ascertained fully.⁴⁶

It is argued that the case-by-case development of the common law is the source of common law's enduring strength. Judges resolve cases at hand, anchoring their decisions in custom and tradition while exposing their reasoning processes in detail through written decisions, thereby facilitating the development of the law.

Common law prioritises jurisprudence over doctrine because its intention is to provide specific guidance in the resolution of particular sets of facts of situations. This finds explanation through the role of legislation in the two legal traditions, with civil law adhering to the principle of the separation of powers. This means that the function of the legislator is to draft statutes and that of the judge to apply these laws, giving rise to the importance of legislation to create general principles to guide court processes. Common law involves a different principle since judicial precedents constitute the core of laws. For common law, the priority is the determination of sound judicial precedents for the development of laws.⁴⁷

The traditional common law system adopts an adversarial model towards trials in contrast to the inquisitorial system found in civil law legal systems. An adversarial model places more responsibility on the litigants. This shapes many aspects of trial procedure. The court is passive and solves only those issues that are put before it. The lawyers identify and frame the issues for their respective sides. 'Truth' is ultimately found by the court, with help from the jury (unlike civil courts), through the passive decision-making that separates persuasive arguments and evidence from the unpersuasive one.

There is also a difference in the functions of the doctrines of civil and common law. Civil law doctrines function by drawing principles and rules from the mass of cases and legal sources in order to clarify meaning and application. By doing so, civil law is able to provide sufficient guidelines to the courts in resolving specific cases. Common law doctrines work by considering precedent cases or case development to draw

⁴⁴ E. Orucu & D. Nelken, *Comparative law: A handbook*, (Hart Publishing, Oxford, 2007)

⁴⁵ R. Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication, Law and Economics,' *Hofstra Law Review*, Vol. 8 (1998) at 531-540.

⁴⁶ M.M. Shapiro, *Courts: A comparative and political analysis* (Chicago University Press, Chicago, 1981).

⁴⁷ A.J. Harding & E. Orucu (eds), *Comparative law in the 21st century*, (Kluwer Law International, The Hague, 2002).

principles and rules. As such, the function of doctrines in common law is simpler when compared to civil law, but the function of doctrines in common law could involve greater criticism of court decisions.⁴⁸

Another area of difference between common law and civil law is in their doctrinal style. Civil law works on legal principles so that legal development in civil law usually involves the tracing of the history of legal principles, changes in functionality, shifts in the domain or scope of application, and changes in impact on obligations and rights. As such, civil law processes involve legal analysis together with the drawing of practical prescriptions from cases. In contrast, common law targets fact patterns. Accordingly, the focus for common law is the analysis of cases, looking into similar case fact patterns to extract legal principles. In addition, common law judges will also determine the scope of application of existing legal rules or develop new rules to cover variances in factual circumstances distinguishable from the facts of the case at issue.⁴⁹ As such, the use of judicial precedents as binding emerged in common law to emphasize the weight of legal principles coming from the higher courts, while in civil law decisions depend on the authority of reason.⁵⁰

4.3 The Convergence of Statutory Legal Traditions

Law has always and will always change. The two legal traditions which have for a short while appeared to be dominant within the international nation-state based world are changing too. Certain legal scholars claim that European legal colonialism, and its post-war modern law movement, was but a moment in history.⁵¹ This is contrary to the Modernist perception of law as a system working gradually towards a unified homogenous order.⁵² However, within the transformations one phenomenon which is occurring is an increasing trend towards convergence between the two statutory legal traditions under which most countries in the world operate. The porous nature of sovereign legal systems to international trends in public and private law, the effects of emerging principles, customary international law, and precedents established within regional and international courts such as the African Court on Human Rights and the International Court of Justice, as well as 'informal' judicial dispute settlement bodies such as the WTO Dispute Settlement Panel, all contribute to a narrowing of the differences between the two most common statutory legal systems.

⁴⁸ L.M. Friedman, 'On the emerging sociology of transnational Law', *Stanford Journal of International Law*, vol. 32 (1996) and P.H. Glenn, *Legal traditions of the world: Sustainable diversity in law*, (3rd edn), (Oxford University Press, Oxford, 1997).

⁴⁹ L.M. Friedman, *ibid.*, and P.H. Glenn, *ibid.*

⁵⁰ D. McCormick & R. Summers (eds), *Interpreting statutes: A comparative study*, (Aldershot, Dartmouth, 1993)

⁵¹ See M. Van Hoecke, 'Legal Orders between Autonomy and Entwinement' in K. Ladeur (ed), *Public Governance in the Age of Globalisation* (Ashgate Pub., 2004), Chapter 8.

⁵² J. Habermas, 'Equal Treatment of Cultures and the Limits of Postmodern Liberalism,' *The Journal of Political Philosophy*, vol.13 [1] (2005) at 1-28.

Table 2: VPA Countries Statutory Legal Systems and Colonial Influences

VPA country	VPA Status in April 2011	Legal System	Colonial and other Political Influences
Cambodia	Pre-negotiation phase	Civil law	French and Socialist/Communist
Cameroon	System development phase	Bi-jural: civil and common law	French and English
Central African Republic	System development phase	Civil Law	French
Congo Brazzaville	System development phase	Civil Law	French, Belgian and Socialist/Communist
Democratic Republic of Congo	Negotiation phase	Civil Law	Belgian
Gabon	Negotiation phase	Civil Law	French
Ghana	System development phase	Common law	English
Indonesia	Negotiation phase	Civil Law	Dutch
Laos	Pre-negotiation phase	Civil Law	French and Socialist/Communist
Liberia	Negotiation phase	Common Law	United States
Malaysia	Negotiation phase	Common law	English
Thailand	Pre-negotiation phase	Common law	English

Since the advantages of civil and common law constitute the disadvantages of common and civil law respectively, this means the improvement in these legal systems lies in the adoption of applicable principles from each other. The possibility

of doing so is exemplified in the number of jurisdictions employing mixed legal traditions. This enables primarily civil law countries to achieve adaptability to changes in social conditions and allows primarily common law countries to also establish rules offering general guidance to achieve legal stability. For example, common law jurisdictions have widely enacted new statutes and moved towards a higher degree of codification. Civil law jurisdictions, on the other hand, make use of precedents which, though not formally binding, are understood as practically binding.

Perhaps most significantly, most countries, even those with common-law origins, have adopted a written constitution. Factors that govern law reform processes, such as who has the right to introduce new legislation, as well as the respective roles and relationships between the legislature, executive, and judiciary will be defined by constitutional law more than by common law or civil law norms. As noted above, a constitution also sets out rights and duties which belong to legal subjects as citizens and which the law is mandated to uphold, protect, and advance. Where a constitution recognizes customary law rights, this can compel recognition of these rights by constitutional courts and the further elaboration of how these rights are to be secured through subsidiary laws.

The trend towards a mixed system, albeit still one legal system, indicates a willingness to accommodate changes in the legal system to address conflicts of laws in various areas. The key is for state jurisdictions to determine the balance that fits their internal and external legal environment.

The convergence of common and civil law can be understood through three central themes: decline of parliamentary supremacy, acceptance of judicial review, and harmonization of commercial practice.

Constitutional supremacy based on fundamental rights ipso facto decreases the power of the legislature and executive and bolsters the judiciary. With post-WWII acceptance of fundamental international human rights, legal systems have been forced to provide remedies that are typically expressed via judicial organs. In many cases, civil law countries will still maintain that these organs are not 'judicial' per se because they do not have the subordinate, civil servant character of proper judges, but as the Constitutional Courts of Austria and Germany aptly demonstrate, it is now difficult to wholly separate these institutions from the judiciary.

Commercial law includes a broad spectrum of both public and private law including carriage by land and sea, merchant shipping, life and accident insurance. It can also be understood to regulate corporate contracts, hiring practices, and the manufacture and sales of consumer goods. Commercial law in both civil and common law countries is converging in form and practice under pressure from transnational legal systems including the World Trade Organisation, bilateral and regional economic trading agreements, standard setting agencies such as the ISO, bank lending operational policies such as those of the World Bank, environmental regulation, and health and safety standards. Civil law countries will adopt Commercial Codes, while common law countries will adopt legislation and regulation accordingly. In all jurisdictions statutory legislation is required to align itself with requirements outlined in international and regional agreements to ensure compliance. Convergence in

commercial law within statutory legal systems reflects the influence of transnational and international legal systems on states in a globalised world. This convergence may occur to the detriment of customary law as the boundaries of access to resources are redrawn in favour of large-scale commercial actors.

VPA processes actively contribute to a more comprehensive understanding of the conflicts which relate to land use and forestry, including how the legality of harvested forest resources is variously understood and enforced in different civil, common, and customary law systems. This is a positive outcome to which the VPA processes actively contribute.

Both common and civil law legal systems have evolved, and continue to do so, in relation to other legal systems. A specific country's statutory legal system, although theoretically either civil or common law, will differentiate from another which is of the same tradition. Historical and cultural contexts have shaped the adaption of imported legal systems in former colonial countries to the point where no one country is identical to another despite convergences in some areas of law. Transnational legal pluralism is yet another wave which is impacting countries and regions legal systems; this topic is taken up in section 7. First, however, consideration is given to statutory law within a legal pluralist framework.

5. The State and Legal Pluralism

Statutory law emerged with the formation of sovereign states. The movement towards such a legal architecture occurred over generations across Europe after the end of the Roman Empire. It is interesting to bear in mind that one legal system, common law, is itself the result of monarchs through judges rationalising customary laws within their kingdoms into a single legal system. Most countries now recognised by the United Nations as sovereign states only adopted an independent statutory-based legal system after the 1950s, when European colonialism ended. At this time, a nascent Law and Development movement emerged in the United States which set about providing the perceived necessary legal tools for these former colonial countries to create 'modern' legal systems to realise the liberal governance ideals of freedom, democracy, and development. Sweeping aside 'primitive' legal orders⁵³ was the name of the game, with the European legal transplants imposed during colonial days providing the foundations for the legal architecture for the 'modern' statutory system. The legal positivist ideology behind this was the belief that 'law is and should be of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions.'⁵⁴

The dominant legal positivist approach to law privileges the state and its laws.⁵⁵ The common belief is that ongoing movement towards a uniform centralised 'modern' legal system is the only way to ensure predictable and morally neutral law in

⁵³ See Box 1 for a discussion of the connotations ascribed to 'primitive' legal orders.

⁵⁴ J. Griffiths, *supra*, note 10 at 1.

⁵⁵ W. Menski, *supra*, note 12 at 82.

practice.⁵⁶ Unification is seen to be inevitable, necessary, normal, modern, and good. This perspective deems legal pluralism as a weakness which ultimately needs to be ended, rather than a strength for law and governance. Any recognition of customary law is based on the notion of the power of the state to do so. This ideological approach was adopted across the board to varying degrees by most former colonial countries, much to the anger of many indigenous peoples and communities within those countries who had fought for an end to colonial rule. As it became increasingly clear that not providing legitimate space for nonstatutory law was undermining governance, states began to make numerous formal acquiescences. These added further legal complexity to what in reality was an inherited complex legal system from the colonial period.

Acknowledgement of legal pluralism by states is not in itself problematic, despite the embedded normative construct of legal monism. The key issue is who has the power and authority to recognise other legal orders and consequently decide upon their place within the legal governance structures of a territory. Also at issue are the implicit effects that recognising other legal normative orders within a state will have on the power of the legal hierarchy of the state. Within what is termed 'weak legal pluralism' this authority will always remain with the state.

For many countries, especially colonised countries, weak legal pluralism was and continues to be the norm. With these countries, the boundaries between the state and other legal normative systems have fluctuated over time depending on geopolitical and economic, as well as regional, national and local situations. With globalisation, the boundaries of weak legal pluralism are under pressure to shift, possibly quite radically. Some claim we are on the precipice of a changing legal order which will move towards a more cosmopolitan order which embraces the autonomy and self-determination of numerous legal orders within the frame of collective cooperation for global governance.⁵⁷ The present situation is far from such a radical transformation. Although there are murmurings of changes and possible mechanisms to leverage change such as the UN Declaration on Rights of Indigenous Peoples, the dominance of the statutory legal system remains intact. But the state legal system is under pressures which are growing, especially from transnational legal influences, and can be seen to be metamorphosing to ensure its continued survival even if its power is ultimately weakened. In practice the state legal system is, like all other legal systems, something that adapts and changes to ensure that it survives. Such adaptation could—if undertaken well—make legal systems more effective at ensuring good governance in a global legal cosmopolitan environment.

⁵⁶ 'Legal positivism' refers more to a conceptual approach to law rather than a single theory. Legal positivism emerged in late eighteenth century Europe as a counter to Natural Law which was dominant at the time. It denied any inherent or necessary connection between law and morality within rules developed by human beings. For legal positivists laws are social norms which we obey because there are consequences to non-compliance. Any penalties from non-compliance should be predictable and apply equally to all. This has led to a 'scientific approach' to law which can fail to take account of the socio-legal nature of law in practice. Legal positivism continues, however, to be an important concept for the development of international and statutory laws.

⁵⁷ B. De Sousa Santos, *Toward a New Legal Common Sense* (Butterworths, 2002) at 5.

A statutory-centrist approach to law tends to hinder the development of dialogues between observers of various legal traditions. In reality, individuals and groups are operating within complex legal landscapes where they are influenced by various normative framings including human rights law, indigenous peoples law, local customary law, state law, and religious law amongst others. With regard to the issues posed by VPA processes, a legitimate and workable definition of 'legal wood' cannot be achieved by denying this reality. Rather, a more realistic and constructive approach will not shy away from analyzing the complexity of the legal landscape, its history as well as modern influences that continue to shape it. As we shall see in the next section, the key issue is how to manage relations between these different legal bodies for the development and governance of laws.

6. Dispute Settlement

Dispute resolution is a crucial aspect of any legal system or legal order, including customary legal systems. There are numerous different means and methods for resolving disputes, including a growing number of judicial mechanisms (courts, tribunals, arbitral panels) and, increasingly, what can be labelled other quasi-judicial, legal, and extra-legal means (such as committees, inspection panels, and ombudsmen).⁵⁸ These changes are occurring nationally, regionally, and internationally. The growth and complexity of judicial and other legal methods of dispute settlement reflect the evolution of various legal orders, yet it is necessary to consider their effectiveness in resolving conflicts between different legal systems, especially customary laws practised by indigenous peoples and minorities. This brief section will examine how disputes between different legal systems and customary law are resolved under statutory settlement mechanisms; this will be followed by a consideration of the place of customary dispute settlement approaches within a plural legal system.

***Alexor Ltd v. The Richtersveld Community*, 14 October 2003, CCT 19/03**

In 2003 the case of *Richtersveld v Alexkor* was brought before the constitutional court of South Africa. Alexkor was appealing a judgement of the Supreme Court (SCA) which had found in favour of Richtersveld. The Richtersveld Community claimed that it was dispossessed of ownership (under common law or indigenous law) or the right to exclusive beneficial occupation and use of the subject land including the exploitation of its natural resources. The Richtersveld is a large area of land situated in the north-western corner of the Northern Cape Province. For centuries it has been inhabited by what is now known as the Richtersveld Community.

The SCA found that the Richtersveld Community had been in exclusive possession of the whole of the Richtersveld, including the subject land, prior to and after its annexation by the British Crown in 1847. It held that those rights to the land (including minerals and precious stones) were akin to those held under common law ownership and that they constituted a "customary law interest" as defined in the Restitution of Land Rights Act 22 of 1994 [Act]. It further found that in the 1920s, when diamonds were discovered on the

⁵⁸ D. French, M. Saul, and N. White, *International Law and Dispute Settlement: New Problems and Techniques* (Hart Pub., 2010).

subject land, the rights of the Richtersveld Community were ignored by the state which dispossessed them and eventually made a grant of those rights in full ownership to Alexkor. Finally, the SCA held that the manner in which the Richtersveld Community was dispossessed of the subject land amounted to racially discriminatory practices as defined in the Act.

The Alexkor contended that the SCA erred in holding that the Richtersveld Community held “a customary law interest” in the subject land which was akin to ownership under common law and that this right included the ownership of minerals and precious stones. The court had to determine (1) the nature and the content of the land rights that the Richtersveld Community held in the subject land prior to annexation and (2) whether such rights survived annexation.

The Richtersveld Community contended that, as of 19 June 1913, it possessed (a) a right of ownership; (b) the right to exclusive beneficial occupation and use; or (c) the right to use the subject land for certain specified purposes, including exploitation of natural resources.

In the main, the Richtersveld Community contended that it possessed these rights under indigenous law and, after annexation, under the common law of the Cape Colony or international law which protected the rights acquired under indigenous law. In the alternative, it was contended that the rights which the Community held in the subject land under its own indigenous law constituted a “customary law interest,” a right in land within the meaning of the Act, even if these rights were not recognised or protected. These rights were also asserted in relation to the right of beneficial occupation for a continuous period of not less than 10 years that had been found by the LCC. The SCA found that the Richtersveld Community

. . . had a ‘customary law interest’ in the subject land within the definition of ‘right in land’ in the Act. The substantive content of the interest was a right to exclusive beneficial occupation and use, akin to that held under common-law ownership

The Richtersveld Community persisted in the claims that it had asserted in the SCA—that its indigenous law ownership constituted a real right in land in indigenous law or at the very least “a customary law interest” within the definition of a right in land. The court held that the nature and the content of the rights that the Richtersveld Community held in the subject land prior to annexation must be determined by reference to indigenous law. That is the law which governed its land rights. Those rights cannot be determined by reference to common law. The court observed that Privy Council had reached the same holding, and they agreed that a dispute between indigenous people as to the right to occupy a piece of land has to be determined according to indigenous law “without importing English conceptions of property law.”

Further, in 1988, the Law of Evidence Amendment Act provided for the first time that all the courts of the land were authorised to take judicial notice of indigenous law. Such law may be established by adducing evidence. It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life.

In a previous ruling, the *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* (1996,) the SCA held:

The [Constitutional Assembly] cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how . . . customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation.

The court stated that in applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.

The court went on to say that the dangers of looking at indigenous law through a common law prism are obvious. The two systems of law developed in different situations, under different cultures and in response to different conditions. It referred to observations of the Privy Council in *Amodu Tijani v The Secretary, Southern Nigeria (1921)*:

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. . . The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. . . The determination of the real character of indigenous title to land therefore “involves the study of the history of a particular community and its usages.

In the end, the appeal in the Richtersveld case was dismissed. This had the effect of amending the order of the supreme court. The court held that the Richtersveld Community was entitled in terms of section 2(1) of the Restitution of Land Rights Act 22 of 1994 to restitution of the right to ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation.

In many countries, a monist conception of national law prevents the adequate recognition of plural legal traditions and leads to the subordination of customary legal systems to one official legal norm. The nonrecognition of indigenous law is part of a pattern of denial of indigenous cultures, societies, and identities in colonial and post-colonial states. It also illustrates the difficulty that modern states have had in recognizing their own multicultural make-up. In these circumstances, nonofficial legal traditions have hardly survived at all, or have become clandestine.⁵⁹ Even in countries where forms of ‘weak legal pluralism’ exist, it is clear that discrimination is

⁵⁹ Commission on Human Rights (Rodolfo Stavenhagen), *INDIGENOUS ISSUES Human rights and indigenous issues Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* (26 January 2004) at para 68, available at <<http://www.galdu.org/govat/doc/g0410528.pdf>> accessed 30 November 2010.

inherent in the day-to-day administration and practice of law.⁶⁰ In the words of UN Special Rapporteur Rodolfo Stavenhagen:

The justice system does no more than express the dominant values of a society, and when these are biased against indigenous peoples (as is so often the case), the courts tend to reflect them. Even when protective legislation is available, their rights are frequently denied in practice, a pattern that is of particular concern in the administration of justice.⁶¹

The justice system—including courts (local, national and supreme), tribunals, official registries and land title offices, legal aid clinics, and state-formed alternative dispute settlement bodies—frequently reflect biases, consciously or unconsciously, which diminish the opportunity for indigenous peoples and minorities to access and realise fair settlements. Access to justice is inhibited by several factors including nonacceptance of indigenous law and customs by the official statutory legal institutions as well as discrimination and lack of impartiality towards indigenous peoples and minorities by the dispute bodies.⁶² Judicial proceedings themselves can be an obstacle. Often indigenous peoples and minority languages are not officially recognised or used in judicial proceedings.⁶³ Language is one of the main barriers to access for the indigenous to statutory forms of justice, including procedures such as completing national registries and any other legal proceeding. The situation of indigenous women is even more serious because of their high rates of monolingualism and illiteracy. Other practical obstacles for indigenous peoples to engage in judicial systems include time, money, and geography. The cost of undertaking judicial proceedings can be prohibitive to indigenous peoples, who may often rely on external actors who support their cause. Court cases can last for long periods, which add to the cost and also take up time. Finally, courts and dispute resolution bodies often are located in urban centres, which are alien environments located great distances from indigenous peoples' communities.

Even when indigenous peoples have access to courts, rules of evidence can be discriminatory, making forms of evidence which are culturally specific to customary legal systems inadmissible, such as oral proof for a claim of land title.⁶⁴ Self-

⁶⁰ Human Rights Council (James Anaya), *Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development Report Of The Special Rapporteur On The Situation Of Human Rights And Fundamental Freedoms Of Indigenous People* (A/HRC/12/34 15 July 2009) <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/145/82/PDF/G0914582.pdf?OpenElement>> accessed 30 November 2010.

⁶¹ Commission on Human Rights, *supra*, note 59.

⁶² This perpetuates the colonial racism used in laws towards the indigenous peoples laws and customs as 'uncivilised' and 'primitive.'

⁶³ In Guatemala, the right of defendants to a Maya-language interpreter was introduced in the Penal Code in 1992 and court interpreters have been hired since 1998.

⁶⁴ Proof of land title is often what is necessary for indigenous peoples and communities to take legal action to defend their territories and collective natural resources property rights. In 2000 the Nairobi High Court, Kenya ruled that the eviction of between 5,000 and 10,000 members of the Ogiek tribe from the Tinet forest was legal as they were unable within the statutory legal system to prove land title over their ancestral lands.

identification may be contested by the court under statutory law. Where self-identification is not recognised, indigenous peoples will be denied legal standing as a 'peoples'.⁶⁵

Certain jurisdictions in indigenous peoples land rights cases have begun to take steps to accommodate the variations in evidence adopted by customary legal systems. The Supreme Court of Canada found in its decision in the *Delgamuukw* case that occupancy sufficient to support aboriginal title should be based on both the physical occupation of the land in question and the pattern of land holdings in Aboriginal law. It accepted the use of indigenous oral histories as proof of historical facts, and ruled that 'this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.'⁶⁶ In 2007 during the *Tsilhqot'i Nation v British Columbia* case, the British Columbia Supreme Court adapted its proceedings to respect indigenous legal and cultural customs, including moving the court to the First Nations territory for five weeks of the court hearing and arranging night sittings for Elders to share sacred stories only told at nightfall as testimonies. This adaptation to statutory court proceedings ensured that crucial evidence was heard in their land rights claim.⁶⁷

In a number of jurisdictions, other new initiatives in judicial proceedings to accommodate indigenous customary legal systems have been initiated. According to UN Special Rapporteur Stavenhagen,

Some countries have made progress in recognizing the specific needs of indigenous people in the field of justice and have adopted laws and institutions designed to protect their human rights. Indigenous customary law is being increasingly recognized by courts and lawmakers, as well as by public administration. Some countries are experimenting with alternative legal institutions and conflict resolution mechanisms, with encouraging results. Such reforms should include respect for indigenous legal customs, language and culture in the courts and the administration of justice; the full participation of indigenous people in justice reform; and the establishment of alternative justice mechanisms.⁶⁸

In Finland, customary law forms part of domestic sources of law and can thus be applied to all court proceedings involving indigenous peoples. In South Africa, the Traditional Courts Act (2003) 'authorises and establishes a hierarchy of customary courts whose jurisdiction extends to criminal and civil cases. The courts will be

⁶⁵ In the case *Endorois Community v The Republic of Kenya*, African Commission on Human Rights 2 February 2010, the Kenyan government had originally claimed the Endorois peoples had no legal standing as they were not a distinct community. The African Commission overruled this claim and upheld the Endorois peoples claim to self-identification.

⁶⁶ *Delgamuukw v. British Columbia* (1997) 3 SCR. 1010 (Supreme Court of Canada).

⁶⁷ Kristin Hausler, 'Evidence in Land Claims Litigation: Integrating Indigenous Customs into Court Proceedings,' paper presented at Workshop on Minority and Indigenous Rights: Emerging Themes and Challenges, Minority Groups and Human Rights, Institute of Commonwealth Studies (18-19 November 2010).

⁶⁸ Commission on Human Rights, *supra*, note 59.

operated by members of the community and decisions will be based on the customary laws of the community, in line with the constitutional values of democracy and equality.⁶⁹ One of the more radical developments is in Columbia, where indigenous peoples have the constitutional right to exercise their own justice in their territorial space and to apply their own norms and procedures through their own authorities, their only limitation being the respect for 'fundamental minimums' as set out by the Constitutional Court. Consequently, indigenous people cannot be dealt with in the ordinary justice system, which is seen as being culturally different from the indigenous environment. The new Colombian Penal Code recognizes the right of indigenous people to be judged by their peers.⁷⁰

Although some developments are occurring to increase accessibility to the statutory judicial system for indigenous peoples and minorities, there remains a great deal to be done to realise a working plural-legal environment which services the needs of all legal cultures within a state jurisdiction. An example from Uganda demonstrates that changes to the law need to be supported by resources and training. The seriousness of the problem of unresolved land disputes in Uganda prompted the government to find creative solutions. The Land Act, applying the principles enshrined in the 1996 Constitution, provided for a dedicated system of land tribunals with more than 1000 at subcounty level and more than 50 at the local level. The act forbade the regular courts and the local council courts to continue hearing land cases. However, a lack of resources and of judicial enthusiasm about the new system led to a total absence of any form of judicial body to deal with land cases. People began taking the law into their own hands and police statistics reported a sharp rise in murders directly connected to land disputes.⁷¹

To ensure that statutory judicial and dispute settlement mechanisms accommodate customary legal systems more effectively, governments need to put in place mandatory training for judges and other judicial officials to understand indigenous legal traditions, and also increase the numbers of judicial officials in rural areas (who should be familiar with the indigenous language of the region where they work). There should also be salaried independent legal interpreters in all jurisdictions where indigenous peoples live in order to assist them in judicial and administrative matters. Finally, legislative measures should be taken to recognize and respect indigenous law and indigenous legal authorities.⁷² These recommendations ought to be applied,

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* at paragraph 73.

⁷¹ P. McAuslan, 'Improving Tenure Security for the Poor in Africa,' Framework Paper for the Legal Empowerment Workshop Sub-Saharan Africa, FAO Legal Empowerment of the Poor, Working Paper #1 (October 2006) at 44 <<ftp://ftp.fao.org/sd/SDA/SDAR/sard/Synthesis%20Nakuru.pdf>> accessed 30 November 2010.

⁷² Commission on Human Rights (Mr. Rodolfo Stavenhagen), *INDIGENOUS ISSUES HUMAN RIGHTS AND INDIGENOUS ISSUES Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, submitted pursuant to Commission resolution 2005/51 Addendum Progress report on preparatory work for the study regarding best practices carried out to implement the recommendations contained in the annual reports of the Special Rapporteur (E/CN.4/2006/78/Add.4 26 January 2006 ECOSOC)

where appropriate, to all official dispute settlement bodies, including those regional and international ones.

The limited efforts to make provisions to accommodate customary legal systems into statutory judicial and dispute settlement mechanisms have by and large failed to realise justice for indigenous peoples and minorities comprehensively. Ongoing nonrecognition of customary laws by statutory legal systems is a violation of indigenous peoples' and minorities' human rights which leads to ongoing abuses in the justice system. This is particularly the case when dealing with self-determination, land rights, and natural resources issues.

To remedy these abuses and prevent the eruption of violent conflict arising from persistent nonrecognition of customary law, statutory justice systems will have to change from being instruments for the control of indigenous people by the state to becoming tools for the protection and promotion of the rights of indigenous peoples.⁷³ This will require extensive changes in public policy objectives designed to alter the traditionally unequal, and often discriminatory, relationship between States and indigenous peoples—changes that will fully include the participation of indigenous peoples in decision-making processes. Many of the injustices of which indigenous peoples are the victims and most of the grievances which they have aired over the years at the national and international levels are not likely to be sufficiently addressed by recourse to constitutionally established ordinary courts. They also require other institutional resources, such as special legislation, political negotiations and political will, alternative conflict resolution mechanisms, spiritual commitment, and lengthy and participatory healing processes. Commitment to changing established statutory dispute resolution processes in states with complex legal pluralist landscapes is required by all members of each legal community and it will take financial resources and time, as well as respect and patience.

7. Legal Influences Beyond the State

Legal pluralists initially focused their analysis on the diversity of legal systems within the territorial boundaries of the sovereign state. Legal anthropologists, socio-legalists, and comparative law scholars probed, examined and documented the relationships between various legal systems within states, in both developed and developing countries. Attention to transnational legal systems was limited to colonial histories and particular legal sectors such as commercial law.

Interest in transnational legal systems and processes (legal systems and processes which transcend traditional state-centric international law) increased rapidly with the growth of globalisation in the early 1990s. Globalised legal systems are nothing new. In pre-colonial and colonial eras the reach of particular legal systems spanned significant territories, especially mercantile law. What was new with late twentieth

<www2.ohchr.org/english/bodies/chr/docs/62chr/ecn4-2006-78-Add4.doc> accessed 30 November 2010.

⁷³ Commission on Human Rights, *supra*, note 59, at paragraph 82.

century globalisation was the breadth and depth of reach that existing law (such as trade law) and new areas of law (such as human rights and international environmental law) were to have.

This section introduces a number of transnational legal systems and considers their impact on customary law within the sovereign state model. It is followed by a brief discussion of the interrelationship between transnational, regional, state, and customary legal systems and how these are being interpreted within legal pluralism scholarship.

7.1 Human Rights Law

Human Rights Law has expanded and developed exponentially since its origins with the Universal Declaration of Human Rights in 1948 to become a significant universal legal system. Numerous covenants, treaties, and declarations have followed. These range from political, economic, and cultural rights to rights for children, women, and against discrimination. The 'human rights movement,' however, is 'not simply a systemic ordering, basically through treaties and [international] customary law, of fundamental postulates, ideologies and norms. On the contrary, these basic elements are embedded in institutions, some of them state, some of them international, some governmental or intergovernmental and some nongovernmental and in related international processes.'⁷⁴ It is this embeddedness which makes human rights law a potentially powerful legal tool for individuals within states.

The institutional structures supporting the enforcement of human rights have been used in a number of important landmark cases to defend the rights of tribal peoples.⁷⁵ In a recent judgement by the African Commission on Human Rights on the Endorois tribal people in Kenya, the Commission found the Kenyan government to be in breach of a number of Articles under the African Charter of Human and Peoples Rights (1986).⁷⁶ The judgement recognised the Endorois tribal peoples' rights to property, culture, natural resources, and development as well as freedom of religion. This was a valuable legal precedent for the recognition of minority and indigenous communities' rights within the African regional human rights court which could have important ramifications for similar future claims by other customary legal actors.

7.2 Indigenous Peoples Law

Indigenous Peoples Law is now a part of the recognised human rights legal architecture. Although only two legally binding agreements on indigenous peoples have been ratified, in 2007 a UN Declaration on the Rights of Indigenous Peoples

⁷⁴ H. Steiner, P. Alston, & R. Goodman, *International Human Rights in Context: Law, Morals, Politics* (Oxford University Press, 2007) (3rd edn.) at 134.

⁷⁵ Cases include *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua* (2001) at the Inter American Court of Human Rights; *Endorois V. Kenya* (2010) at the African Commission on Human and Peoples Rights.

⁷⁶ For a detailed account of the ruling, see Lucy Claridge, 'Landmark Ruling Provides Major Victory to Kenya's Indigenous Endorois' (July 2010), Minority Rights Group International <www.minorityrights.org/download.php?id=885> accessed 30 November 2010.

(UNDRIP) was agreed by the UN General Assembly.⁷⁷ It is widely acknowledged that, as an international instrument, UNDRIP could catalyse institutional action and influence the development of national laws and policies on indigenous issues.

Arguably UNDRIP now forms a basis for the minimum standard by which to gauge the development of indigenous peoples rights. Article 38 of UNDRIP provides that states shall take appropriate measures, including legislation, to achieve the ends of the Declaration. The Declaration represents the culmination of two decades of negotiations including indigenous peoples and therefore is seen to be a legitimate indicator of customary international norms and principles by which to guide the actions of sovereign states. The Declaration includes articles on difficult and challenging issues for sovereign states such as self determination; rights over land and natural resources; free, prior informed consent; cultural integrity; education; and dispute settlement.

The Declaration has already formed the basis for legal changes in a number of countries, for example, the Indigenous People's Rights Act in the Philippines (1997) and Bolivia's National Law 3760 (2001) which incorporate UNDRIP without change. Domestic courts have also started to make use of the Declaration as adopted, exemplified by the 2007 judgment by the Supreme Court of Belize in the consolidated cases of *Aurelio Cal et al. v. Belize*.⁷⁸ The Chief Justice in that case, in elaborating on his finding of a violation of customary international law, stated his view that the 2007 Declaration 'embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it.'

Under UN norms, states have a duty to draw on the guidance provided by UNDRIP in their relations with indigenous peoples within their jurisdictions, despite the fact that the Declaration itself is not legally binding. Other nonstate actors including multinational enterprises, international organisations, and civil society, along with intergovernmental representatives, are also obliged to include best practice guided by UNDRIP in interactions with both sovereign states and indigenous peoples directly. As the previous section on dispute settlement indicated, this will take time as state and nonstate practices reform laws and institutional structures which upheld generations of discrimination, oppression, and suffering for indigenous peoples. There are indicators of change but these exist amid ongoing violence, discrimination and injustice for many indigenous peoples throughout the world.

⁷⁷ See ILO 107 The Indigenous and Tribal Populations Convention, 1957 18 ratifications, ILO Convention 169 on Indigenous and Tribal Peoples, 1989 20 ratifications
<<http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>> accessed 30 November 2010.

⁷⁸ *Aurelio Cal et al. v. Belize* Claim 121/2007 (18 Oct 2007) Mayan Land Claim.

7.3 Economic Law

Economic Law is one of the most important areas of international law. Under this heading the subcategories of commercial law, trade law, and banking law are included. The main focus will be on international trade law, particularly World Trade Organisations (WTO) laws. In terms of transnational legal pluralism, these subcategories ought to be understood as forming part of a unified system which constitutes the rules and norms for international capital and business flows which have important implications for indigenous peoples norms and customs, especially in terms of land and natural resource use.⁷⁹

The guiding normative principle which underpins the international economic law system is free trade. The principle of free trade is to ensure, in theory, open access to all markets on an equitable basis and consequently prevent any protectionism and discrimination. The intention of free trade is to increase global economic growth efficiently. The free trade agreements, initially the General Agreement on Tariffs and Trade (1948) which were renegotiated under the so-called Uruguay Round to become the Marrakech Agreement (1995), set the rules for international trade. Compliance with those rules is overseen by the WTO Dispute Settlement Panel established under the Marrakech Agreements. Since 2001, member states of the WTO have sought to enhance equitable participation of poorer countries which represent a majority of the world's population. This so-called Doha Round has been dogged by disagreement between exporters of agricultural bulk commodities and countries with large numbers of subsistence farmers on the precise terms of a 'special safeguard measure' to protect farmers from surges in imports.

Two WTO agreements, the Agreement on Agriculture and the Agreement on Trade Related Intellectual Property Rights (TRIPS) pose particular concerns for indigenous peoples. The Agreement on Agriculture encourages the growth of large-scale production of single crops for export where a country has a competitive advantage.⁸⁰ Such a normative principle acts against small-scale production (including agro-forestry practices, grazing, and nomadic herders) often adopted over generations by indigenous peoples to suit their needs and to maintain cultural traditions within specific environments. The WTO Agreement on Agriculture is criticised for privileging large-scale mono-crop production at the expense of sustainable agricultural practices which maintain the diversity of traditional crops, ensure greater food security, and protect ancestral lands from development. It has also been associated with increased dispossession of indigenous peoples and minorities from ancestral and traditional territories. Added to this is the increasing concern centred around genetic technology and associated intellectual property rights under the WTO TRIPS agreement.⁸¹ Both these WTO agreements are at odds with normative principles contained in the

⁷⁹J. Dine, J & A. Fagan, *Human Rights and Capitalism: A Multidisciplinary Approach* (Edward Elgar Pub, 2006) at 5.

⁸⁰ WTO Agreement on Agriculture (1994)

<http://www.wto.org/english/tratop_e/agric_e/agric_e.htm> accessed 30 November 2010.

⁸¹ WTO TRIPS (1994) <http://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs> accessed 30 November 2010.

UNDRIP. In the eyes of many indigenous peoples, these WTO agreements are another alien normative legal order which is imposed through the statutory legal system which itself is an imposition onto their customary norms and practices.

The expropriation and patenting of traditional knowledge, which comes within the scope of TRIPS, is an issue which indigenous peoples have increasingly had to challenge. The UN Convention on Biological Diversity (1992) has provided a platform on which indigenous peoples could fight for safeguards for their traditional knowledge and demonstrates the interface between transnational economic law and indigenous peoples' law in a legally pluralist world. Within the Convention on Biological Diversity, indigenous peoples have sought to mobilise support for their rights over sustainable use and equitable distribution of the benefits of genetic materials with limited success. On 29 October 2010, the 'Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization' was adopted, somewhat reluctantly, by the CBD Conference of the Parties.⁸² The Nagoya Protocol legalises the previously negotiated Bonn Guidelines on Access and Benefit Sharing.⁸³ Its scope is outlined in Article 1, which applies to 'traditional knowledge associated with genetic resources.'⁸⁴ It will, along with UNDRIP, provide indigenous peoples with legal mechanisms to challenge statutory laws which do not contain appropriate procedures for free, prior informed consent and equitable access and benefit sharing over natural resources, including those found in forests.⁸⁵

So far attention has focused on the international economic legal order. Operating alongside this are regional hubs where trading agreements between member states are negotiated. These regional trading agreements are focused centres which further the implementation of the normative principle of free trade articulated under the WTO agreements. The number of these regional trade agreements has increased exponentially, creating preferential trading centres and a complex legal landscape on top of existing bilateral and multilateral trade agreements.⁸⁶ The interface between customary law and this ever expanding body of international and regional economic law is beyond the scope of this paper. However, it is clear that it requires greater

⁸² Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation (2010), Nagoya, Japan (advanced unedited version) <www.cbd.int/.../advance-unedited-version-ABS-Protocol-footnote-en.doc> accessed 30 November 2010.

⁸³ Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation (2002) <<http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf>> accessed 30 November 2010.

⁸⁴ Given the concerns raised by a number of developing states, entry into force of this protocol may be slow.

⁸⁵ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation will only enter into force when fifty Parties have ratified it. To date only eight countries have ratified the Protocol: Algeria, Brazil, Central African Republic, Ecuador, Mexico, Rwanda and Yemen (12 April 2011)

⁸⁶ J. Crawford. & R. Fiorentino, 'The Changing Landscape of Regional Trade Agreements,' WTO Discussion Paper #8, (2006) <http://www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf> accessed 30 November 2010.

attention in order to achieve an understanding which will assist in ensuring that indigenous peoples are not further undermined in seeking to maintain traditional knowledge, livelihoods, and cultures.⁸⁷

7.4 Environmental Law

Environmental Law is a relatively new field within international law. Its impact on sovereign states is increasing, however. There are over 400 international and regional multilateral environmental agreements. Many international environmental laws have direct or indirect implications for indigenous peoples, particularly the 1992 Rio Conventions which tackle global environmental issues of 'common concern' such as climate change, desertification and biodiversity loss. International environmental law is articulated through numerous conventions as well as declarations and guidelines.

All international environmental agreements include legal principles. The customary international legal principle of sovereignty over natural resources for peoples/states is always recognised. A variety of other normative principles, such as common but differentiated responsibility, polluter pays, precautionary principle, and inter/intra generational responsibility, are, to varying degrees, referenced to guide the interpretation and implementation of the agreements.

One of the most significant principles invoked by international environmental law, which is at times referred to as a meta-norm framing all international environmental law, is sustainable development. The link between the environment and development has allowed certain flexibility towards economic development which provides space for social and environmental considerations to be incorporated.⁸⁸ In the International Court of Justice *Gabcikovo-Nagymaros Case*, Judge Weeramantry argued that sustainable development 'offers an important principle for the resolution of tensions between two established rights. It reaffirms in the arena of international law that there must be both development and environmental protection, and that neither of these rights can be neglected.'⁸⁹ This opinion is, however, directed at states rather than individuals, and the common nation-states neo-liberal interpretation of sustainable development since the early 1990s has more often than not undermined the rights of indigenous peoples and minorities. Numerous cases exist of indigenous peoples being displaced for the purposes of sustainable development projects, including state projects such as hydro dams, national parks, sustainable forestry and ecotourism. For some indigenous peoples and minorities, environmentalism under the guise of sustainable development is nothing more than another colonial wolf in sheep's clothing. Reversing these perceptions will require a serious commitment by the statutory and political institutions to full participation of indigenous peoples and

⁸⁷ J. Faundez, 'International economic law and development: before and after neo-liberalism,' in J. Faundez & C. Tan, *International Economic Law, Globalisation and Developing Countries* (Edward Elgar, 2010), chapter 2.

⁸⁸ P. Cullet, 'Environment and Development: the missing link,' in J. Faundez & C. Tan, *International Economic Law, Globalisation and Developing Countries* (Edward Elgar, 2010) at 357.

⁸⁹ ICJ, *Gabcikovo-Nagymaros Project*, 1997:95.

minorities in sustainable development issues, as well as a significant change in understanding of the relationship between statutory and customary law.

7.5 Global Administrative Law

Global Administrative Law is not an officially recognised legal system, but recent scholarship is highlighting the extensive reach that an emerging global administration commands. As Kingsbury et al highlight:

Underlying the emergence of global administrative law is the vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence in such fields as security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations, including refugees. Increasingly, these consequences cannot be addressed effectively by isolated national regulatory and administrative measures. As a result, various transnational systems of regulation or regulatory cooperation have been established through international treaties and more informal intergovernmental networks of cooperation, shifting many regulatory decisions from the national to the global level. Further, much of the detail and implementation of such regulation is determined by transnational administrative bodies—including international organizations and informal groups of officials—that perform administrative functions but are not directly subject to control by national governments or domestic legal systems or, in the case of treaty-based regimes, the states party to the treaty. These regulatory decisions may be implemented directly against private parties by the global regime or, more commonly, through implementing measures at the national level. Also increasingly important are regulation by private international standard-setting bodies and by hybrid public-private organizations that may include, variously, representatives of businesses, NGOs, national governments, and intergovernmental organizations.⁹⁰

New transnational, often nonstate, institutions are closely involved in decisions which affect the lives of communities and indigenous peoples. For example, the World Bank has an Operational Policy and Bank Policy on Indigenous Peoples (OP/BP 4.10) which mandates the early involvement of indigenous peoples in Bank projects. It demands, wherever possible, the active participation of indigenous peoples in the development process itself. The World Bank's policy, however, does not include free prior informed consent as a norm which is included as a prerequisite for involvement by indigenous peoples. This falls short of the requirements of UNDRIP.

⁹⁰B. Kingsbury, N. Krisch, and R. Stewart, 'The Emergence of Global Administrative Law,' *Journal of Law and Contemporary Problems*, vol.68 (2005) [16]
<<http://www.iilj.org/GAL/documents/TheEmergenceofGlobalAdministrativeLaw.pdf>> accessed 3-November 2010.

The need to take seriously the normative effect of the various layers and forms that global administrative law are taking is gaining more ground as questions of the legitimacy and accountability of these institutions come into focus. Like other aspects of international governance, the scale and the diversity of normative rules informing encounters between groups and individuals are difficult to monitor. The recent emergence of the concept within the UN Framework Convention on Climate Change of reduced emissions from avoided deforestation and degradation (REDD) has resulted in a plethora of new initiatives from existing international organisations, such as the World Bank's Forest Carbon Partnership Facility, as well as new actors involved in various aspects of creating REDD opportunities directly with forest communities, local governments, and/or civil society. Many of these actors are supported by funding bodies that have particular agendas which are not always in the best interests of communities or indigenous peoples. With limited understanding of the legal pluralist context in many developing countries, interventions can be crude and have negative consequences resulting in perverse incentives.

The complex interrelationship between all these different legal systems is only beginning to gain the attention that it requires. To take account of interlegality, pluralism needs to be conceived as a 'universal phenomenon appearing not only in the dual structure of the state law and customary law but also the triple of customary law, national law and international law.'⁹¹ The new era of globalisation built upon a nascent universal state-centric legal architecture centred on the United Nations governance model formed in 1945. Key international legal treaties, declarations, and institutions were agreed and formed the foundation upon which globalisation was to depend. The expanding nature of global interlegality, however, is resulting in symbiosis, convergences, adaptations, partial integrations and hybridisations between various legal systems. But concerns over subordination, repressions and destruction of other legal systems are not misplaced and should not go unquestioned.⁹² These dynamic changes are occurring without any simple vertical-ordered hierarchy, and consequently it is difficult to monitor the various influences, impacts, and consequences which are taking place day to day in the world.

Tracing the links between the different legal systems in this apparently fragmented world requires the adoption of a holistic approach to issues. Actors engaged in specific issues need to incorporate a broad legal analysis using a pluralistic approach. This will require greater exchange between different legal systems. This in itself will require patience, time and resources. In situations where previous encounters have resulted in abuse of power there will be a need for building of trust through reconciliation.

⁹¹ M. Chiba, *Legal cultures in human society: A collection of articles and essays* (Tokai University Press, Tokyo, 2002) at 1-2.

⁹² W. Twining, *supra*, note 14, at 474.

8. VPA Navigation in a Legal Pluralist Environment

Both customary law systems and the statutory law systems that have been overlaid upon them are part of the legal pluralist landscape that comprise the existing laws in VPA partner countries. Moreover, since the onset of colonialism, the statutory system has also influenced the evolution of customary law through various government interventions. Customary law, like statutory law, has also been influenced by the broader pluralist constellation of international law including human rights law, indigenous peoples law, economic law, environmental law, and global administrative law. In addition, what might be considered a bilateral administrative system accountable to the EU as well as the partner country governs compliance with the terms of the VPA. As the VPA processes themselves also actively intervene within this constellation of laws, there is a clear need to draw on lessons learned to avoid repeating mistakes made elsewhere which ultimately undermine those living according to customary law.

VPAs seek to define the legal production of wood in a legitimate manner likely to realise compliance across the entire population. It is integral to the success of VPAs that diverse customary laws are secured within a workable definition of the legal production of timber that can be translated and recognized by both international and domestic trading partners. To arrive at a legitimate and workable definition of the legal production of timber within VPA processes as well as ensure the full implementation of the agreements, statutory legal systems in all partner countries will need to draw upon different tools other than the usual set. Using the recommended tools listed in Box 2, a legal pluralist approach to developing solutions that match the legally pluralist reality of VPA partner countries should:

- **Ensure procedural rights:** Law reforms that take as their starting point an understanding of the reality of legal pluralism and seek to reconcile tensions between statutory and customary laws in order to arrive at a workable and legitimate definition of 'legal timber' will focus on *procedural rights* through which context-specific approaches to securing local resource rights can be pursued. Law reforms should aim to secure resource claims based on the *operation* of customary tenure systems, including their flexibility to evolve and renegotiate forest land and use claims following changes in social relations, governed by the overriding concern of regulating individual rights to livelihood against land security as a common good. Accordingly, law reforms should design procedural rights that *secure access* to customary tenure systems, rather than attempting to codify static substantive rights into legislation, trying to interpret customary rights using statutory law tools such as civil or common law courts, or otherwise overhauling customary law systems.

Substantive laws define the distribution of legal rights and duties, whereas procedural rights enable the exercise of legal rights and ensure the effective implementation of legal duties. In many countries, reform of forest laws has failed upon implementation because no adequate procedural laws were secured to ensure the effective implementation of the substantive law reforms. It is important also to note that the effective exercise of procedural rights entails not

only access to information and meaningful participation in decision-making, but also effective access to justice to secure adequate implementation of laws. Securing effective procedural rights will ensure that tensions and conflicts between customary laws and the statutory legal system are able to be identified and to be addressed through appropriate dispute resolution mechanisms.

The design and implementation of legitimate procedural rights should also be informed by a legal pluralist view. Within a weak legal pluralist state, procedural mechanisms are likely to use procedural tools which are normatively framed according to the state's legal customs. In a legally pluralist landscape, it will be important to ensure that the procedural rights secured are also consistent with customary laws and norms, such that the procedural rights normative to the statutory legal system do not in fact bar rather than facilitate the recognition and exercise of customary law. The procedural norm of free, prior and informed consent as articulated in the UN Declaration of the Rights of Indigenous Peoples is instructive on this point. More specific prescriptions on how the proposed procedural rights should be construed and implemented in each country will require country-specific research and analysis.

- **Understand the statutory legal system of the country:** In some countries, recognition of customary laws is likely to emerge through case law jurisprudence, in some through constitutional reform, in others through a legislative law reform process, and in others through the application and incorporation of transnational legal norms. Relevant factors include civil law or common law norms shaping the statutory legal system, the content and procedural framework of the customary law systems at issue, the country's constitutional framework and norms, and international conventions and treaties the country has adopted. A legal pluralist approach requires context-specific analysis of existing norms and institutions as well as how these interact in order to discern a pathway that most respects legal pluralism. More specific recommendations on how to approach each country VPA will require country-specific research and analysis.
- **Recognise the Legal Diversity in Practice:** It is important to recognize that customary laws are diverse and varied, even within a single state, depending upon their history and setting. Most states include numerous distinct ethnic communities, each with its own customary laws. In light of this, there will be no universal solution to securing customary rights even within a single state. That is, a solution to such a complex situation will not be achieved through the adoption of a single law outlining forest rights and tenure in substantive terms.
- **Create Effective Participatory Mechanisms:** An avenue for realising normative exchange within a plural legal environment is to create effective participatory mechanisms. Multi-stakeholder participation is already a core principle of VPA processes. When engaging in participatory processes, a legal pluralist approach requires careful deliberation on questions of representation. These include: How are communities to be represented defined (standing)? Who represents the community (institution)? What is represented (content)? And how

is it being represented (process)? Although the process is aimed at reconciling statutory and customary laws, it should not be assumed from the onset that customary leaders or institutions are necessarily representative of the communities at issue. Rather, an appropriate framework for community representation is one that explicitly and unambiguously addresses these questions, establishes and presents collective community interest, and ensures the selection of legitimate and accountable representatives.⁹³

- **Look Beyond the Normative Content of Statutory Forest Laws:** Legal pluralism requires practitioners to look beyond the limitations of existing forest legislation to higher normative laws to determine the normative scope and content of relevant laws. Human rights law, indigenous peoples law, economic law, international environmental law, and global administrative law, as well as national constitutional law, can provide useful lessons, examples, and frameworks for navigating customary and statutory laws.

9. Conclusion

This report has provided an introduction to the concept of legal pluralism as a framework for navigating the complex legal landscape of overlapping statutory and customary laws of VPA partner countries to arrive at a legitimate and workable definition of 'legal wood'. It has explored how legal pluralism is perceived and accommodated within a statutory legal system where power largely lies—in many cases more often in theory than practice—with the institutions of central state governance. By examining a traditional account of common law and civil law, this report provides a foundation for understanding the challenges that customary law places upon statutory legal systems. This has been highlighted by examining dispute settlement approaches under the statutory legal system for customary legal issues. In addition, consideration has been given to the expansion of legal pluralism into the transnational context, questioning the functional capacity of the traditional statutory legal system to continue to act as sole legal normative gatekeeper.

In recognition that a politically legitimate standard for legality needs to involve wide consultation with all affected groups, VPAs entail a commitment to multi-stakeholder dialogues. These inclusive national standard-setting processes must tackle critical questions of land and resource rights in order to define the legal production of wood.

Effective participatory mechanisms can provide an avenue for realizing normative exchange within a plural legal environment. This, in turn, can lead to the reconciliation of statutory and customary law systems necessary to effectively operationalise customary rights. VPAs provide a platform for such a process to take place regarding the difficult and long-contested issue of control over forest land and

⁹³ E. Marfo, 'Unpacking and Repacking Community Representation in Forest Policy and Management Negotiations: Lessons from the Social Responsibility Agreement in Ghana,' *Ghana Journal of Forestry*, Vol. 15&16 (2004) at 20-27.

resources. An understanding of legal pluralism can provide a compass to help stakeholders successfully navigate this challenging path.