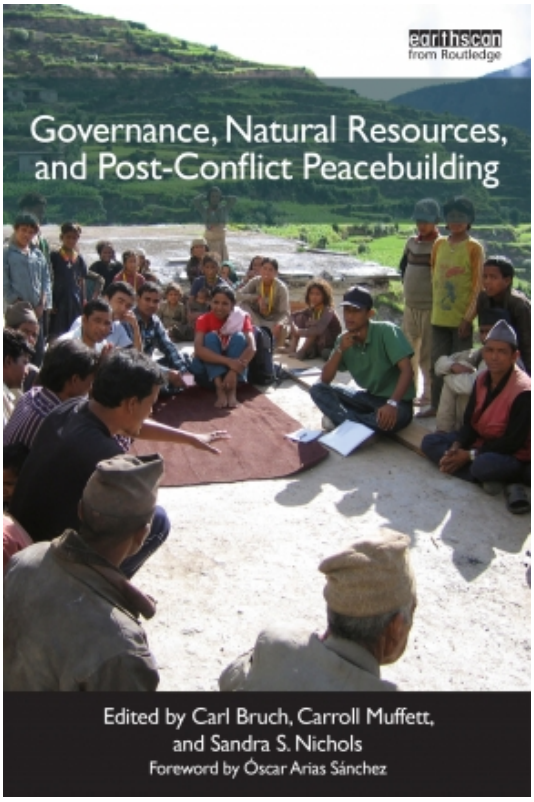

Property Rights and Legal Pluralism in Post-Conflict Environments: Problem or Opportunity for Natural Resource Management?

Ruth Meinzen-Dick[a] and Rajendra Pradhan[b]

[a]*International Food Policy Research Institute (IFPRI), Consultative Group on International Agricultural Research (CGIAR)*

[b]*Nepā School of Social Sciences and Humanities*

Online publication date: 30 November 2016

Suggested citation: R. Meinzen-Dick and R. Pradhan. 2016. Property Rights and Legal Pluralism in Post-Conflict Environments: Problem or Opportunity for Natural Resource Management?, *Governance, Natural Resources, and Post-Conflict Peacebuilding,* ed. C. Bruch, C. Muffett, and S. S. Nichols. London: Earthscan.

Property rights and legal pluralism in post-conflict environments: Problem or opportunity for natural resource management?

Ruth Meinzen-Dick and Rajendra Pradhan

Of all the institutions that affect how people interact with natural resources, property rights systems are among the most influential.[1] Property rights not only determine who may use what resources and how they may use them but also shape incentives for investing in and sustaining the resource base over time. Property rights to natural resources are often contested and uncertain even at the best of times, but uncertainties are heightened during and after periods of rapid social, economic, or political transition. Conflict, in particular, tends to damage, call into question, or destroy the institutions that communities use to govern natural resources such as land, forests, and water.

In post-conflict situations, rebuilding the property rights system is thus a high priority for both governments and international agencies, particularly where natural resource management was a major factor in the conflict. But the process of rebuilding tenure systems is not as straightforward as rebuilding roads and infrastructure. In fact, efforts to restore tenure systems may reignite tensions that originally led to conflict.

Another source of uncertainty regarding rights to natural resources is that individuals and groups often use various legal orders, singly or in combination,

---

Ruth Meinzen-Dick is a senior research fellow at the International Food Policy Research Institute, in Washington, D.C., and coordinator of the Systemwide Program on Collective Action and Property Rights (CAPRi) of the Consultative Group on International Agricultural Research (CGIAR). Rajendra Pradhan is dean of the Nepā School of Social Sciences and Humanities, in Kathmandu, Nepal. This chapter draws from Ruth S. Meinzen-Dick and Rajendra Pradhan, "Legal Pluralism and Dynamic Property Rights," CAPRi Working Paper No. 22 (Washington, D.C.: International Food Policy Research Institute, 2002). The research on which the chapter was based was supported by CAPRi, a program of CGIAR, which is funded by the governments of Norway and Italy, and the World Bank.

[1] According to Norman Uphoff, "*Institutions*, whether organizations or not, are complexes of norms and behaviors that persist over time by serving collectively valued purposes, while *organizations*, whether institutions or not, are structures of recognized and accepted roles" (Uphoff 1993, 614). An institution may thus be embodied in an organization, but some institutions are sets of rules that persist without structured roles. Marriage and the market, for example, are institutions that exist outside of specific organizations.

to claim rights to natural resources. The coexistence of different types of law within the same social setting is known as *legal pluralism*.[2] Among the different types of law are the following:

- State law, also known as statutory law, which is created by legislative bodies, enforced by the state, and includes the regulations necessary for enforcement.
- International law, which includes treaties, customary international law, and peace agreements.
- Religious law, which includes both written doctrine and accepted practice.
- Customary law, which may be ancient or relatively new, and may include written rules or living interpretations of custom.[3]
- Project law, which includes the regulations associated with particular projects or programs, especially those of donor nations or organizations.[4]
- Organizational law, such as the rules made by farmers' associations or armies.
- A variety of local norms, which may incorporate elements of other laws.

Each of these types of law is associated with "bearers"—that is, institutions or individuals that represent or have the authority to interpret or implement laws. State law, for example, is backed by government land registries, local governments, or the police. International law may be backed by the United Nations, the World Trade Organization, or other bodies. Bearers of religious law include formal bodies, such as the Catholic Church, particular religious congregations, or individual clergy. The strength of property rights depends on the strength of the institution that stands behind the rights; that strength, in turn, depends not only on how powerful the embodied authority structure is, but also on how widely accepted the associated rules and norms are.

---

[2] Of the many definitions of *legal pluralism*, Gordon R. Woodman's is perhaps the most useful: "Legal pluralism in general may be defined as the state of affairs in which a category of social relations is within the field of operations of two or more bodies of legal norms. Alternatively, if it is viewed not from above in the process of mapping the legal universe but rather from the perspective of the individual subject of law, legal pluralism may be said to exist whenever a person is subject to more than one body of law" (Woodman 1996, 157). As used in this chapter, *legal pluralism* refers to both the coexistence of multiple legal orders, and to a perspective, or lens, through which those legal orders may be viewed. For further discussion of this distinction, see F. von Benda-Beckmann (2002). On legal pluralism in general, see J. Griffiths (1986); de Sousa Santos (1987); Merry (1988); Woodman (1998); and F. von Benda-Beckmann, von Benda-Beckmann, and Spiertz (1997). For reviews of legal pluralism, see K. von Benda-Beckmann (2001); F. von Benda-Beckmann (2002); and A. Griffiths (2002). For critiques of legal pluralism, see Tamanaha (1993); Fuller (1994); and Roberts (1998).

[3] Legal anthropologists recognize different kinds of customary law, which can be old or new, and can be created by local communities ("people's customary law") or by the state and the courts ("lawyers' customary law") (F. von Benda-Beckmann, von Benda-Beckmann, and Spiertz 1996, 84). While customary law is usually unwritten, written customary law—for example, the law governing water rights in Spain—does exist (Guillet 1998).

[4] For a discussion of project law, see Weilenmann (2005).

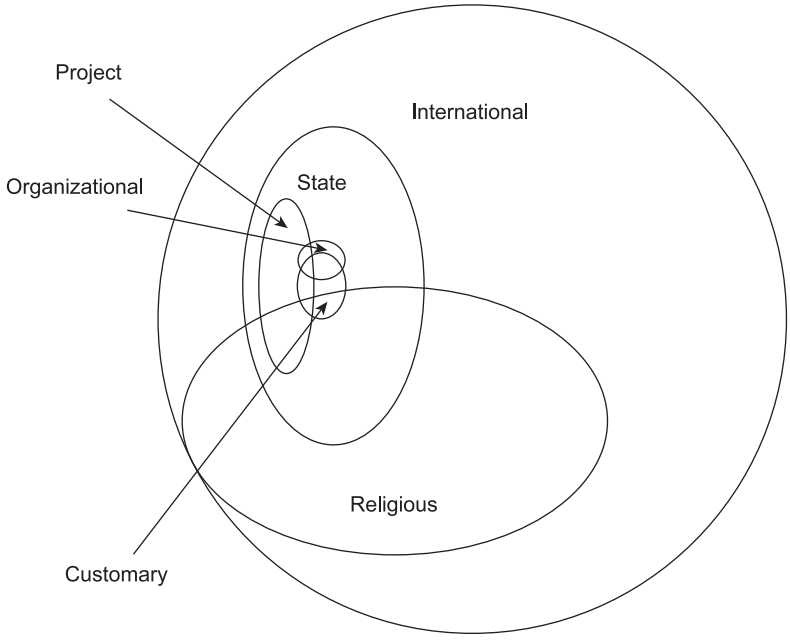

Figure 1. Overlapping legal orders
Source: Adapted from Meinzen-Dick and Pradhan (2002).
Note: Reproduced with permission from the International Food Policy Research Institute, www.ifpri.org. The CAPRi Working Paper from which this figure comes can be found online at www.capri.cgiar.org/pdf/capriwp22.pdf.

The various types of law (including statutory, international, and customary law) do not exist in isolation, but interact with and influence each other (see figure 1). In West Africa, for example, customary authorities have been interacting with the state for over a century, and have incorporated elements of statutory law into their own law (Lavigne Delville 2000). On a wider scale, conflict between statutory law and the customary law of many indigenous groups helped give rise to indigenous movements—and, ultimately, to the passage of the United Nations Declaration on the Rights of Indigenous Peoples (UNGA 2007). The declaration, in turn, has been codified into state law in many countries: thus, customary law influenced an international declaration, which ultimately influenced statutory law.[5]

Because any one individual is unlikely to be familiar with all the types of law that might be relevant to a given situation, and because rival claimants may use various types of law to lay claim to a natural resource, legal pluralism can create uncertainty. Furthermore, since in many cases it is impossible to predict

[5] For discussions of some cases in Latin America, see Boelens, Getches, and Guevara-Gill (2010).

which law or interpretation of a law will be accepted as valid, the outcomes of disputes are contingent on a host of context-specific factors, including individual actions. Nevertheless, at the same time that multiple legal frameworks contribute to uncertainty, they also allow considerable flexibility in the use of natural resources.[6]

When state records of property rights, and the government institutions that stand behind them, become the casualties of civil conflict, one option, which is often supported by outside donors, is to try to rebuild and expand the records and the state capacity to administer them. Thus, in the name of providing tenure security or in an effort to achieve efficiency through well-defined property rights, policy makers often seek to consolidate rights through statutory law, while ignoring the complex and overlapping rights held by different groups. In such settings, the coexistence of multiple legal orders is seen as a problem to be overcome.

The alternative, which involves assessing claims over natural resources and building on a pluralistic legal framework, has been used in a number of post-conflict states where the government recognized that it lacked the capacity to address all property disputes, and therefore had to draw upon other institutions to help adjudicate claims, restore property, and rebuild the property rights systems.[7] Because the different legal frameworks in a pluralistic system influence each other and can change over time, pluralism brings a certain fluidity to property rights. Unless this dynamism is recognized by policy makers and donor agencies, changes in statutory law intended to increase tenure security may instead increase uncertainty, especially for groups with little education and limited contact with government officials and implementing agencies.

Legal pluralism cannot simply be wished or legislated away and replaced by statutory systems. This chapter argues that instead of trying to ignore laws and claims on natural resources that originate outside the formal statutory system, policy makers and donor agencies should recognize the different bases for claiming property rights.[8] Because there are multiple and often overlapping bases for claims, property rights and natural resource use are best understood as negotiated outcomes. Not only does this perspective lead to a more accurate assessment of the situation that natural resource users face, but it also allows greater flexibility to adapt to the uncertainties of post-conflict settings. Although incorporating legal pluralism into post-conflict institution building poses challenges, it also provides

---

[6] For case studies of the use of legal pluralism in natural resource management, see F. von Benda-Beckmann and van der Velde (1992), Spiertz and Wiber (1996), and Pradhan (2003).

[7] For an example of such an approach in Mozambique, see Unruh (2002).

[8] Although some scholars have argued that the proponents of legal pluralism have a specific agenda, others hold that legal pluralism is a neutral concept, and that the purposes to which multiple legal orders are put is a separate matter, to be evaluated on a case-by-case basis. For a review of the debate about the intentions of legal pluralism, see F. von Benda-Beckmann (2002).

an opportunity to achieve more broadly accepted and more stable outcomes, by creating tenure systems that recognize the complexity and dynamism of the rights that govern natural resource use.

This chapter is divided into four major parts: (1) a consideration of the relationship between legal pluralism and property rights; (2) a discussion of the relationship between legal pluralism and uncertainty; (3) an analysis of the role of legal pluralism in post-conflict situations; and (4) a brief conclusion.

LEGAL PLURALISM AND PROPERTY RIGHTS

Legal pluralism can be thought of as a field with many plants growing in it, some of which were deliberately planted and others of which grow wild. Although one may try to eradicate all other species and establish a monoculture of statutory law, the "weeds" will keep coming back; more important, the single crop may not flourish, especially if it is not as well adapted to local conditions as the other varieties. Alternatively, one can seek a better understanding of the climate and soil conditions, and cultivate a pluralistic field in which different species complement one another. Not all local varieties (of plants or law) are beneficial; some may require pruning to get the desired outcomes. And just as plants reflect environmental conditions, the varieties of property rights and the institutions that stand behind them reflect social conditions. An understanding of such conditions can form the foundation for an integrated approach to property rights. Such an approach is especially important in the post-conflict environment, when there are so many variables in flux.

To fully understand rights to natural resources, one must go beyond the unitary concept of freehold ownership, in which the owner has all rights to a property, and recognize property rights as an umbrella concept that embraces different categories of rights, sometimes known as "bundles of rights." In this conception, rights holders can simultaneously have different types of rights—that is, portions of the bundles of rights (F. von Benda-Beckmann, von Benda-Beckmann, and Spiertz 1996). Building on Melanie G. Wiber's approach, property rights may be defined as claims to use or control natural resources that are (1) recognized as legitimate by a larger collectivity and (2) protected by law (Wiber 1991). Under this definition, the types of claims that may be asserted by individuals or groups include the right to use a natural resource; to derive income from it; to regulate and control its use; and to transfer it through sale, lease, gift, or inheritance. Because there can be more than one legal system at play that meets the standard of legitimacy (that is, recognition by a large collectivity and protection by law), claims based on different legal orders can result in disputes.[9]

Different rights holders may hold different "sticks" within a given bundle of rights that pertain to the same piece of land. Such arrangements often yield

---

[9] For a similar understanding of property rights applied to water rights, see F. von Benda-Beckmann, von Benda-Beckmann, and Spiertz (1996) and Spiertz (2000).

complex and overlapping uses and users: for example, a village council or the head of a clan might have the right to regulate and control the use of the village commons, while individual families might have use rights to specific plots of land for agricultural purposes, and pastoralists might have the right to graze cattle on that same agricultural land during the fallow season. Further, such overlapping rights are accompanied by responsibilities to observe the rights of others and to contribute to the maintenance of the property in question (for example, by providing labor or cash for the upkeep of irrigation systems) (Meinzen-Dick and Mwangi 2008).

The validity of any given property right depends on the rights held by the claimant in a given system, and on whether the claimant has complied with the procedures and conditions by which persons (individual or corporate) establish, maintain, transfer, and lose rights in that system. In many cases, different laws offer different definitions of rights. Depending on which type of law best suits their interests, individuals and groups may choose among state, international, or customary laws, in an effort to select those that are most likely to legitimize their claims to natural resources (Spiertz and Wiber 1996). For example, on the basis of a license awarded by the state, national and multinational companies may claim the right to fell trees or mine minerals in a forest, but traditional users of the forest (for example, indigenous peoples) may not accept the state-based rights as legitimate—and, on the basis of their own customary law, may attempt to resist exploitation of "their" natural resources.

Legal orders change in response to context—specifically, in response to shifts in social, economic, and political conditions, and in response to shifts in other types of law. In other words, different legal orders are mutually constitutive: they are not isolated, but interact with and influence each other (Guillet 1998).[10] The precise ways in which different legal orders interact depends, in part, on power relationships between the bearers of different laws—for example, the relationship between a government agency and the staff of a nongovernmental organization (NGO), or between customary and religious leaders and the local leaders of political parties. Because such power relations are in flux during and immediately after conflicts, so, too, is the strength of different types of law and the property rights that derive from them.

LEGAL PLURALISM AND UNCERTAINTY

While legal pluralism exists in almost all contexts, it is particularly important in situations of uncertainty. Lyla Mehta and colleagues have identified three types of uncertainty that play an important role in shaping human behavior (Mehta et al. 2000):

---

[10] For further elaboration of the sense in which statutory and customary law interact and mutually influence each other, see de Sousa Santos (1987).

- Ecological uncertainty, which is caused by changes in weather and other biophysical phenomena.
- Livelihood uncertainty, which is caused by economic phenomena such as a drop in demand for some products and fluctuations in employment opportunities.
- Knowledge uncertainty, which is caused by unpredictability or incomplete understanding.

This chapter adds a fourth category: social or political uncertainty, which is caused by shifts in regimes or political power. This category encompasses the effects of conflict, which have particular significance for property rights.

Although legal pluralism can provide adaptive responses to ecological, livelihood, and social or political uncertainty, it can generate or increase knowledge uncertainty. The next four sections explore the linkages between legal pluralism and different types of uncertainty.

Ecological uncertainty

Fluctuations in the natural resource base call for different sets of rules to deal with different situations, and legal pluralism expands the available repertoire of rules. During a drought, for example, water use may not be governed by the rules that apply under normal circumstances, when some users have the right to exclude others; instead, people suffering from hardship may appeal to norms that call for sharing, or that require basic human needs to be met. Such shifts may be observed in diverse situations—for example, when pastoralists in semiarid areas request access to grazing land on the basis of semiformal agreements with other groups (Mearns 1996; Ngaido and Kirk 2000), or when irrigators in Bali and Nepal are allowed to use water when their own flows are insufficient (Sutawan 2000; Pradhan and Pradhan 2000).[11] Such adaptations increase the livelihood security of households that depend on fluctuating natural resources.[12] Thus, in the wake of violent conflict, it is important for policy makers, NGOs, and development agencies to consider whether the ties of mutual accommodation have been strengthened or weakened, because such ties affect whether and how households can access natural resources to which they do not have rights under normal circumstances.

---

[11] In times of critical need (for example, drought), irrigators may have "tolerated access" to water: that is, they may be temporarily allowed to access water from sources to which they do not normally have rights, as long as they do not claim permanent rights to those sources. For further discussion of such arrangements, see Pradhan and Pradhan (2000). The social and political relationships between those who have rights to the water sources and those who do not often determine whether those who lack rights will be allowed access during times of need.

[12] Because climate change increases ecological uncertainties, adaptive strategies for accessing natural resources are likely to grow in importance. The alternative to accommodation is often conflict; hence, it is better to allow relatives and neighbors to use one's natural resources, and to hope for reciprocity in one form or another.

Livelihood uncertainty

As in the case of ecological uncertainty, legal pluralism expands the bases for claims to a natural resource and allows for adaptation to new circumstances. For example, customary, locally defined rights to forest or fishing resources may be sufficient to deal with subsistence-level exploitation, but not with an influx of outside users; new technologies that allow for more efficient exploitation; or increased links to markets, which can change the value of the natural resource. In such cases, national or even international law may be called on to define and enforce rights and impose limits on natural resource exploitation.

In the face of mining, or oil and gas development, indigenous groups in Latin America have called upon the provisions for free, prior, and informed consent contained in the UN Declaration on the Rights of Indigenous Peoples. Although this declaration does not have the full status of international law and cannot be enforced except where it is embodied in the statutory law of individual countries,[13] it provides an important vehicle for making claims.[14] And even where the declaration has not been converted into national law, national and international movements of indigenous peoples can be called on for support in such situations. It may also be possible to appeal to organizational law—for example, to corporate social responsibility policies in place at investor firms.

During conflict, an influx of new users, such as refugees or internally displaced persons (IDPs), may increase demands on land and land-based natural resources. As is the case when outside developers or investors attempt to lay claim to natural resources that have been under customary ownership, international bodies may be called in to regulate natural resource access. Even where such claims are prohibited by formal rules, statutory law, or customary law, users may acknowledge that survival can be used as a basis for claiming natural resources. Religious norms that call for compassion for the less fortunate, or for sharing water with all, may further reinforce survival-based claims. In the case of refugees and IDPs who may need either temporary or permanent access to land and water, most people do not regard such natural resources only as commodities, but also as objects that have symbolic associations (such as with ethnic identity, prestige, and religion) that are connected to social security, and that are enmeshed in the web of social exchange.[15]

---

[13] Unlike UN treaties and conventions, UN declarations are not legally binding; conventions such as the International Covenant on Economic, Social and Cultural Rights, in contrast, are binding on the countries that have ratified them.

[14] On the use of the UN Declaration on the Rights of Indigenous Peoples for making claims, see for example, Boelens, Getches, and Guevara-Gill (2010).

[15] For example, claims to land may be associated with having ancestors who settled the area and whose graves are there—thus linking the land to ethnicity, prestige, and religion. The connections between the symbolic and social security aspects of property rights are part of what James Scott refers to as the "moral economy," which stresses mutual support to ensure survival in the face of scarcity (Scott 1976).

Livelihood uncertainties can also result from the removal of customary users—for example, when men are killed in combat, or when they migrate and leave women to take over farming. In such cases, customary rules that limit women's landownership or participation in management bodies may limit the rights of female-headed households to control natural resources; at the same time, new rules—supported by the state, external donors, or NGOs—may call for more participation of women in governance structures, and hence strengthen (at least theoretically) the claims of women farmers to use and manage the land. In Mozambique and Tanzania, for example, customary systems did not (and to some extent still do not) allow women to own land, but Mozambique's 1997 Land Law and Tanzania's 1998 Land Act (amended in 2004) and 1999 Village Land Act give women that right. In addition, Tanzania and Uganda require spousal consent before a husband can dispose of marital property. Implementation of such legislation is often lagging, however—not only in Mozambique, Tanzania, and Uganda, but also in other nations where customary law does not allow ownership of land by women (Hilhorst 2000). In Nepal, where state law and the project law of most donor agencies require that women make up at least one-third of the management committees of forest user groups and water user groups, the requirement has been implemented in most forest user groups and some water users groups (Adhikari and Adhikari 2010).

Knowledge uncertainty

Although legal pluralism can help cope with ecological, livelihood, and social and political uncertainty, it exacerbates knowledge uncertainty. It is rarely possible for one individual to be familiar with all the pertinent or potentially applicable legal frameworks, or their provisions for property rights. A lawyer may know statutory law, a government official may know project regulations, a village elder may know customary law, and a priest may be an expert on religious law and norms, but each is likely to have limited knowledge of other legal frameworks. In many countries, state laws are largely unknown in villages —and when new laws are promulgated, not only villagers but even government officials at the district or village levels may be ignorant of them. In Nepal, for example, many villagers, local irrigation officials, and members of village councils were unaware of the Water Resources Act of 1992, and were alerted to its existence and provisions only when they became involved in water-related disputes (Pradhan et al. 1997; Pradhan, von Benda-Beckmann, and von Benda-Beckmann 2000).

Because knowledge of multiple legal orders is necessarily fractured and partial, natural resource users may act in ignorance of some definitions of property rights. For example, those who do not know that state law gives the state sole rights to harvest certain trees will continue to fell them; similarly, newcomers to an area may follow their understanding of state law and thereby violate local rules of which they are unaware.

The other form of knowledge uncertainty that legal pluralism creates or intensifies is uncertainty about what other people will do. Institutions, such as a property rights system, define "the rules of the game"—and thereby allow people to predict the behavior of others (North 1990, 1). This predictability provides assurance that if one abides by the rules governing the use of a natural resource, others will too. This assurance, in turn, allows users to overcome the fear of being taken advantage of by free riders (those who take benefits without contributing). But if several legal frameworks can be applied at the same time, and others may be abiding by different laws and definitions of property rights, then that assurance is eroded. And if no one can predict how property rights will be determined, tenure security is eroded as well.

In some cases, economists (who are interested in increasing efficiency), and policy makers and analysts (who are interested in sustainable natural resource management) attempt to reduce pluralism by consolidating all legal orders under a unitary rule of law, by which they mean statutory law; they do so out of a sense that legal pluralism can erode the basis of property rights and tenure security. In other cases, customary law may be repressed because it is seen as "primitive," and therefore as something that must be overcome in the quest for modernization. Such attitudes, often originating in colonial practices, have carried over into contemporary governments.[16] But the imposition of state law may actually increase uncertainty. In West Africa, for example, Philippe Lavigne Delville has found that uncertainty arises not because people are unsure of their rights under the customary system, but because they are unsure whether those rights will be cancelled by the state—a pattern that is also found in places as diverse as Haiti and Cambodia (Lavigne Delville 2000; Smucker, White, and Bannister 2000; Ironside 2010).

Although knowledge uncertainties may be inherent in legal pluralism, such uncertainties are not necessarily major obstacles to equitable and sustainable natural resource management. As noted earlier, the flexibility associated with legal pluralism is important in dealing with environmental, livelihood, and some types of social and political uncertainty. Consolidating all property rights under statutory law, even if it were possible, would be cumbersome and inappropriate in many situations, and hence would sacrifice adaptability. Moreover, statutory law itself may be a major source of livelihood uncertainty, especially for those who have less money, education, connections, or other means of access to state legal mechanisms. For example, Tor A. Benjaminsen and colleagues have demonstrated how formalization of land tenure in Mali, Niger, and South Africa set off conflict over land and created opportunities for elites with power, information, and resources to capture land (Benjaminsen et al. 2008). Furthermore, legal pluralism distributes knowledge uncertainty so that no one stakeholder has a monopoly on knowledge; nor is anyone likely to be totally without some notion of property rights.

---

[16] On West Africa, see Lavigne Delville (2000); for Latin American cases, see Boelens, Getches, and Guevara-Gill (2010).

The recognition of diverse sources of property rights offers most parties some basis for a claim on a natural resource. Jeremy Ironside's observation about indigenous areas in Cambodia has broader applicability:

> Defending rural livelihoods . . . requires exploration of alternative social, cultural and agro-ecological systems. Singular forms of land tenure simply do not allow for the effective multiple uses, overlapping production cycles and forms of management of those resources (Ironside 2010, 18).

In a pluralistic environment, rules and laws are subject to negotiation, reinterpretation, and change; among the sources of this dynamism are the ways in which people call upon different legal orders in asserting claims and negotiate with others who are calling upon different legal orders. Thus, the interaction between legal frameworks provides a source of dynamism that can respond to changing circumstances.

Social and political uncertainty

Conflict, regime change, an influx of migrants, and other social and political upheavals create uncertainties that are at least as profound as ecological and livelihood uncertainties. Under conditions of social or political change, legal pluralism may in some cases increase uncertainty for local natural resource users—especially when statutory law does not recognize customary rights, and when those with political connections, those who have greater knowledge of state law, or those who have better access to the courts capture natural resources by using state law to override customary rights.[17] In other cases, however, legal pluralism can assist in coping with upheaval. In Haiti in the 1990s, for example, locally defined property rights to land, enforced by local recognition, offered peasants a basis for defense against a predatory state (Smucker, White, and Bannister 2000).[18]

Social and political change may bring profound shifts in decision-making rights and authority. For example, new political regimes can reshape property rights by changing laws or rules and by determining which laws or rules are to be applied in given instances; the rise and fall of communist or socialist regimes in Eastern Europe offer clear illustrations of the shifts in property rights that may accompany regime change. Similarly, in South Africa (since the fall of apartheid) and in Zimbabwe (since the 1990s), rights to land and water have been significantly restructured on the basis of state and customary laws.

---

[17] The use of state law to abrogate customary rights has contributed, for example, to the erosion of common property systems and the loss of livelihoods among indigenous populations. For further discussion of this topic, see Bruce (1999) and Boelens, Getches, and Guevara-Gill (2010).

[18] Locally defined property rights are rights defined by local communities within a given area; they may include customary law, elements of state law, and local versions or interpretations of customary and state law.

The conflict between the Nuba and Baggara in Sudan illustrates how a complex interplay of ecological, livelihood, and social and political uncertainties led to both conflict and cooperation (Suleiman 1999). Around 1800, the Baggara, Arab pastoralists who occupied the plains of Kordofan and Darfur, pushed the ethnic groups that are collectively referred to as the Nuba into the Nuba Mountains. Despite the fact that the Baggara conducted slave raids among the Nuba, the two groups engaged in trade and intermarriage.

In 1967 and 1968, the state allocated the best lands in the region to absentee landlords for mechanized monoculture; this decision coincided with a drought, during which the Baggara and their animals moved into the mountains. The combination of pressure from mechanized farming and the influx of Baggara severely undermined the Nuba's ability to exercise their customary land and water rights, which eventually contributed to the outbreak of violence between the Nuba and Baggara. During the civil war, which began in 1983, the Nuba and Baggara found themselves on opposing sides. The Nuba were sympathetic to the Sudanese People's Liberation Army, which was rebelling against the Sudanese government, while the Baggara, armed by the Khartoum government, began raiding Nuba villages.

As the conflict continued, the Nuba and the Baggara came to recognize their previous history of cooperation; they also realized that they had both suffered from the loss of lives and animals, and from the disruption of trade relations, which had formerly benefited both groups. Although the Nuba and the Baggara made several attempts to sign peace agreements, their efforts were sabotaged by the central government. In this case, legal pluralism was insufficient to accommodate the combination of ecological, livelihood, and sociopolitical shocks to which the two tribes had been subject; nevertheless, a tradition of interethnic cooperation provided more of a foundation for both groups to protect their property from outside incursions than if they had relied on the government's laws and policies alone.

LEGAL PLURALISM IN POST-CONFLICT SITUATIONS

In post-conflict situations, local customary law may be weakened or disrupted by the death or departure of knowledge bearers, but it still exists, and is likely to come into contact (and conflict) with the customs of immigrant groups. Meanwhile, sources of statutory or project law (for example, of the state, local and international NGOs, and development agencies) are also likely to have been weakened by conflict and may need time to restore their capacity, especially in rural areas.[19] Further complicating matters, peacekeepers or refugee agencies may bring in new rules that affect natural resource tenure—for example, by claiming land for camps and infrastructure or regulating the return of IDPs. (See sidebar on page 537 for additional land governance challenges in post-conflict situations.) All these events create legal uncertainties, but they also create opportunities for local residents, refugees, and IDPs.

[19] See Adhikari and Adhikari (2010).

Land governance challenges in post-conflict situations

Like many other post-conflict countries, Liberia has placed high priority on rebuilding the land tenure system. In summarizing the land tenure situation in his country, Amos Sawyer, chair of Liberia's Governance Reform Commission (now, the Governance Commission), listed characteristics that are applicable to many other post-conflict situations; among the challenges that Sawyer noted are the following (Sawyer 2009):

- Tenure insecurity.
- Illegal occupation and displacement.
- Land rights documentation that is either missing or in disarray.
- Organized fraud in the land sector, involving government surveyors, probate court officers, and managers of archives, among others.
- Malfunctioning land administration agencies.
- Judicial corruption and lack of capacity.
- Breakdown of nonjudicial mechanisms for the resolution of land disputes.
- Claims emanating from a prolonged history of intermittent conflict.
- Adverse possession (when a party acquires title to a property without compensation by holding the property for a specific period).
- Multiple sales of the same piece of land, resulting from unclear records.
- Boundary disputes between ethnic communities.

In a post-conflict situation, it is not enough to simply restore land records and a statutory tenure system; it is also necessary to recreate the institutional backing for property rights. In such situations, legal pluralism is often regarded as a complication to be overcome—specifically, by reestablishing and extending the arm of statutory law. But instead of trying to overcome legal pluralism through the assertion of statutory law, those who are trying to establish secure property rights in post-conflict situations can utilize legal pluralism, tapping into different sources of law and legitimacy.

Jon Unruh provides an example from post-war Mozambique, where massive displacement and resettlement disrupted many customary forms of property rights, but the state lacked the capacity to define or arbitrate property rights—especially as IDPs returned and attempted to reclaim land in areas that had been occupied by others. As a result, multiple rules of evidence were employed to settle conflicts, including social evidence (for example, testimony establishing a link between a person and a community), cultural-ecological evidence (for example, signs of human activity on the landscape, such as old planted trees), and physical evidence (for example, the ability of a claimant to identify features of the natural terrain, and thereby confirm familiarity with an area) (Unruh 2002).

In post-war Cambodia, as Ironside recounts, customary systems of resource management and dispute resolution used by the indigenous communities of the remote northeast had great potential value for peacebuilding because of their emphasis on restoring social harmony. Nevertheless, these customary institutions were not tapped as a resource for post-conflict reconstruction, even though the state lacked the capacity to manage natural resources in the area. Moreover, state policies, under which concessions for land and for timber clearing were allocated to outsiders for monoculture rubber plantations, undermined both statutory law, which recognized the collective land rights of indigenous groups, and the jurisdiction of customary authorities. As a result, village elders were unable to resolve land and forest disputes involving powerful outsiders, including government officials, soldiers, and businesspeople (Ironside 2010).

Ironside argues that there is still an opportunity—even a need—to build on customary authority as a first line of defense against deforestation, incorporating

traditional conflict resolution processes into peace tables: informal processes through which all stakeholders are brought together to discuss conflicts (Ironside 2010). State decentralization policies and international agreements to support community conservation areas provide a basis for the government to engage with customary systems, and thereby foster more sustainable production systems in Cambodia.

The case of Timor-Leste demonstrates that where the state is sympathetic, customary systems may emerge even stronger after conflict (Miyazawa 2013). During the conflict between the Indonesian forces and East Timorese resistance (1975–1999), forests were cleared to remove hiding places for opposition forces, disrupting ecological systems. Social systems were disrupted when the Indonesian military forced migrations from ancestral homelands to areas that were more easily controlled by government forces. The traditional leaders who had regulated tree felling were replaced by forestry officials, who allowed tree felling.

After the conflict, the newly established government lacked the capacity to regulate natural resource use and restore pre-war environmental conditions. The government chose to restore local control, explicitly recognizing traditional leaders and customary practices as governing the use of natural resources, and even paying for the ceremonial expenses that were necessary to witness and reinforce prohibitions on tree felling and other environmentally damaging practices (Miyazawa 2013). By fostering interplay between statutory and customary law, the government was able to tap into local knowledge of natural resources and local capacity to enforce rules. Statutory and customary law also reinforced each other, particularly during the period when both the central government and the customary authorities sought to establish their legitimacy in the newly independent state. After state agents attended and participated in customary ceremonies, both the state and the customary authorities gained prestige in the eyes of the populace, and there were clear improvements in environmental conditions.

Jay R. Adhikari and Bhim Adhikari describe a case in which project law provided stability during the Maoist insurgency in Nepal (1996–2006), when the actions of both the central government and the Maoist rebels caused widespread damage to forests (Adhikari and Adhikari 2010). In areas where community forest user groups (CFUGs) had been established before the insurgency, local communities were better able to maintain forest cover, which helped to support both livelihoods and environmental conditions, and in some cases even permitted investment in community infrastructure. Adhikari and Adhikari argue that decentralized natural resource management authority not only taps into local social and ecological knowledge and interests, but also fosters resilient and adaptive local institutions that have the capacity to cope even during armed conflict. Although the Nepal example reinforces the importance of working with local institutions, CFUGs are not customary in origin, but were deliberately created by a project—not overnight, but through constructive engagement over time.[20]

[20] For more analysis of CFUGs and peacebuilding in Nepal, see Sanio and Chapagain (2012).

In the most problematic of the cases discussed in this chapter, Sudan and Cambodia, the government was attempting to introduce monoculture of crops or trees and was also asserting the dominance of statutory property rights, whereas the relatively more successful cases of Timor-Leste and Nepal involved forestry programs that incorporated diverse plant species. The difference in governmental approach may reflect the extent to which each of the governments was, in James Scott's words, "seeing like a state"—that is, seeking to impose order and reshape society or the environment according to a rational design—with respect to both production and legal systems (Scott 1998). The more favorable outcomes for both livelihoods and the environment, as well as dignity, acknowledged biological as well as legal or institutional diversity.

None of what has been said implies that customary law and local authorities are unproblematic, or that the interests associated with differing legal systems necessarily converge. Unruh's analysis of post-war Sierra Leone, for example, highlights the tensions between the interests, on the one hand, of customary authorities, "strangers" (immigrants), and previously marginalized groups, and on the other, the state, donor nations, and investors (Unruh 2008). In an effort to bolster their positions, customary authorities appealed to customary law, immigrants and marginalized groups appealed to the project law of NGOs and development agencies, and the state relied on statutory law. In this case, a view of rights as bundles that could be separated into smaller bundles—which could, in turn, be divided into individual sticks—made it possible to accommodate the interests of the different groups: statutory law reinforced the inalienability of rights to land for landowning lineages; this increased the security of customary authorities' tenure, but also allowed for innovative forms of conveyance, which permitted various use and management rights to be transferred both within and outside the lineage (without transferring full ownership), rendering more land available for immigrants, marginalized groups, and investors.

In many post-conflict situations, new property rights arrangements are required to redress historic inequities and avoid the recurrence of conflict. In Nepal, areas that had established CFUGs may have experienced less disruption of livelihoods or damage to natural resources because many CFUGs had already addressed some inequities by providing households that were disadvantaged by caste and landlessness with proportionately greater shares of forest products (Adhikari and Adhikari 2010). Inequities exist not only along caste or ethnic lines but also along gender lines, even within households: as noted earlier, many customary systems provide property rights to women only through their relationship to men—a particular problem in post-conflict situations, where women heads of households need tenure security to obtain access to the land and water that are essential for survival and the restoration of livelihoods. Statutory reforms, such as the provisions for women's property rights under Mozambique's Land Law, are an attempt to address such issues, but legal reform does not necessarily change practice. Considerable effort is required to publicize and implement such changes; to achieve broad acceptance of legal reforms, it may be necessary for the government to work with customary authorities and to foster an interplay between differing legal systems.

CONCLUSION

Property rights registries and the state capacity to enforce property rights are often among the casualties of conflict. Customary systems may also be disrupted by the death or displacement of large numbers of people. So that post-conflict countries can move forward, governments and donor nations and agencies often assign high priority to reestablishing tenure security. But instead of trying to create a statutory property rights system that covers the whole country, it is more realistic to identify the various sources of law and to find ways of working through multiple institutions. At the same time, it is important to recognize that attention to local law alone is not sufficient. Local laws are not necessarily more equitable than those promulgated by the state; nor should one assume that local groups have sufficient technical knowledge to manage their natural resources.

In many cases, customary users have lost access to natural resources when outsiders, or those with greater access to courts or government agencies, have used statutory law to override property rights that were based on other legal frameworks. On the other hand, external laws (such as those promulgated by the government or by newly developed organizations) can strengthen customary property rights; such laws have been used, for example, by indigenous or disadvantaged groups to increase their bargaining power in negotiations for natural resources (F. von Benda-Beckmann and van der Velde 1992). However, for such approaches to be effective, new laws designed to strengthen the rights of women, indigenous peoples, or other marginalized groups must be accompanied by programs to create broad awareness of the legislation, to ensure that the laws will be cited and accepted in the negotiation process.

For a variety of reasons, both pragmatic and ideological, donor nations and agencies can play an important role in encouraging property rights reforms, both in law and implementation. It is crucial for development partners to be aware of how their interventions play out against the complex background of existing laws and institutions. Although conflict may seem to have broken down both the power of customary authorities and the government apparatus, the slate is not blank. When outsiders attempt to import new statutory legislation or project law without understanding the local context, the new laws often fail to take root, or may have unanticipated negative effects. Even in the successful case of CFUGs in Nepal, the groups were built up over time, through pilot efforts, gradual replication of the institutional innovation, and considerable adaptation to local conditions. Given the contingent nature of legal pluralism, there are no blanket prescriptions—except the need for careful analysis of existing situations.

The establishment of peace in post-conflict countries often involves international judicial processes. Recognition of legal pluralism does not restrict such changes, but it does reveal their limitations: simply changing statutory law or introducing new project law, for example, does not automatically change rights or behavior on the ground. Implementation capacity and enforcement are also needed. The more new laws diverge from customary rules and practices, the greater the effort that may be needed to promote the new laws.

Opportunities for interplay among legal systems create dynamism in property rights. Dialogue between different systems of property rights is especially important with respect to critical natural resources (such as the forests of Cambodia, Nepal, and Timor-Leste), where it is necessary to tap into local ecological knowledge and natural resource–monitoring efforts in order to prevent further destruction of the natural resource base. Where post-conflict governments (and donor nations and agencies) genuinely seek to rebuild natural capital and the livelihoods of natural resource–dependent rural communities, constructive engagement with different types of law, and their underlying authorities, provides a resource. In the case of predatory governments, legal pluralism provides a resource for marginalized communities, who can appeal to customary, religious, project, or international law in order to protect their rights to use and manage natural resources.

In general, the prevalence of legal pluralism calls for greater humility in policies and programs. There is no such thing as getting the "right" law or the "right" institution to allocate or manage natural resources: rights to resources are often established through messy, dynamic processes. Yet these processes provide the scope to respond to the complex uncertainties that natural resource users face as they rebuild their lives and livelihoods after conflict.

REFERENCES

Adhikari, J. R., and B. Adhikari. 2010. Political conflicts and community forestry: Understanding the impact of the decade-long armed conflicts on environment and livelihood security in rural Nepal. Paper presented at CAPRi international workshop "Collective Action, Property Rights, and Conflict in Natural Resources Management," Siem Reap, Cambodia, June 28–July 1. www.forestrynepal.org/publications/article/4720.

Benjaminsen, T. A., S. Holden, C. Lund, and E. Sjaastad. 2008. Formalisation of land rights: Some empirical evidence from Mali, Niger and South Africa. *Land Use Policy* 26 (2008): 28–35.

Boelens, R., D. Getches, and A. Guevara-Gill. 2010. *Out of the mainstream: Water rights, politics and identity*. London: Earthscan.

Bruce, J. W. 1999. Legal basis for management of forest resources as common property. Community Forestry Note No. 14. Rome: Food and Agriculture Organization of the United Nations.

de Sousa Santos, B. 1987. Law: A map of misreading; Toward a post-modern conception of law. *Journal of Law and Society* 14 (3): 279–302.

Fuller, C. 1994. Legal anthropology: Legal pluralism and legal thought. *Anthropology Today* 10 (3): 9–13.

Griffiths, A. 2002. Legal pluralism. In *An introduction to law and social theory*, ed. R. Banakar and M. Travers. Oxford, UK: Hart Publishing.

Griffiths, J. 1986. What is legal pluralism? *Journal of Legal Pluralism* 24:1–50.

Guillet, D. 1998. Rethinking legal pluralism: Local law and state law in the evolution of water property rights in northwestern Spain. *Comparative Studies in Society and History* 40 (1): 42–70.

Hilhorst, T. 2000. Women's land rights: Current developments in sub-Saharan Africa. In *Evolving land rights, policy and tenure in Africa*, ed. C. Toulmin and J. Quan. London:

United Kingdom Department for International Development / International Institute for Environment and Development / Natural Resources Institute.

Ironside, J. 2010. The outbreak of peace: Communal land management and traditional governance in a remote Cambodian province. Paper presented at CAPRi international workshop "Collective Action, Property Rights, and Conflict in Natural Resources Management," Siem Reap, Cambodia, June 28–July 1. www.capri.cgiar.org/pdf/CAPRi_Conflict_Ironside.pdf.

Lavigne Delville, P. 2000. Harmonising formal law and customary land rights in French-speaking West Africa. In *Evolving land rights, policy and tenure in Africa*, ed. C. Toulmin and J. Quan. London: United Kingdom Department for International Development / International Institute for Environment and Development / Natural Resources Institute.

Mearns, R. 1996. Community, collective action and common grazing: The case of post-socialist Mongolia. *Journal of Development Studies* 32 (3): 297–339.

Mehta, L., M. Leach, P. Newell, I. Scoones, K. Sivaramakrishnan, and S.-A. Way. 2000. Exploring understandings of institutions and uncertainty: New directions in natural resource management. Institute of Development Studies Discussion Paper No. 372. Brighton, UK: Institute of Development Studies.

Meinzen-Dick, R., and E. Mwangi. 2008. Cutting the web of interests: Pitfalls of formalizing property rights. *Land Use Policy* 26 (1): 36–43.

Meinzen-Dick, R. S., and R. Pradhan. 2002. Legal pluralism and dynamic property rights. CAPRi Working Paper No. 22. Washington, D.C.: International Food Policy Research Institute. www.capri.cgiar.org/pdf/capriwp22.pdf.

Merry, S. E. 1988. Legal pluralism. *Law and Society Review* 22 (5): 869–896.

Miyazawa, N. 2013. Customary law and community-based natural resource management in post-conflict Timor-Leste. In *Land and post-conflict peacebuilding*, ed. J. Unruh and R. C. Williams. London: Earthscan.

Ngaido, T., and M. Kirk. 2000. Collective action, property rights, and devolution of rangeland management: Selected examples from Africa and Asia. In *Collective action, property rights, and devolution of natural resource management: Exchange of knowledge and implications for policy*, ed. R. S. Meinzen-Dick, A. Knox, and M. di Gregorio. Feldafing, Germany: Zentralstelle für Ernährung und Landwirtschaft.

North, D. C. 1990. *Institutions, institutional change and economic performance*. New York: Cambridge University Press.

Pradhan, R., ed. 2003. Legal pluralism and unofficial law in social, economic and political development. *Papers of the XIIIth International Congress, Chiang Mai, Thailand*. Three volumes. Kathmandu, Nepal: International Centre for Study of Nature, Environment, and Culture.

Pradhan, R., and U. Pradhan. 2000. Negotiating access and rights: A case study of disputes over rights to an irrigation water source in Nepal. In *Negotiating water rights*, ed. B. Bruns and R. S. Meinzen-Dick. New Delhi, India: Vistaar; London: Intermediate Technology Press.

Pradhan, R., F. von Benda-Beckmann, and K. von Benda-Beckmann, eds. 2000. *Water, land and law: Changing rights to land and water in Nepal*. Kathmandu, Nepal: Freedeal; Wageningen, Netherlands: Wageningen Agriculture University; Rotterdam, Netherlands: Erasmus University Rotterdam.

Pradhan, R., F. von Benda-Beckmann, K. von Benda-Beckmann, H. L. J. Spiertz, S. S. Khadka, and K. Azharul Haq, eds. 1997. *Water rights, conflict and policy*. Colombo, Sri Lanka: International Irrigation Management Institute.

Roberts, S. 1998. Against legal pluralism: Some reflections on the contemporary enlargement of the legal domain. *Journal of Legal Pluralism* 42:95–106.

Sanio, T., and B. Chapagain. 2012. Forest user groups and peacebuilding in Nepal. In *High-value natural resources and post-conflict peacebuilding*, ed. P. Lujala and S. A. Rustad. London: Earthscan.

Sawyer, A. 2009. Land governance challenges: The case of Liberia. Presentation at the World Bank land governance conference, Washington, D.C., 9–10 March.

Scott, J. C. 1976. *The moral economy of the peasant: Rebellion and subsistence in Southeast Asia*. New Haven, CT: Yale University Press.

———. 1998. *Seeing like a state: How certain schemes to improve the human condition have failed*. New Haven, CT: Yale University Press.

Smucker, G. R., T. A. White, and M. Bannister. 2000. Land tenure and the adoption of agricultural technology in Haiti. CAPRi Working Paper No. 6. Washington, D.C.: International Food Policy Research Institute.

Spiertz, H. L. J. 2000. Water rights and legal pluralism: Some basics of a legal anthropological approach. In *Negotiating water rights*, ed. B. R. Bruns and R. S. Meinzen-Dick. London: Intermediate Technology Publications.

Spiertz, J., and M. G. Wiber, eds. 1996. *The role of law in natural resource management*. The Hague, Netherlands: VUGA Uitgeverij.

Suleiman, M. 1999. The Nuba Mountains of Sudan: Resource access, violent conflict, and identity. In *Cultivating peace: Conflict and collaboration in natural resource management*, ed. D. Buckles. Ottawa, Canada: International Development Research Centre.

Sutawan, N. 2000. Negotiation of water allocation among irrigators' associations in Bali, Indonesia. In *Negotiating water rights*, ed. B. R. Bruns and R. S. Meinzen-Dick. London: Intermediate Technology Publications.

Tamanaha, B. Z. 1993. The folly of the "social scientific" concept of legal pluralism. *Journal of Law and Society* 27:192–217.

UNGA (United Nations General Assembly). 2007. United Nations declaration on the rights of indigenous peoples. A/RES/61/295. October. www.un.org/Docs/journal/asp/ws.asp?m=A/RES/61/295.

Unruh, J. 2002. Land dispute resolution in Mozambique: Evidence and institutions of agroforestry technology adoption. In *Innovation in natural resource management: The role of property rights and collective action in developing countries,* ed. R. S. Meinzen-Dick, A. Knox, F. Place, and B. M. Swallow. Baltimore, MD: Johns Hopkins University Press / International Food Policy Research Institute.

———. 2008. Land policy reform, customary rule of law and the peace process in Sierra Leone. *African Journal of Legal Studies* 2:94–117.

Uphoff, N. 1993. Grassroots organizations and NGOs in rural development: Opportunities with diminishing states and expanding markets. *World Development* 21 (4): 607–622.

von Benda-Beckmann, F. 2002. Who is afraid of legal pluralism? *Journal of Legal Pluralism* 47:37–82.

von Benda-Beckmann, F., and M. van der Velde, eds. 1992. *Law as a resource in agrarian struggles*. Wageningen Sociolgische Studies No. 33. Wageningen, Netherlands: Poduc.

von Benda-Beckmann, F., K. von Benda-Beckmann, and H. L. J. Spiertz. 1996. Water rights and water policy. In *The role of law in natural resource management*, ed. J. Spiertz and M. G. Wiber. The Hague, Netherlands: VUGA Uitgeverij.

———. 1997. Local law and customary practices in the study of water rights. In *Water rights, conflict and policy*, ed. R. Pradhan, F. von Benda-Beckmann, K. von Benda-Beckmann, H. L. J. Spiertz, S. S. Khadka, and K. Azharul Haq. Colombo, Sri Lanka: International Irrigation Management Institute.

von Benda-Beckmann, K. 2001. Legal pluralism. *Tai Culture* 6:18–40.

Weilenmann, M. 2005. Project law: Normative orders of bilateral development cooperation and social change: A case study from the German Agency for Technical Cooperation. In *Mobile people, mobile law: Expanding legal relations in a contracting world*, ed. F. von Benda-Beckmann, K. von Benda-Beckmann, and A. Griffiths. Aldershot, UK: Ashgate.

Wiber, M. G. 1991. Levels of property rights, levels of law: A case study from the northern Philippines. *Man*, n.s., 26 (3): 469–492.

Woodman, G. R. 1996. Legal pluralism and the search for justice. *Journal of African Law* 40 (2): 152–167.

———. 1998. Ideological combat and social observation: Recent debate about legal pluralism. *Journal of Legal Pluralism* 42:21–59.