Land Rights for African Development
From Knowledge to Action

CAPRi

CGIAR System-wide Program on
**COLLECTIVE ACTION AND
PROPERTY RIGHTS**

**UN
D P**

International
Land Coalition

Contents

Introduction

Esther Mwangi and Eric Patrick

The UNDP's Drylands Development Center, the International Land Coalition (ILC), and the Consultative Group on International Agricultural Research (CGIAR) systemwide program on Collective Action and Property Rights (CAPRi) began formal collaboration in 2004. All three organizations, i.e UNDP (a global development policy implementation organization), ILC (a global advocate on land issues to increase cooperation between civil-society, governments and intergovernmental organizations) and CAPRi (a CGIAR systemwide policy research program) share the conviction that land tenure can be a mechanism through which the goals of gender equity, poverty reduction, efficiency and sustainable resource management can be achieved.
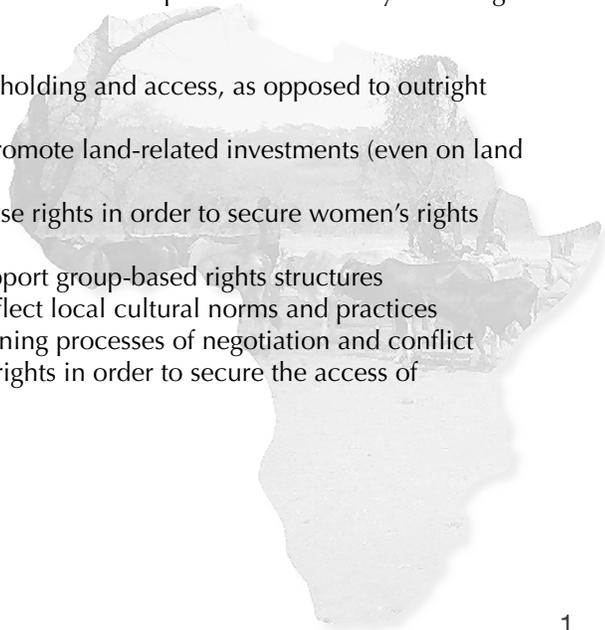
All three organizations also appreciate that the complexity of tenure systems, in Africa and elsewhere, requires complex policy solutions, which can be tailored to respond to cultural, political and ecological demands at multiple levels. Common property arrangements in particular continue to be significant to the lives and livelihoods of many poor, whose land rights are increasingly threatened. UNDPs DDC, ILC and CAPRi focus their joint efforts and comparative advantages in bringing these issues to policy at multiple levels and to engender the participation of multiple stakeholders to foster meaningful policy change.

From October 31st to November 3rd, 2005 UNDPs Drylands Development Center and the International Land Coalition hosted a workshop: *"Land Rights for African Development: From Knowledge to Action."* This workshop addressed key land tenure issues in Africa that influence food security, environmental sustainability, agricultural intensification, conflict, peace building and broader rural development. It brought together a total of about sixty five practitioners, legal experts, policy makers, development partners and civil society representatives from different parts of the world. This collection of briefs summarizes select papers presented at this workshop.

A wide range of issues are captured and reiterated in the 12 briefs contained in this collection. These include: the prevalence and importance of customary tenure; the prevalence and importance of common property arrangements; constraints to women's access under both customary and statutory tenure; the need to secure common property and other forms of tenure; and the importance of broad based participation to secure broad consensus among multiple actors in order to enhance the efficiency, equity and sustainability objectives of land tenure reforms.

The briefs also reflect on the innovations necessary for securing tenure for the poor under a variety of settings. These innovations include:

- adjusting received law to customary norms and rules of land holding and access, as opposed to outright replacing customary tenure
- altering lending rules by banks and financial institutions to promote land-related investments (even on land regulated by customary and/or religious law)
- de-emphasizing the notion of ownership and refocusing on use rights in order to secure women's rights and access
- restructuring conventional land administration systems to support group-based rights structures
- encouraging decentralized land management systems that reflect local cultural norms and practices
- in situations of multiple, overlapping resource use, strengthening processes of negotiation and conflict resolution as opposed to a generic concern with substantive rights in order to secure the access of permanent and transitory resource users.

A ten-step procedure is also suggested (Alden Wily), which would enable communities to restore their group rights and practices to create and control their own tenure norms. These innovations, while desirable, are also risky: corruption, elite capture, exclusion of 'non-members' and lack of capacities have been hurdles faced by communities.

The background papers and the issues they raised formed the basis of rich discussions by workshop participants. Workshop outcomes are a general restatement of the content of the background papers and presentations. There was substantial agreement on the following:

• Land tenure in Africa is complex. The existence of customary, religious and statutory arrangements (i.e. legal pluralism) is a critical, defining feature of African land tenure. Land tenure reform must accommodate this complexity rather than replace it.
• The pit-falls of formalization should be avoided, and in particular tenure codification should be delinked from collateralization. Cheaper ways of registering rights than the cadastre are needed.
• In order to effectively address land tenure security, power issues at local and national levels must be addressed. There is a need for a multi-level, multiple actor approach. Land tenure reform is an urgent governance issue that can best be addressed by all development partners in collaboration.
• The implementation and impacts of land tenure reforms should be evaluated at multiple governance levels in order to identify constraints, craft solutions, and to ensure that reforms are securing the rights and livelihoods of women, the poor and marginalized groups.
• New innovations are needed over and above tinkering with existing possibilities. For instance, the development of centers for legal advice and assistance for both rural and urban dwellers may enable the poor to claim their rights and even challenge abuses of power.

The entire set of panel presentations, background papers and discussion summaries is available at the following website: http://www.undp.org/drylands/lt-workshop-11-05.htm

Esther Mwangi (e.mwangi@cgiar.org)
Esther Mwangi is a Postdoctoral Fellow with the CAPRi research program

Eric Patrick (eric.patrick@undp.org)
Eric Patrick is a Policy Specialist at UNDPs Dryland Development Center

Land Tenure, Land Reform, and the Management of Land and Natural Resources in Africa

Joan Kagwanja

Examining benefits and costs of alternative land rights regimes is vital to a successful land rights reform agenda.

Introduction

Land and land resources in Africa are increasingly governed by modern systems of tenure and less by customary systems. Unfortunately, changing land use and land ownership patterns have not always been accompanied by appropriate reforms in policies, laws, and institutions. Africa must ensure that the current wave of land reform initiatives, which often coincide with political and economic reforms emanating from democratization, help to establish needed changes in land rights as well as legal and institutional frameworks.

Issues Regarding Land Tenure and the Management of Land Resources

Agriculture and food security: African land use regulation has long tended to protect large-scale farms that produce agricultural exports at the expense of small-scale customary lands used mainly for food crops. Unequal land distribution hampers agricultural development by limiting land access to many needy Africans or relegating them to marginal lands. Constraints relating to insecure land tenure and the nontransferable nature of land continue to discourage Africans from making needed agricultural investments.

Common property resource management: Pastoral resources are predominantly common property resources that are by nature difficult to partition. While in some cases community institutions and conventions govern such resources, in others "open access" can lead to overuse and degradation. Governments face the choice of individualizing the resources or strengthening community institutions to better govern them. Though simpler, individualization excludes many—especially the poor. Community management systems traditionally protect access rights for the poor, women, pastoralists, and others. Because common property management is more complex, it is important that the state empower communities through legal provisions, institutional arrangements, and capacity building for decisionmaking and enforcement. Also important is ensuring that indigenous systems—including customary tenure—that contribute to sustainable use of resources are recognized.

Gender relations: Not only do women produce and prepare food, they also transmit knowledge and skills relating to food, agriculture, and natural resource management. While often regarded as the keepers of the environment, under many land tenure systems women do not hold primary rights to land but instead gain access through male relatives. Security of tenure in private, communal, and other forms of land ownership can encourage women to invest in the land, adopt sustainable farming practices, and better take care of other resources.

Natural resource conflicts: Activity- and actor-led land and natural resource conflicts are a cause for concern

Disputes mostly center on the demarcation, ownership, and inheritance of land; or from the weakening of customarily held rights of pastoralists. The causes include unsuitable land legislation, especially where there is no comprehensive land policy or ambiguous laws do not address overlapping rights and claims to land. Dysfunctional and inaccessible land administration also contribute to disputes, as do land grabbing and land invasions. In addition, disputes are fueled by the pressure of increasing population.

HIV/AIDS: Families affected by HIV/AIDS may, in extreme cases, be forced from their lands, such as when widows are prevented from controlling land left to them by their husbands. In common property resources, where the ability to use the resources is vital to maintaining rights to resources, HIV/AIDS can have detrimental effects on land rights as affected households are excluded from access and control. For those who have secure rights, AIDS can render them unable to use the land or force them into distress land sales. Land reforms must consider the effects of the pandemic on families, households, and communities.

Current Reforms Geared toward Alternative Land Rights

Most land reform agendas are either driven by efficiency or equity objectives, or both. Understanding the dynamics associated with different types of land rights is crucial to any land reform efforts.

Customary land rights offer access to land and security of tenure to many poor households. However, because they provide limited access to formal credit and input markets and to sales outside the group, opportunities for productive exchange and access to credit are limited. In a shift toward titling, *registered customary land rights* boost the possibilities for land transactions in both formal and informal markets and for access to formal credit institutions.

> Customary land rights offer access to land and security of tenure to many poor households. However, because they provide limited access to formal credit and input markets and to sales outside the group, opportunities for productive exchange and access to credit are limited.

Once advocated as the optimal solution for granting tenure security and land access, *land titles* often involve high transaction costs. While titling may benefit farmers of high-value commodities, it is usually impractical for poor resource farmers. In addition, the links between land titling and tenure security, credit availability, and investments have not been well established in Africa.

Redistributive land rights aim to reduce inequalities in landowning emanating from previous imbalances. As confiscated land initially becomes state land, redistributive rights provide limited opportunities for sale and rental. In some areas, redistributive rights have proved to fulfill both efficiency and equity objectives by providing more land access to women and younger, more productive households. Recent reforms in southern Africa encouraging *market-based land polices* were aimed at facilitating equity and efficiency while avoiding the negative effects of land confiscation. Unfortunately, there is evidence that white farmers acquired more land under these policies than disadvantaged black farmers. *Subsidized market-based reforms* provide land right holders with financial support to pay for part of the cost of acquiring land. If well targeted, such programs could benefit women and poor people.

A Reform Agenda

Getting Africa on a path of land reform that facilitates efficient, equitable, sustainable use of its land and natural resources requires understanding the intended beneficiaries of land reform programs and their environment. Examining benefits and costs of alternative land rights regimes is vital to a successful land rights reform agenda. Reforms should address all processes, including the capability of governments to undertake the necessary reforms.

- *Reforming customary rights and local institutions:* Simple inexpensive registration programs for customary rights can help these rights become legally recognized. The aim is to improve efficiency by enhancing tenure security and land transfer, and facilitating access to credit and other inputs for rights holders.

- *Improving land rights gained from redistribution:* The majority of current land redistribution programs result in restricted land rights with rights holders denied the right to sell land. Although it is important to ensure that mass land sales do not follow such programs, it is equally important to recognize the need to allow these rights to evolve.

- *Addressing constraints in market-based reform programs:* The valuation system should be reformed by making a distinction between improved and nonimproved lands. This would reduce the price of unimproved lands and make them more affordable to governments to acquire for redistribution or to poor farmers who wish to buy land.

> The majority of current land redistribution programs result in restricted land rights with rights holders denied the right to sell land.

- *Decentralized land administration:* Reforms geared toward elected authority for local land administration would increase responsiveness to local interests and needs. The government, however, must provide the broad framework and principles, rules of tenure and access, and ensure transparency and accountability of these institutions.

- *Enhancing mechanisms for land and natural resource dispute resolution:* The effectiveness of any dispute resolution mechanism depends on the ability to anticipate conflict. This calls for early warning and strategic planning. Short-term capacity-building efforts can strengthen institutions that handle refugee repatriation and integration. The ability of internally displaced persons to participate in dispute resolution should also be strengthened. Resettlement programs should be reviewed with the aim of reducing conflicts among different land uses. Programs for civic education aimed at enhancing peaceful coexistence could be useful. Institutional, legal, and policy responses to conflict should aim for comprehensive programs that work through well-established forms of redress. Improved land registration and affordable mechanisms for demarcating boundaries are essential, as are law reforms geared toward recognizing rights of communities to natural resources. Finally, trends toward improved governance are a welcome sign that inefficiency and corruption in land administration will be addressed.

Further Reading

Economic Commission for Africa (2004). Land Tenure Systems and their Impacts on Food Security and Sustainable Development in Africa. Addis Ababa, Economic Commission for Africa. http://www.uneca.org/ eca_resources/Publications/sdd/Land_Tenure_systems.pdf
Economic Commission for Africa (2004). Land Tenure, Land Reform and the Management of Land and Natural Resources in Sustainable Development Report on Africa. Forthcoming in 2005.
Ngaido T (2005). Reforming Land Rights in Africa. 2020 Africa Conference Brief 15, Washington D.C: IFPRI. http://www.ifpri.org/pubs/ib/ib31.pdf

Joan Kagwanja (*jkagwanj@uneca.org*)
Joan Kagwanja is an Economic Affairs Officer at the UN Economic Commission for Africa

Legal Dualism and Land Policy in Eastern and Southern Africa

Martin Adams and Stephen Turner

Tenure dualism needs to be recognized as a resource
—not an obstacle—in the changing livelihoods of the poor.

The Historical Background of Legal Dualism

Colonial regimes imported systems of common and statute law for their own purposes, operating them alongside existing systems of customary law. Customary law prevailed in some areas, while statute law and imported common law prevailed in others. This legal and tenure dualism tended to reinforce settler interests, simplify and strengthen the roles of traditional authorities, and suppress women's land rights. Since independence, different countries have pursued different policies, though the relegation of customary law to second-class status was usually maintained. Often, customary land administration arrangements have decayed without being replaced by satisfactory statutory arrangements.

> Colonial regimes imported systems of common and statute law for their own purposes, operating them alongside existing systems of customary law.

Initially, many newly independent governments believed that measures to nationalise land would sweep away the inequities of tenure dualism and create unified systems of land rights that would bring prosperity to peasants and the urban masses alike. A number of countries sought to create a single legal system that made statute and imported common law paramount. Others attempted to restrict tenure dualism through statist policies of nationalization and the conversion of freehold to leasehold.

But customary law and tenure proved tenacious, and few early reforms aimed at strengthening state control over customary land proved effective or durable. Though customary law may hardly be acknowledged in national legislation, it often continues to dominate real life, especially in the rural sector and among the poor and underprivileged.

A focus on the specifically legal aspects of the gap between theory and practice is not the most helpful way forward. It is more useful to ask what societies can do to bridge the divide between land tenure systems based on the imported concept of absolute private ownership and those based on more complex indigenous frameworks of nested individual and group rights.

Registration and Titling Programs

More gradualist approaches, some initiated in the colonial period, have focused on adjudication and titling as ways to extend the perceived benefits of secure individual tenure to rural people living under customary tenure regimes. However, registration and titling programs have not automatically unlocked economic growth. Instead, they have often disempowered vulnerable people, embroiled rural people and bureacrats in innumerable disputes, and tied down substantial state resources. Statutory registration of title has also served to weaken the land rights of women and tenants and downplay the status and role of women as users of land. Unmarried women, divorcees, and widows, who were ensured at least some user rights under traditional tenure systems, were particularly vulnerable. Further, land registration, designed for a sedentary mode of agriculture, marginalized pastoralists, who lost access to key land resources during droughts. After decades

of effort, titling approaches have covered only limited areas, adding evidence to the global lesson that rural titling often causes more problems than it solves.

Primary and secondary land rights communally held by poor households in sub-Saharan Africa are not well suited to formal recording and registration and the issuance of negotiable bonds. In any case, the idea that formalizing property rights would increase the supply of credit is unrealistic, judging from the failure of the land titling program in Kenya to unlock farm loans. Apart from the absence of title to mortgageable property, there are many other constraints to the supply of credit to poor farmers in remote rural areas. In addition, an efficient land market requires an adequately resourced and managed land administration, one free from corruption and rent seeking. Though an efficient land administration is not beyond the bounds of possibility in Africa, it seems a long way down the road, principally because governments do not have the administrative and technical capacity to unscramble the legal framework and 40 years of neglect of incremental reform.

What Is Needed

Rapidly growing urban populations are particularly vulnerable to land tenure and administration systems that still reflect the tenure dualism introduced by colonial regimes. In these areas, land reform may be required to regularize extralegal tenure and facilitate development. Governments may be reluctant to legitimize such extralegal practice, but they need to accept the continuing limitations of state policy and statute law and the ongoing significance of customary law and tenure.

> Rapidly growing urban populations are particularly vulnerable to land tenure and administration systems that reflect ineffective governmental attempts to address tenure dualism.

In an increasing number of countries, land policy proposals support the idea of legally strengthening the powers of local communities on customary land to manage their own land rights. However, decentralization of decision making to the local level is not a panacea. What is needed in the necessary legal reappraisal is to catch up with the tenure approaches and mechanisms that citizens have themselves devised in the face of legislative and institutional inertia or indifference.

More realistic policy approaches to tenure dualism are being gradually developed in eastern and southern Africa. Some countries have begun to embrace tenure dualism in imaginative ways, adjusting to and embracing customary tenure regimes rather then seeking to overthrow them. These evolutionary approaches recognize that statute law should allow customary law and tenure to continue in the ordinary lives of land users until they have specific reasons to convert their titles to new formats. When such need arises and is identified, the legal and institutional apparatus should be ready with appropriate forms of title and necessary support systems and procedures.

These proactive approaches to tenure dualism are more challenging than their less imaginative predecessors. They require the building of bridges between tenure regimes and legal systems, and they demand realism from policymakers and legislators about the capacity of African states to influence the evolution of tenure and administer their citizens' land affairs. They also require governments to recognize the continuing limitations of state policy and statute law and the ongoing significance of customary law and tenure in the land rights and transactions of their citizens. In so doing, African governments are invited to bring the social and institutional resources of customary systems to modern processes of national development.

Rather than changing daily practice on the ground, the formal character and structure of land rights must be altered to facilitate an evolutionary conversion. This means that clear and secure paths to more modern formats and modes must be provided. Though land tenure and administration may be integrated in a single statute law, tenure dualism needs to be recognized as a resource—not an obstacle—in the changing livelihoods of the poor.

Further reading:

Elizabeth Daley and Mary Hobley, 2005. Land: Changing Contexts, Changing Relationships, Changing Rights.
*http://www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/downloads/land_changing_contexts_relationships_*
rights.rtf
Martin Adams, Faustin Kalabamu, and Richard White. 2003. Land Tenure Policy and Practice in Botswana - Governance
Lessons for Southern Africa. Austrian Journal of Development Studies XIX (1): 55-74.
http://www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/downloads/botsless.rtf
Christopher Tanner. 2002. Law-Making in an African Context: The 1997 Mozambican Land Law. FAO Legal Papers Online
#26, March 2002. http://www.fao.org/Legal//Prs-OL/lpo26.pdf

Martin Adams *(martin.adams@get2net.dk)*
Martin Adams is Principal Consultant with Mokoro Consulting

Stephen D. Turner *(sdturner@iafrica.com)*
Stephen Turner is a Senior Consultant at the Center for International Cooperation

Legal Pluralism as a Policy Option: Is it Desirable? Is it Doable?

Patrick McAuslan

The use of land as security and an engine of wealth creation in Africa will continue to be problematic until more creative mortgage systems and laws are applied.

Essential Preconditions for Workable Pluralism

- There is one legal system with two coequal sets of legal rules—received law and customary law—and the judicial system is empowered to fuse the systems over the long term. This equality means that communal and collective rights in land are recognized and protected, and people can choose one equal tenure and legal system over another. There is also local-level land administration and registration, where all customary interests are recorded and protected in land adjudication and customary as well as statutory alternative dispute resolution processes can be used. In addition, pluralist tenure and land law extend to urban areas, along with land regularization schemes and urban land adjudication.
- Legal systems are in concert with basic national goals, and all legal rules are adapted to meet constitutional (and perhaps international) norms relating to gender equality, administrative justice, and protection of private and communal property rights.
- Participatory community planning replaces top-down master planning. Formal market institutions are on board, and officials are advisers and facilitators of lay people who make the decisions. The powers and duties of public officials are delineated, regulated, and exercised transparently and accountably. There are clear rules for actions and transactions, as well as mechanisms for enforcement.

Pluralist Approaches, Now and in Future

Though African countries are increasingly adopting a pluralist approach and have ceased attempts to abolish customary tenure, governments, international financial institutions, and the private sector outside Africa are reluctant to try to work with or even to begin to understand its strengths. But seminal judicial decisions in Australia, Canada, and South Africa have recognized that the original, customary rights of indigenous inhabitants do not disappear because no notice is taken of them by the government of the day. These customary rights are only extinguished by clear legal or factual governmental acts—such as a grant of land in freehold—that demonstrate beyond any doubt that these rights have been superseded by other rights in the land.

While any state can specifically abolish customary tenure or create rights inconsistent with the continuation of rights to land under customary tenure, doing so requires payment of compensation or land, since these rights predated the existence of the state. Customary tenure is—and always has been—one of the foundational elements of the land laws of all states in Africa. It is not an add-on to received law; indeed, received or imposed law is the add-on. Received law thus needs to be adapted and adjusted to indigenous law, not vice versa, and proponents of received law should be advancing the case for legal pluralism.

Monism, Pluralism, and Mortgage Law

Despite considerable evidence that legal monism—a single, unified system—does not work, external forces such as the World Bank and various donors have offered prescriptions for "modernizing" land tenure that implicitly assume benefits accruing from monism and the homogenization of national land laws. The view of the World Bank and commercial banks is that customary land rights—however well protected and secured—don't count,

and titles registered in traditional civil law systems via land books and land courts—however well secured—don't count. Only registered titles that are individually owned or jointly owned by a spouse and governed by received law are acceptable security for loans by private-sector banks and building societies. In addition, banks and international financial institutions have very strongly resisted attempts by African governments to provide by law the kind of relief offered in the developed world that tempers the strictness of rules governing default by mortgagors, especially mortgagors of family homes.

> Banks in Tanzania now do not contemplate lending on anything other than a title registered under the Land Registration Act, which reduces the scope of their lending to less than 10 percent of the land in the country.

A case study in Tanzania illustrates this point. Its 2001 land law relating to mortgages sparked opposition by local banks, who were supported by the World Bank. They objected to provisions that abolished foreclosure and those that apparently granted powers to the courts to reopen mortgages that were prima facie oppressive, illegal, or discriminatory. They also objected to provisions relating to time limits for bank actions to be taken, court injunctions to prevent actions for possession and sale for "non-meritorious" reasons, and the concept of "small mortgages," or small loans taken out for short periods. Faced with this opposition, the Government of Tanzania revised the new law and abolished small mortgages. The reform will benefit those with regular mortgages—the urban middle and upper classes—but the less well off will lose out. Banks in Tanzania now do not contemplate lending on anything other than a title registered under the Land Registration Act, which reduces the scope of their lending to less than 10 percent of the land in the country.

The use of land as security and an engine of wealth creation in Africa will continue to be problematic until more creative mortgage systems and laws are applied. Where governments in Africa need to make changes is in their procedures and processes; it is this, rather than in any pluralist system of land tenure, that inhibits investment in land. It is therefore not "customary tenure" but "customary conservative state bureaucracy" and private mortgage practices and attitudes that need fundamental reform.

Further reading:

Patrick McAuslan. 2003. Bringing the Law Back In: Essays on Land, Law and Development Aldershot: Ashgate. McAuslan, P. 1998. Making Law Work: Restructuring Land Relations in Africa. Development and Change 29: 525-552.

Patrick McAuslan *(P.McAuslan@bbk.ac.uk)*
Patrick McAuslan is Professor of Development Law at Birbeck School of Law, University of London

Gender Issues in Land Tenure under Customary Law

Patricia Kameri-Mbote

The predominance of patriarchy in law, policy, and practice ensures that the land has owners but that they are not women.

Introduction

Under all systems of law in many African countries, land ownership is anchored in patriarchy. Law can be used to reinforce or make permanent social injustices, and, in the realm of women's rights, legal rules may give rise to or exacerbate gender inequality. Legal systems can also become obstacles when change is required: often the *de jure* position, which may provide for gender neutrality, cannot be achieved in practice due to numerous obstacles.

There are three issues to be noted with regard to law in its governance of tenure relationships:
- Statute books contain legal rules and principles that are or can be seen as legitimizing the subordination of women.
- The structure and administration of laws can occasion the subordination of women.
- The socioeconomic and patriarchal realities in many African countries prevent the translation of abstract rights into real substantive rights.

Women's Land Rights under Customary Law

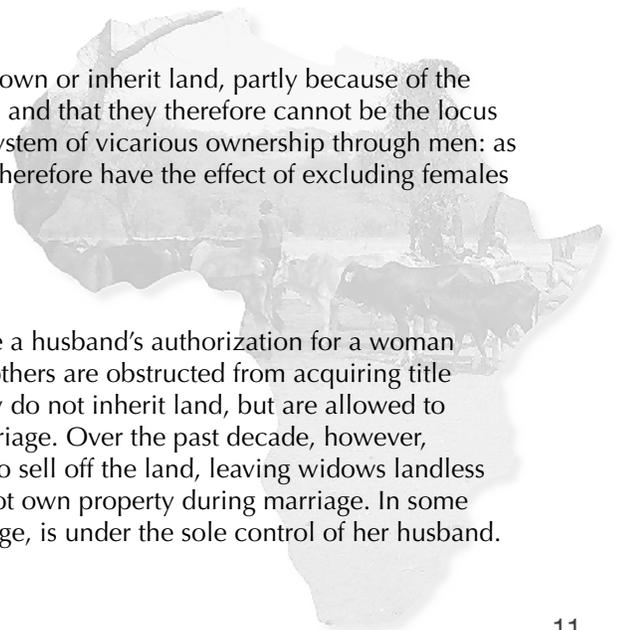Customary law is not uniform across Africa, but there are some common factors:
- Customary law tends be the unwritten social rules and structures of a community derived from shared values and based on tradition.
- Customary law pertaining to women's land tenure is based on social relations between men and women and, more specifically, husbands and wives.
- Customary law seems to have few provisions for divorced women and even fewer for single women.

Property Rights in General

In Africa, under most systems of customary law, women do not own or inherit land, partly because of the perception that women are part of the wealth of the community and that they therefore cannot be the locus of land rights' grants. For most women, access to land is via a system of vicarious ownership through men: as husbands, fathers, uncles, brothers, and sons. Customary rules therefore have the effect of excluding females from the clan or communal entity.

Property Rights within Marriage

In several countries, customary land registration systems require a husband's authorization for a woman to acquire title independently, and single women and single mothers are obstructed from acquiring title altogether. Under customary law, widowed women traditionally do not inherit land, but are allowed to remain on the matrimonial land and home until death or remarriage. Over the past decade, however, even this social safety net has eroded, with male heirs tending to sell off the land, leaving widows landless and homeless. In most ethnic groups, a married woman does not own property during marriage. In some communities, all her property, even that acquired before marriage, is under the sole control of her husband.

Although the wife has the right of use over property, such control must be exercised with her husband's consent. Most control exercised by women on land is over use rather than control and ownership. This subordination of women socially and economically renders them less competitive than they should be under the current economic structuring of society.

Property Rights at Separation and Dissolution

At dissolution, distribution of property depends on whether the property is land or otherwise and whether it was acquired before or after marriage. Generally, a divorced wife may take her personal effects, but all other property remains with the husband.

Effects of the Registered Land Act (RLA) of Kenya

The RLA was passed for the main purpose of enabling titleholders to deal with the land any way they see fit. Right from the beginning, registration was bound to exclude most women from acquiring titles, since they generally only had use rights. Also, the tenure reform process only considered the rights of people who had land, not the landless or those who had only use rights. In most cases families designated the eldest son or the male head of household to register, and a right of occupation at customary law would only be protected if noted on the register. Since the RLA does not recognize customary rights of use, women are at the mercy of the titleholder. While section 30 states that registered land is subject to overriding interests, these do not include customary rights of use, an interpretation that has been upheld by the courts. The registration process thus unintentionally excludes most women from property ownership and the benefits accruing from such ownership.

> The RLA was passed for the main purpose of enabling titleholders to deal with the land any way they see fit.

The RLA limits the number of people who can register as common or joint owners of property. This is to control subdivision under the Land Control Act, which controls transactions in agricultural land and generally discourages fragmentation. The act affects succession rights of women, especially in polygamous households where the property of the deceased husband has to be subdivided. Subdivision into uneconomic units will not be upheld by the courts, and this has the indirect effect of excluding some widows from ownership.

The Intersection of Customary and Statutory Law

The convergence between the English doctrine of coverture and customary and statutory law on property relations has had negative effects on women. For women, patriarchy exacerbates the situation, since male heads of households constitute the exclusive locus of landholding when individual tenure is introduced. The effect of this is to extinguish women's land rights, including rights to access under customary law. Unfortunately, gender neutral laws on land rights apply in contexts that are still very much gendered.

Countries have sought to entrench human rights norms in national constitutions as a way to address discriminatory customary law. They do this by proscribing discrimination generally and by providing for both gender equality and the application of customary and religious laws. However, they leave it to the courts to arbitrate on what rights should prevail. This approach has its limitations: allowing for customary law application in personal law matters maintains biases against women, and leaving the issues for courts to decide presupposes that the arbiters are not themselves influenced by prevailing gender perceptions.

Conclusions

The predominance of patriarchy in law, policy, and practice ensures that the land has owners but that they are not women. For law and policy to influence gender relations in the tenure realm, there is need to deconstruct, reconstruct, and reconceptualize customary law notions around the issues of access, control, and ownership. The view should be to intervene at points that make the most difference for women.

There is need for innovative and even radical approaches. In determining tenure to land, rights should be earned or deduced from an entity's relationship to the land. Rights should be anchored on use and subjected to greater public good resident in the trusteeship over land for posterity. Given women's roles in land management and husbandry, such an approach will identify them as loci for rights' grants and thus address the skewed gender and land relations under customary law that have been further entrenched by statutory laws.

Further reading:

Kameri-Mbote, Patricia. 2005. "Inheritance, Laws and Practices affecting Kenyan Women." In Makumi Mwagiru (ed.), . African Regional Security in the Age of Globalisation. Nairobi : Heinrich Böll Foundation. http://www.ielrc.org/content/a0502.pdf
Ingunn Ikdahl et al. (2005). Human rights, Formalisation and Women's Land Rights in Southern and Eastern Africa. Studies in Women's Law No. 57. Institute of Women's Law, University of Oslo. http://www.sarpn.org.za/documents/d0001447/P1786-Women-rights_June2005.pdf
L. Muthoni Wanyeki (ed). 2003. Women and Land in Africa - Culture, Religion and Realizing Women's Rights. Zed Books.

Prof. Patricia Kameri-Mbote (pkameri-mbote@ielrc.org)
Patricia Kameri-Mbote is Program Director at International Environmental Law Research Center at the University of Nairobi

Innovations in Land Tenure, Reform and Administration in Africa

Clarissa Augustinus and Klaus Deininger

Insufficient innovative tools exist to deliver affordable security of tenure and property rights at scale for most of Africa's populations.

The Importance of Land Issues

Land and the institutions that govern its ownership and use greatly affect economic growth and poverty reduction. Lack of access to land and inefficient or corrupt systems of land administration have a negative impact on a country's investment climate. Well-functioning land institutions and markets improve it, reducing the cost of accessing credit for entrepreneurs and contributing to the development of financial systems. Access to even small plots of land to grow crops can also greatly improve food security and quality. Broad-based land access can provide a basic social safety net at a cost much below alternative government programs, allowing governments to spend scarce resources on productive infrastructure. Policies that foster lease markets for land can also contribute to the emergence of a vibrant nonfarm economy.

> Conventional land administration systems in sub-Saharan Africa do not fit customary structures of group and family rights, do not function adequately or solve land conflicts, and are not useful to most people

Increased demand for land may lead to public investment in infrastructure and roads and increased land values. When well-functioning mechanisms to tax land are added, this can contribute significantly to local government revenues and provide resources needed to match decentralization of responsibilities for service delivery. Improving land administration may also contribute to broader public service reform and provide a basis for wider reforms.

Innovations and Options Needed

Conventional land administration systems in sub-Saharan Africa do not fit customary structures of group and family rights, do not function adequately or solve land conflicts, and are not useful to most people. Registering a title can take between 6 months and 10 years, records are poorly kept, most people do not have title deeds, and millions of titles await registration. Furthermore, most systems are centralized, inaccessible, too expensive, not transparent, and do not protect women's land rights sufficiently. Transforming such systems is a time-consuming and complex task. It normally entails the reform of a number of separate agencies, alterations in power and patronage, and extensive civil society debate at national and local levels.

Innovations in land reform and land administration that are adapted to current conditions are being attempted in some countries in sub-Saharan Africa. However, insufficient innovative tools exist to deliver affordable security of tenure and property rights at scale for most of Africa's populations. New tools need to be developed, but these are not simple, easy to produce, or easily adapted to the diverse needs of various countries.

No single tenure option can solve all problems. Policy on land tenure and property rights can best reconcile social and economic needs by encouraging a diverse range of options, adapting and expanding existing systems when possible, and introducing new ones selectively.

Many countries are doing this. Some have passed new laws associated with typical PRSP objectives, offering decentralized local land administration offices, inexpensive or free titles or tenure protection for the poor, adjudication procedures that protect occupants of land, accommodation of forms of legal evidence used by the poor to protect their assets, and protection of women's land rights (such as prioritized allocation and co-ownership). Other innovations relate to dispute resolution and the technical design of the land administration system. Such designs must have national application and be affordable to the poor, and they must not override customary and local tenure.

Another approach seeks to eliminate gender-based discrimination regarding land, housing, and property rights. This is particularly needed because individualization of land tenure, land-market pressure, and other factors have eroded customary laws and practices that used to protect women. The HIV/AIDS crisis has worsened the situation, and land-grabbing and discriminatory practices have increased evictions of women by their inlaws or husbands. Secure tenure would be a mitigating factor for these women, and would assist those widowed by conflict who meet legal or customary discrimination against widows inheriting land.

> Though some African countries have passed land legislation that is advanced in many respects, they are struggling to modernize and equip their land institutions to deal with the demands of implementation.

Though some African countries have passed land legislation that is advanced in many respects, they are struggling to modernize and equip their land institutions to deal with the demands of implementation. In doing so, they often try to copy unaffordable and sometimes inappropriate approaches (such as high-precision surveying) from other parts of the world that cannot be scaled up quickly.

To reach Millennium Development Goals whose achievement is mediated by security of tenure, more focus is needed on implementation of policy at scale, along with cost-effective and pro-poor land tools that fit the human resource envelope.
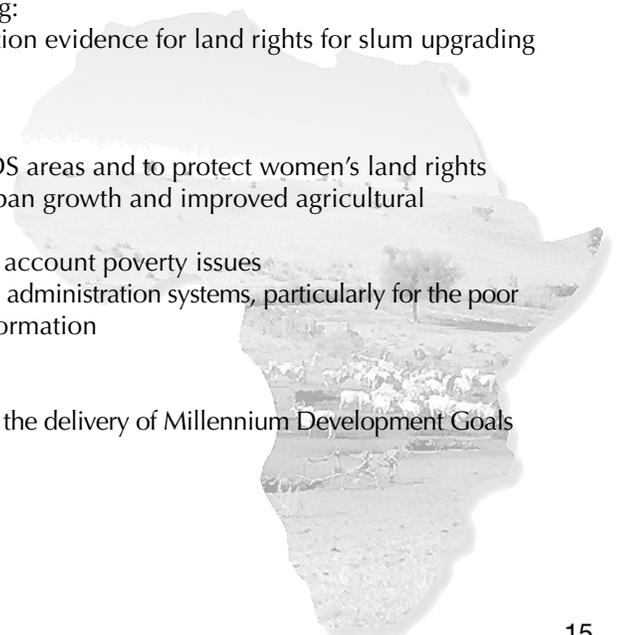
One example is computerization of land records in some states in India, which, the evidence suggests, can significantly reduce the scope of the exacting of bribes by officials and increase their accountability. The computerization also linked formerly disparate institutions, effected improvements in tenure security, and increased the government's revenue collection.

Affordable Pro-Poor Tools

Affordable pro-poor tools that are needed include the following:
- NGO enumeration information that becomes first adjudication evidence for land rights for slum upgrading and post-disaster housing delivery
- gender-friendly approaches to adjudication
- land administration appropriate for postconflict societies
- just-deceased estates administration, especially for HIV/AIDS areas and to protect women's land rights
- expropriation and compensation for the management of urban growth and improved agricultural production
- a regulatory framework for the private sector that takes into account poverty issues
- capacity building programs for in-country sustainability of land administration systems, particularly for the poor
- an affordable geodetic for Africa, possibly using NASA's information
- LIS/GIS spatial units as framework data
- high accuracy, off-the-shelf GPS units for nonprofessionals
- robust indicators or benchmarks to measure tenure security for the delivery of Millennium Development Goals
- nontitled land rights that can be upgraded over time

What is needed is a global assessment to establish which tools exist, options for scaling them up and widely disseminating them, and estimates of their cost effectiveness. New tools also need to be developed. This agenda will take many years, significant funding, and a comprehensive global framework.

Further reading:

Augustinus, C. 2005 Innovations in Africa: Pro Poor Land Approaches, Paper presented at the African Ministers Conference on Housing and Urban Development (AMCHUD), 31 January -3 February, 2005, Durban, South Africa (unpublished).

Food and Agriculture Organisation of the United Nations, 2005. Access toRrural Land and Land Administration after Violent Conflict, FAO Land Tenure Studies 8, Rome.

International Federation of Surveyors, 2005 Proceedings of an Expert Group Meeting held by the International Federation of Surveyors, Commission 7, UN-HABITAT and the Commonwealth Association of Surveyors and Land Economists on 'Secure land tenure: New Legal Frameworks and Tools', 11-12 November, 2004, Nairobi, Kenya.

Fourie, C. 2001 Land and Property Registration at the Cross Roads: A Time for more Relevant Approaches, Habitat Debate, 7(3):16.

Clarissa Augustinus (*Clarissa.Augustinus@unhabitat.org*)
Clarissa Augustinus is the Chief, Land and Tenure Unit at UN Habitat

Klaus Deininger (*Kdeininger@worldbank.org*)
Klaus Deininger is a Lead Economist in the Development Economics Group at the World Bank

The Commons and Customary Law in Modern Times: Rethinking the Orthodoxies

Liz Alden Wily

Much attention needs to be paid to common properties. These are often the only asset of the very poor and possess untapped economic potential. Unregulated attrition and wrongful state appropriation of these lands continues. Entrenching these estates as the private group-owned property of communities is urgent and registration programs need refocusing accordingly. It is the tenure of the commons, not individual farms or houses, that is least secure.
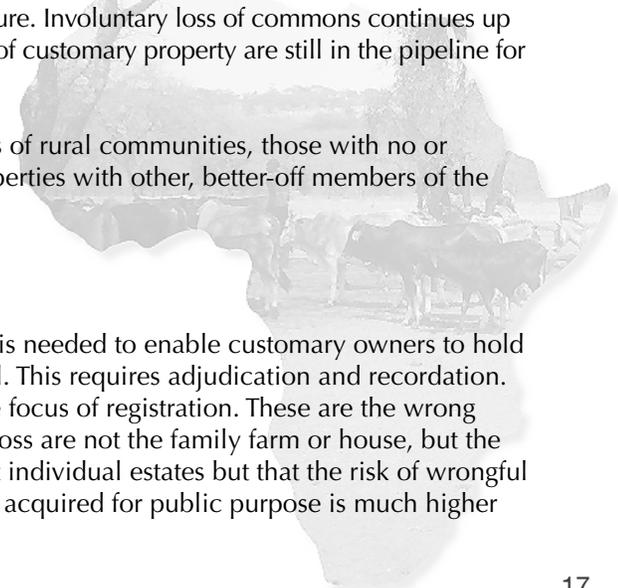
Background

There is much conceptual confusion about communal property. The idea of commons as un-owned open access land is still widespread and increasingly self-fulfilling through lack of correct policy and legal support. From a customary perspective, common properties are not un-owned lands at all but the private property of all members of a group or community. This ownership is appropriately held in undivided shares given the nature of these estates as usually pasture, swamp or forest lands. Failure to distinguish between these communal properties and communal tenure (or customary tenure) also persists. The first is real property that may be mapped and described and the second is a regime of land administration comprising norms, regulations and enforcement mechanisms. It is distinctive by being based upon local, not imported norms and through its exercise as a community-based regime.

Even after a century of attrition and state appropriation, common properties remain a substantial resource in agrarian states, amounting to over 30 percent of the land area in Africa. Quite aside from their contributing role to livelihood, the commons possess an extraordinary real estate and rental value and their products massive, and sustainable, extractive income. Governments, not communities, have so far reaped the benefits. This is because even after a decade of land reforms, common property in most countries still bears the status of un-owned or public land, falling to governmental jurisdiction and de facto tenure. Involuntary loss of commons continues up to the present, for example in Sudan, where millions of hectares of customary property are still in the pipeline for reallocation to outsiders as commercial farms.

These losses directly affect the poor. Even the poorest members of rural communities, those with no or little farmland share the customary ownership of common properties with other, better-off members of the community. This may be their only real property.

Why Record Common Property?

Clarifying and entrenching the rightful tenure of the commons is needed to enable customary owners to hold onto and reap benefits from these estates, current and potential. This requires adjudication and recordation. Up until the present individually-held properties have been the focus of registration. These are the wrong target. For those properties that are most at risk of involuntary loss are not the family farm or house, but the commons. This is not to say insecurity of tenure does not afflict individual estates but that the risk of wrongful appropriation and failure to pay any compensation at all when acquired for public purpose is much higher for the commons.

A second and rising pool of insecurity that also needs prioritization is at the rural-urban interface where farms and commons are often forcibly converted into building plots, often to the manipulated benefit of others than the customary owners. Statutory recognition of all customary land interests as private property rights due the same protection of non-customary land rights needs purposive acceleration, achieved thus far in only a handful of African states.

> Owning communities could mortgage one part of their often substantial commons to raise loans for community based income-generating activities such as maize grinding mills and without risking family livelihoods.

The purpose of titling itself is long overdue for review. Longstanding and recurrently revitalised justification of titling as for the purpose of collateralization has over-focused the procedure upon classically-centred individual enterprise and muddied clarity as to what must remain the founding reason for recording and entrenching customary rights – simply to secure that tenure, irrespective of whether or not this provides a basis for investment loans. Each has its own rationale but for strategic clarity need to be de-linked.

In any event, collateralization in the agrarian context could be a red herring. It is yet to be demonstrated that individual mortgaging may occur at mass scale in Africa, although this appears to have more promise in both technically advancing agricultural economies and transitional states like the Ukraine. The reasons are many but prominently include the fact that other safer routes for raising loans exist in the emerging African micro-credit market, that commercial lending agencies are understandably wary of mortgaging peasant holdings for fear that foreclosure will render the household destitute and that demand for mortgages remains low in the absence of better agriculture markets and given the limited potential for intensification in the mainly dryland agro-economies.

Collateralization could however gain a new lease of life in respect of common properties. Owning communities could mortgage *one part* of their often substantial commons to raise loans for community based income-generating activities such as maize grinding mills and without risking family livelihood and to the greater inclusion of the majority poor. The rental capacity of these estates without mortgaging should however be explored first, widely demonstrated in government use of captured commons for leasehold commercial agriculture. Even pursuit of this potential must remain academic however without first identifying the rightful owners of each common property and to whom such opportunities and benefits should accrue.

What Is Required

In pursuit of registration, clearer understanding is needed as to the relationship between statutory and customary law. These are not an either/or. Statutory support – i.e. parliamentary enacted laws – is essential to recognise, sustain and uphold customary rights, irrespective of whether or not these are held by individuals, families, clans, groups or whole communities. Nor should it be assumed that that the codification of customary law is prerequisite to formal recognition or registration of customary land interests: it is not the rules themselves that need modern law support as these do and should continue to alter with changing circumstances such as already widely experienced over the last century. Rather it is the founding template of the customary tenure regime itself which needs legal support; the fact that at essence this is no more and no less than community based land tenure administration, a foundation in tune with modern demands for devolved and democratic land governance and upon which modern customary owners can slowly build more modern 'customary practice'.

An equally important requirement is to make real the mantra that formalization procedures must be simple and cheap to enable mass uptake and sustained use. Reversion into expensive and remote systems too often still occurs in so-called reformist administration programmes. The fact remains that while desirable in

principle, registration based upon a cadastral title system may never be applicable or sustainable at scale, and for the vast majority of small estates like rural farms and houses, is unnecessary. Legal recognition of detailed boundary description, lodged in community land registers, may be more than sufficient, and land law redrafted accordingly.

Recommended Steps to Implementation

Implementation of simple customary land security measures that target vulnerable properties and build upon what exists in cost-effective ways deserve more application and testing. The following ten step model may serve as example:-

1. Following determination of interest, a technical facilitator calls representatives of rural communities to a meeting to decide the basis upon which they will identify and operate their customary domains, with a village basis generally preferred.
2. A representative boundary committee from each community is formed. Each works with neighbouring committees to agree the exact location of their shared boundary. This is done by walking every step of the boundary and recording the description agreed by the two committees. Expert facilitation is available to promote compromises. GPS readings are taken to enable maps to be produced. It is the detailed boundary description however that is put before full community meetings for their approval.

> Community members determine beforehand how they want the council constituted, with what proportion of elected and traditional leadership and the procedures through which land councillors will be accountable to itself and how decisions will be implemented.

3. Where the customary domain has been routinely used by outsiders (e.g. pastoralists) with acknowledged customary access rights to products or areas, these outsiders are consulted and their support secured. In the process these access rights are renegotiated to clarify their nature as access, not ownership rights and to establish a new management regime agreeable to both parties.
4. Each community is assisted to form a community land council (with seasonal user representation as appropriate) to serve both as trustee owner of the root title of the domain on behalf of the community and as the local land authority over the domain, responsible for zoning, regulation of access and land use, procedures for transfer and the establishment in due course of simple registers of ownership and transaction of properties within the domain. Community members determine beforehand how they want the council constituted, with what proportion of elected and traditional leadership and the procedures through which land councillors will be accountable to itself and how decisions will be implemented. Annual training of land councillors is useful, gradually increasing their capacity and scope of their administrative mandate.
5. Policy and legal support is secured, ideally founded upon at least a reasonable degree of trial implementation in the field, to ensure that legal constructs and procedures will be workable and easily replicated and sustained. New legislation may outline how customary land authorities operate and provide for registration of community domains and registers of common properties within them, and in due course individual properties on a demand basis.
6. Communal Domain registers are established at local government level and simple procedures for this disseminated. Final registration of Communal Domains takes place only after boundaries have been finally agreed and the community land council is up and running. Registration of the council as the lawful local land authority is part of the process.
7. Councils use simple land-use planning to divide domains into zones—for example, current farming zones, potential investment zones, community pastures, and protected areas—and they devise and put into effect any needed regulations for each zone.
8. Where restitution of wrongfully appropriated customary lands is constitutionally provided for, community land councils are assisted to identify affected areas and to make those claims, seeking direct restitution and/or compensation as appropriate. Where such lands are under lease or licence to outsiders, rental

income thereafter accrues to the council, with rigorous financial accountability measures instituted as a prerequisite.

9. Formal identification and registration of common properties in the domain as the private group owned property of all community members is encouraged where these remain vulnerable to wrongful occupation or appropriation by Government agencies or others, including by local elites or corrupt leaders. Registration of these conservation areas (e.g. Community Forest, Pasture or River Reserves) may provide double protection.

10. Reworked and modernized community based regimes are put in place for resolving disputes between and within communities, with appeal to higher levels.

Conclusion

Such a process may restore and develop the right and practice of communities to create and control their own tenure norms. It begins by inducing the critical mass of popular ownership that mobilizes the effort and sustains implementation. Conflicting land interests are unpacked by the parties themselves, making it more likely that compromises and agreements will be upheld. Finally, the process clarifies customary rights and access rights, while providing relevant local institutions for their modern administration.

Further reading:

L. Alden Wily. Forthcoming. The Role of Customary Property Rights in the Legal Disempowerment and Empowerment of the Poor: A Case Study from Sudan. International Sudan Studies Conference, Bergen, Norway, 6-8 April 2006.
D. Kirkpatrick. 2005. 'Best Practice' Options for the Legal Recognition of Customary Tenure. Development and Change 36(3):449-475.
B. Cousins. Forthcoming. African Land Tenure and the Failure of Titling. Forum for Development Studies.
J. Bruce and S. Migot-Adholla (eds). 1994. Searching for Land Tenure Security in Africa. The World Bank.

Liz Alden Wily (*lizaldenwily@wananchi.com*)
Liz Alden Wily is an Independent Land Tenure Advisor

Biting the Bullet: How to Secure Access to Drylands Resources for Multiple Users

Esther Mwangi and Stephan Dohrn

Instead of the allocation of rights, tenure regulation needs to center on rules and mechanisms for regulating access and use among multiple interests.

Drylands Users and Access Rights

Close to 1 billion people worldwide depend directly on drylands for their livelihoods. Because of their variable and erratic climate and political and economic marginalization, drylands have some of the highest incidents of poverty, including the world's poorest women and men. Users of dryland resources—including pastoralists, sedentary farmers, hunter-gatherers, and refugees—need to be assured of appropriate and effective access to sustain their diverse livelihood strategies in their risky shared environments.

Pastoral and sedentary production systems that coexist in drylands very often use common property arrangements to manage their access to and use of natural resources. But despite their history of complementary interactions, pastoralists and sedentary farmers increasingly face conflicting claims over land and other natural resources. Past policy interventions and existing regulatory frameworks have not offered lasting solutions to problems relating to land tenure and resource access for multiple and differentiated drylands resource users. These users require flexibility of access; they adopt opportunistic strategies to cope with the uncertain conditions in which they operate.
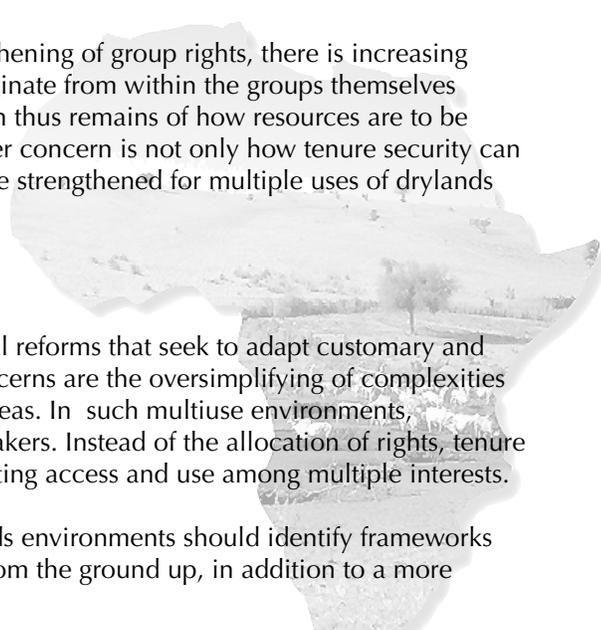
It now seems to be recognized that drylands resources need to be secured for their users against some form of threat, often external. So is the idea that some legal solution premised on local customary rules may be appropriate and effective in protecting group rights. These realizations are informed by earlier top-down, state-led approaches of individualization or nationalization that privileged some customary users over others, undermined authority systems regulating resource access, and opened up opportunities for non-customary users and immigrants to appropriate resources.

However, in seeking legal solutions for recognition and strengthening of group rights, there is increasing empirical evidence that threats to tenure security may also originate from within the groups themselves with women's rights being particularly vulnerable. The question thus remains of how resources are to be allocated, accessed, used, and managed within groups. Another concern is not only how tenure security can be enhanced for mulitple resource users, but also how it can be strengthened for multiple uses of drylands resources.

A Focus on Process

Among a range of innovations tackling these problems are legal reforms that seek to adapt customary and local systems to wider statutory obligations. However, key concerns are the oversimplifying of complexities and the exclusion of secondary and temporary users in rural areas. In such multiuse environments, process—rather than content—should be the focus of policymakers. Instead of the allocation of rights, tenure regulation needs to center on rules and mechanisms for regulating access and use among multiple interests.

Attempts to secure access for multiple users in variable drylands environments should identify frameworks for negotiated conflict resolution. This requires crafting rules from the ground up, in addition to a more

generalized or generic identification of rights. Elite capture and exclusion of women and young people continue to pose significant challenges in decentralized processes.

Local actors are the competent authorities to determine the forms of insecurities that exist and levels of appropriate action that might alleviate them. To secure access options to drylands resources and opportunities for differentiated local actors, negotiated processes must have meaning in local settings, and elite influence must be strategically confronted. Efforts to reform rights systems may yield little benefit if pushed too soon, too quickly, or without appropriate synchronization between different components of institutional change. These efforts will be more effective if timing matches local priorities and schedules, allowing continuous learning and integration between changes in policy, regulation, and practice.

Negotiating Access Rights

> Attempts to support tenure policies must try to reconcile legitimacy, legality, and practice of tenure rights. To create legitimacy on the ground requires promotion and support for dialogue and negotiation among resource users.

Attempts to support tenure policies must try to reconcile legitimacy, legality, and practice of tenure rights. To create legitimacy on the ground requires promotion and support for dialogue and negotiation among resource users. This works best within a legal framework that centers on process, leaving details to local people and enabling them to adapt their local systems to specific external and internal threats to tenure security. Law thus sets the principles and procedures of accountable, transparent, and inclusive negotiation and dialogue. Even then, the state would need to function as a capable mediator and enforcer.

The process may also benefit from an explicit description of what constitutes security of access for different categories of users or different resources, at different times and scales. Seeking answers to the fundamental question of what security means, for whom, and against what threats may well open up a range of useful policy options for securing land access rights. Unpacking tenure insecurity may also provide some clues on how powerful interests may be countered for the benefit of a wider segment of society. For rights to be meaningfully secured, there is need to identify the nature and sources of threats that create insecurities.

Addressing accountable, inclusive, and transparent procedures for negotiating and arbitrating disputes at local levels provides an avenue out of the need to record and legalize all manner of rights and negotiations. These should based on local, salient values of what is fair and equitable. Recent attempts at decentralizing authority and functions to local and district levels have remained incomplete, thus strengthening local elites and increasing the vulnerability of those already marginalized. A system of incentives is required to ensure that central and local institutions are more responsive and accountable to local populations as a whole.

There are, however, limitations: negotiation may not be practicable, either due to prior injustices or unequal capacities of parties, and the elite may capture the process. Though the state's theoretical role as the ultimate guarantor of property rights and arbiter of conflicts is fairly clear, the complement of institutions and actors that comprise the state have proved incapable (and perhaps unwilling) to perform this role effectively. A state's institutional weakness is bound to lead to the failure of mediation, without which there can be no consensus and no general framework of dynamic relations between actors in rural development.

Further reading:

Esther Mwangi and Stephan Dohrn. Forthcoming. Biting the Bullet: How to Secure Access to Drylands Resources for Multiple Users. CAPRi Working Paper. Washington DC: IFPRI. 2006.

Lavigne-Dellville, P., H. Ouedraogo and C.Toulmin. 2004. Land Tenure Dynamics andGovernment Intervention: Land Tenure Policy in West Africa: Current Issues, Debate and Innovation. In: GRAF/GRET/IIED, Making Land Rights More Secure: International Workshop for Researchers and Policy Makers. Ouagadougou, March 19-21, 2002. http://www.iied.org/pubs/pdf/full/9251IIED.pdf

Kristine Juul and Christian Lund (eds). 2002. Negotiating Property in Africa. Portsmouth,NH: Heinemann.

Geoffrey Payne (ed), 2002. Land, Rights and Innovation: Improving Tenure Security for the Urban Poor. London: ITDG.

Maryam Niamir-Fuller (ed.) 1999. Managing Mobility in African Rangelands: The Legitimization of Transhumance. Filey, UK: IT Publications.

Esther Mwangi (*e.mwangi@cgiar.org*)
Esther Mwangi is a Postdoctoral Fellow with the CAPRi research program

Stephan Dohrn (*s.dohrn@cgiar.org*)
Stephan Dohrn is a Research Analyst with the CAPRi research program

Decentralization: An Enabling Policy for Local Land Management

Hubert M.G. Ouedraogo

Decentralization presents a clear opportunity for promoting democracy and encouraging sustainable development, but to work, certain conditions must be fulfilled, and it must be understood as an ongoing process.

Introduction

Decentralization has been ongoing in West Africa since the early 1970s. Whether seen as the means of consolidating the newly independent state, imposed by donors, or an outgrowth of grassroots development efforts, decentralization was intended to create space for local actors and institutions to become involved in decisionmaking for development. It works by transferring power to elected local authorities or local offices of central government. In West Africa, decentralization is not seen as merely a political and institutional reform, it is also considered part of the development process. Behind decentralization are the objective to promote economic and social development and the assumption that local government is able to more efficiently mobilize funds and natural resources.

The Benefits of Decentralization in Regard to Land Rights

A replacement for the failure of state land monopoly: For a long period most West African states claimed exclusive ownership of land. However, customary land laws were the reality in the field: access to land, tenure security mechanisms, and land dispute resolution all remained tied to local customs and traditions. As a consequence, there is a disconnect between land laws and local practices, and land laws are not effective in rural areas.

More effective land management: Democratic decentralization means that the central government transfers authority as well as resources. In regard to land, transfer of authority means that local government must have the capacity to manage land and deliver titles. Such capacity brings land management closer to the people and gives them the chance to benefit from the rights the land law provides. Land can be a very important asset to local government, generating significant financial resources through sustainable land management and taxation. In Niger, decentralized land management through local land commissions recognizes customary land rights and delivers titles to poor farmers. The procedures are simple, the title delivery costs are affordable, and each local government decides the level of taxes that can be sustained.

Flexibility and legal pluralism: The power to adopt regulations that reflect local realities and cultural norms is essential. Different approaches have been experimented with in the context of land management. Communities have created "local rules" for natural resource management or promoted "local conventions" where stakeholders make arrangements for access to land and natural resources or for local land transactions. Another approach is local land dispute resolution that builds on the knowledge and legitimacy of local institutions such as traditional chiefs, heads of lineages, and religious authorities.

Improved participation and local governance: Decentralization also relies on the participation of civil society. By opening more democratic spaces for CSOs, decentralization reduces the discretionary powers of bureaucrats and reduces the risk of corruption.

Constraints and Risks of Decentralization

While decentralization is a more democratic way to manage natural resources and a more efficient way to promote local development, it is not a panacea.

Lack of local capacity and resources: Transfer of responsibility is effective only if there is the capacity to assume responsibility. Unfortunately, in most countries, there is a severe lack of local capacity. Most people, including members of local governments, cannot read, write, or even understand the country's official language. In land management, local authorities need to be able to survey land, maintain records and manage local land administration.

Poverty is also a constraint. How can local authorities raise funds from poor populations? If there are no funds for decentralization, the process will not proceed. All decentralization codes declare that the central government must transfer resources to local governments to enable them assume their new responsibilities. However, central governments are distrustful and even hostile when asked about transferring resources, as they face many unfunded national priorities such as education and health.

Conflict between local and national interests: Local interests are generally short term: local governments need resources quickly to finance infrastructure. On the other hand, central government—responsible for the whole nation and future generations—is more strongly concerned with the sustainable use of natural resources.

Corruption: There is a strong risk that transfer of authority and resources may lead to a transfer of corruption as well. In many rural areas, the population is uneducated and CSOs are still poorly organized. In such conditions, elected local governments could easily fall prey to corrupt practices.

> How can local authorities raise funds from poor populations? If there are no funds for decentralization, the process will not proceed.

Exclusion: The transfer of authority may create the paradox of promoting notions of "indigenousness", which can lead to the vulnerability or marginalization of "non-indigenous" individuals or groups. For example, pastoralist groups are often denied equitable access to natural resources such as water and grazing areas based on the manipulation of the principle of "indigenousness".
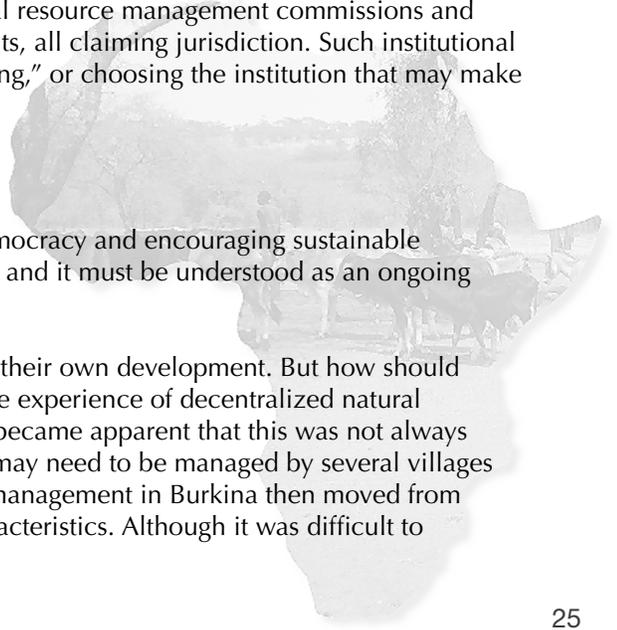
Institutional confusion: Rural areas in Africa are well known for overlapping local institutions: there are traditional institutions, those created by central governments to promote better organization of rural producers, donor-funded projects acting as their own interlocutors, and finally elected local government. Regarding land, there may be traditional chiefs, land and natural resource management commissions and committees, rural producer organizations, and local governments, all claiming jurisdiction. Such institutional confusion has created the local practice of "institutional shopping," or choosing the institution that may make the decision most favorable to the petitioner.

How Can It Be Made to Work?

Decentralization presents a clear opportunity for promoting democracy and encouraging sustainable development, but to work, certain conditions much be fulfilled, and it must be understood as an ongoing process.

Decentralization brings communities decisionmaking power in their own development. But how should a community be defined in an African rural area? In Burkina, the experience of decentralized natural resource management started at the village level, but it rapidly became apparent that this was not always the best place to manage activities. For example, a local forest may need to be managed by several villages bordering it. The experience of decentralized natural resource management in Burkina then moved from village to inter-village areas that shared social and cultural characteristics. Although it was difficult to

capture administratively, the concept proved more adaptable. Unfortunately, when decentralization was implemented, the choice was made to create artificial boundaries, and today rural communes in Burkina are too large.

> If local institutions do not work well, decentralization will not work. It is difficult to create new institutions and make them work efficiently for decentralization at the same time.

If local institutions do not work well, decentralization will not work. It is difficult to create new institutions and make them work efficiently for decentralization at the same time. A shortcut would be to build the capacity of existing institutions that are perceived as legitimate, that is, that appear to operate in line with the will and expectations of the people. Legitimacy is not static, however, and therefore it is important that decentralization be built on the basis of democratic local institutions that function under the principles of good governance.

Decentralization will not work if local government does not have appropriate resources. Central governments must demonstrate their commitment to decentralization through the transfer of resources. A second dimension of resource mobilization at the local level is the development of the capacity to generate financial resources from sustainable natural resource management.

Conclusion

Decentralization can be an opportunity for local development and for more secure land rights for the poor people. But for decentralization to work, the constraints and risks inherent to such a complex reform must be anticipated. Successful decentralization needs to build on ongoing local processes; it needs to invite the participation of CSOs. It also needs to cooperate with central government through sound deconcentration process: decentralization is not implemented against the state, but in collaboration with the state.

Further reading:

Jesse Ribot. 2004. Waiting for Democracy: The politics of choice in natural resource decentralization. *Washington DC: World Resources Institute. http://governance.wri.org/pubs_pdf.cfm?PubID=3821*
Hubert Ouedraogo. 2003. Decentralization and Local Governance: Experiences from Francophone West Africa. Public Administration and Development 23 (1): 97-103.
GRAF. 2003. Challenges for a viable decentralisation process in rural Burkina Faso. KIT Bulletin, 356.

Hubert Ouedraogo *(o.hubert@fasonet.bf)*
Hubert Ouedraogo is Coordinator LandNet West Africa

Will Formalizing Property Rights Reduce Poverty in South Africa's "*Second Economy*"? Questioning the Mythologies of Hernando de Soto

Ben Cousins, Tessa Cousins, Donna Hornby, Rosalie Kingwill, Lauren Royston, and Warren Smit

We must build a better understanding of the complexity of multiple, informal tenures within the extra-legal sector and acknowledge that they are fundamentally different from the individualized, exclusive, private property systems of Western capitalism.

Much more attention should be paid to supporting existing social practices that have widespread legitimacy rather than expensive solutions that try to replace them.

Introduction

South Africa has among the world's highest levels of inequality, and the gap between rich and poor is widening. According to some analysts, a key contributor is the absence of formal property rights to assets owned by the poor. According to economist Hernando de Soto, capitalism can be made to work for the poor through formalizing their property rights in houses, land, and small businesses. This approach resonates strongly in South Africa, where private property is dominant and works well for those who inhabit the "first economy." Yet there is strong opposition from NGOs, social movements, and others to de Soto's single-minded focus on individual title, formalization, and credit as solutions to poverty. This brief uses evidence from South Africa to suggest that many of de Soto's policy prescriptions may be inappropriate for—and even harmful to—the poorest and most vulnerable.

De Soto and His Critics

De Soto's *The Mystery of Capital*, focuses on formal recognition of "extra-legal" property. He argues that the poor hold huge assets in the form of houses, buildings, land, and small businesses. The problem is that the holdings are not adequately documented and thus "cannot readily be turned into capital, cannot be traded outside of narrow local circles…, cannot be used as collateral for a loan and cannot be used as a share against an investment." In the West, by contrast, every building, piece of land, and equipment is documented as part of a "vast hidden process" that endows them with the potential to act as capital and create additional value. What is required across the developing world, de Soto says, is a program to "capitalize the poor" by legalizing their extra-legal property.

While appealing to many, de Soto's ideas and policy prescriptions, according to a significant body of scholars and land reform practitioners, oversimplify the informal economy and associated property relations: he assumes that "formal property" means individual, private property; he does not adequately acknowledge that numerous titling programs have failed to produce the results he predicts; he fails to acknowledge the different principles that often inform extralegal property systems in rural areas and informal settlements; and he skirts the challenges in adjusting legal systems to accommodate other property systems.

Securing Property Rights in Postapartheid South Africa

Joe Slovo Park, Cape Town

In 1990 a group of households occupied part of a well-located, vacant piece of land in Cape Town that was owned by a parastatal company. After years of negotiation, the Joe Slovo Park housing project was implemented, building 936 houses using a housing subsidy. In line with national policy, the form of tenure granted was individual ownership. However, ownership was registered in the name of only one household member and the allocation process was biased. New property owners became liable for paying rates and service charges that many were unable to afford. Despite the titling program, almost all property sales were informal, and some who legally owned houses were unable to occupy them, as street committees had decided who should be the occupier. Some socioeconomic impacts have been negative: informal economic activities have been displaced and social networks were disrupted as the allocation of plots ignored kinship ties and social networks. The case study reveals that individual ownership can sometimes result in a decrease in de facto security of tenure and a negative impact on socioeconomic status. It also provides clear evidence of processes of informal resale and "reversion" to informality.

Ekuthuleni, KwaZulu-Natal

In this rural community of 224 households, residents live on state-registered land that they wish to formally acquire through land reform and hold in collective ownership. Most households survive on welfare grants supplemented with subsistence agriculture and natural resources harvested from the commons. Community members say they want to hold land in common to "prevent strangers from coming in and causing conflicts" and because they cannot afford maintaining individual title." Ekuthuleni clearly reveals the limitations of the dominant system of property rights, which requires that an individual rights holder be identified; describes the exclusive rights of the rights holder; and depicts the boundaries of land parcels through beaconing and geo-referencing. But in Ekuthuleni property ownership is never exclusive to one person and is always shared by a changing number of family members. The closest current law can come to accommodating this would be a family trust, but even that would not capture the nature, content, or governance of family- and community-based land rights. The Ekuthuleni case reveals that there is often a fundamental incompatibility between property rights in community-based systems and the requirements of formal property. Formalization of property rights transforms and alters both the nature of the rights and the social relations and identities that underlie them.

> Formalization of property rights transforms and alters both the natrue of the rights and the social relations and identities that underlie them.

Alternative Approaches

Formalization via integration into the existing system of private property is not the answer for large numbers of people. Much more attention should be paid to supporting existing social practices that have widespread legitimacy rather than expensive solutions that try to replace them. Some features of extra-legal property regimes found in South Africa's informal settlements and communal areas provide a key to the solutions: their social embeddedness; the importance of land and housing as assets that help secure livelihoods; the layered and relative nature of rights; and the flexible character of boundaries. Approaches based on Western property regimes fail to acknowledge and respond to these features.

Second, more attention should be focused on the complex relationship between property rights, development, and state investment and administration. In many developing countries the state lacks the capacity to provide the poor with formal housing and associated infrastructure and services. Attempts to address the problem through one-off solutions involving high levels of state investment need to give way to a more nuanced, incremental, and integrated development approach that would extend infrastructure, services, and economic opportunity linked to legal recognition of diverse tenure forms.

Third, the enormous inequities in property ownership inherited from the apartheid era remain a fundamental constraint on the livelihoods of the poor. Poverty reduction policies must therefore include a central focus on large-scale redistribution programs.

Fourth, land reform laws that seek to secure the rights of occupiers without necessarily transferring full ownership to them remain important but are proving inadequate. Property rights of people on farms need to be strengthened, and government needs to allocate resources for their protection. Similar arguments can be made for people subject to evictions from urban and peri-urban land.

For these suggestions to take root, reform of the dominant legal and administrative frameworks for holding and regulating property are urgently required, so that the principles that govern extra-legal property in rural and urban informal settlements can receive legal recognition and practical support. This suggests that tenure reform requires a more rigorous and far-reaching approach than the term "formalization" implies.

> …reform of the dominant legal and administrative frameworks for holding and regulating property are urgently required, so that the principles that govern extra-legal property in rural and urban informal settlements can receive legal recognition and practical support.

Conclusion

Policy makers must resist the temptation to seek simplistic solutions to poverty. Poverty reduction efforts of the scale required in South Africa and elsewhere require a great deal more than the securing of property rights in the manner prescribed. Tenure reform remains necessary and important, but is far from sufficient. In addition, it must be recognized that restructuring the dominant frameworks of property law and administration, so that they work to support the interests of the poor, is no easy task. We must build a better understanding of the complexity of multiple, informal tenures within the extra-legal sector and acknowledge that they are fundamentally different from the individualized, exclusive, private property systems of Western capitalism.

Further reading:

Cousins, Ben. 2005. 'Embeddedness vs. titling: African land tenure systems and policy failure'. Paper presented to an International Conference on Property Law, University of Stellenbosch, April 5, 2005.
Hornby, Donna. 2004. "Securing Tenure at Ekuthuleni". Paper presented at the Symposium: 'Aligning Development Planning with Communal tenure arrangements in the Context of Changing Legislation in South Africa'. Leap & KZN Planning & Development Commission. 9 September.
Kingwill, R. 2005. Options for Developmental Land Administration Systems in the Context of Communal Tenure situations; and implications for Service Delivery. Association for Rural Advancement (Afra).
Royston, Lauren. 2002. 'Security of Tenure in South Africa: Overview of Policy and Practice', in: Alain Durand-Lasserve and Lauren Royston, (eds) Holding Their Ground. Secure Land for the Urban Poor in Developing Countries, London: Earthscan.

Benjamin Cousins *(bcousins@uwc.ac.za)*
Ben Cousins is Director Program for Land and Agrarian Studies at the University of Western Cape

Getting the Process Right: The Experience of the Uganda Land Alliance in Uganda

Oscar Okech K. and Harriet Busingye

Planning and organization—including building the capacity of coalition members and stakeholders—is important to increasing understanding of the issues and broadening support for reform.

Introduction

This brief lists key challenges and lessons learned by the Uganda Land Alliance as it undertook lobbying and advocacy to influence land reform policymaking. The alliance is a consortium of 68 NGOs and individuals, founded in 1995, that lobbies and advocates for fair land laws and policies for the protection of the land rights of the poor and marginalized groups. The alliance has lobbied for customary tenure, women's land rights, and citizen's radical title to land to be included in the constitution.

How It Was Done

The alliance compelled the government to recognize it because it is widely representative. The government therefore gave the alliance seats on key committees and working groups related to land policy. To ensure ownership among members, build its constituency, and maintain its credibility, the alliance continuously incorporates the views of all stakeholders in the land reform process.

The alliance developed specific messages indicating its positions clearly. For example, one message was "women are not property, but land is property women can own." To develop positions, the alliance conducts research on relevant issues and verifies knowledge sources. When it speaks, it does so based on the facts. The alliance organized seminars and conferences to target policymakers, the media, academics, and civil society organizations. At many of these meetings, the alliance presented research findings and demonstrated to policymakers that legislating for land rights of the poor had to be done as a priority.

The alliance made use of grassroots testimonials to convince doubtful legislators. For example, 14 Karimojong elders testified in 1998 before a parliamentary committee about their use of common property resources, and seven women whose family lands were grabbed by in-laws testified before an international women's conference in Kampala in 2002.

At the peak of the debates, alliance members attended parliament daily and met with MPs. They also held a breakfast meeting for MPs, informal meetings with individual MPs, and structured meetings with parliamentary committees and associations. Meetings were also held with technical officials in the Ministry of Water, Lands and Environment.

Because Uganda's president is able to influence public opinion, the alliance works with friendly MPs and lobby groups to reach the president and influence his opinion. For example, in early 2005, the National Forestry Authority began to evict over 180,000 occupants of what it claimed were forest lands. When the alliance lobbied the MPs, they met with the president, who ordered a halt to the evictions and a review of the whole process.

Throughout the process of drafting the Land Act of 1998, the alliance was invited to sit on the technical committee debating the bill and used the opportunity to consistently demand that the bill include the

rights of the poor on land. The alliance submitted proposals that included legal recognition of customary land tenure and the registration of women's interests on customary land; protection of common property resources; spousal and children's consent in person for any transactions on family land; spousal co-ownership of land; the legal recognition of tenants on mailo land; the land fund; and representation of women on all land management and dispute resolution institutions. The alliance drafted clauses for especially contentious issues and then convinced an MP to introduce the clauses in parliament. It is easier to get agreement from legislators when a bill comes from fellow MPs rather than from civil society.

Finally, the alliance was willing to take legal action where agreement through the above channels failed. For example, the alliance and Benet community leaders sued the government in 2002 for dispossessing them of about 2,000 hectares of land when the Mt. Elgon forest was gazetted as a National Park. After the litigation, the Uganda Wildlife Authority (UWA) agreed to degazette the 2,000 hectares and allow the community to develop the area.

> The alliance drafted clauses for especially contentious issues and then convinced an MP to introduce the clauses in parliament. It is easier to get agreement from legislators when a bill comes from fellow MPs rather than from civil society.

Major Challenges

- The alliance's legitimacy has been challenged on many fronts, especially by members of the public, policymakers, and the courts.
- Influencing policymakers is a necessary but expensive venture, especially when the issues are contentious.
- It is important to ensure that the coalition remains relevant to the members and meets both their expectations and those of their constituents/ beneficiaries.
- Failure to build consensus on an issue risks sending conflicting messages to both policymakers and the public.
- The alliance was constantly challenged on how to present its achievements: some members and organizations felt they were not given due recognition when the alliance was recognized for its achievements.
- It is important to maintain consistency among the members participating in lobbying activities and to ensure that members have a good understanding of the issues.

Key Lessons

- It is important to have a clear message and position.
- It is important to have the facts right and for the spokespersons to know the subject well. To get the facts, research is very important and the evidence must be presented simply, accurately, and reliably.
- Messengers should be chosen with care: they need to be credible in the eyes of the target audience.
- By working together, alliance members gained access to more resources and experience. Moreover, the credibility gained in numbers increased the likelihood of influencing policy.
- Policy reform is not an event but a process. Therefore, one must be persistent and committed to a long-term effort.
- Besides legislative reform, there is sometimes a need to change cultural biases, such as attitudes toward women's ownership of land.
- Achieving consensus on an issue may take a lot of time. The alliance found that some MPs would change their stands, at first agreeing, for example, that children should be consulted in family property transactions, but later saying children should be left out.
- Government political will has been a problem: although interested in the land reform process, government has been wary in its dealings with powerful landowners.
- Some MPs have to be sensitized as well as lobbied; it was clear that some lacked understanding of what the laws were or should be.
- Planning and organization, including building the capacity of coalition members and stakeholders, is

important to increasing understanding of the issues and broadening support for reform.
- It is important to listen to what others, including opponents, have to say and to use opponents' views to win them over.

Conclusion

The experience of the Uganda Land Alliance in getting agreement on land reform demonstrates that "working together works." The recognition that the alliance got from policymakers was due to its being seen as representative of the views of civil society. Another important lesson is the need for research before any advocacy activity is embarked on. The engagement of the local people as key beneficiaries is crucial to frame the issues from their perspective and derive mandate to speak on their behalf.

Policy reform is an ongoing process rather than something that brings immediate results. Alliance members must work hard, be innovative, and be willing to go back to the drawing board and re-examine the issues at each stage to see how best they can be presented to succeed.

Finally, not getting certain issues into law or policy does not mean failure. That the issues come out in the open for debate and analysis indicates progress. With time, consensus and agreements will be achieved.

Oscar Okech (*osakest@yahoo.com*)
Oscar Okech is Coordinator of Uganda Land Alliance

Getting Agreement on Land Tenure Reform: The Case of Zambia

Joseph Mbinji

Public sensitization is an important component in any policy review process, as it enables greater and more meaningful participation.

Background

Zambian postindependence land reforms have mainly focused on land repossession from absentee landlords to the state and conversion of titles through the Land (Conversion of Titles) Act of 1975, improving the land administration system, and regulating and liberalizing land markets. This brief reviews the approach and challenges of the latest land reform efforts that begun in 1993. The aim of current land policy reforms is to modify land policy and law review to achieve the following:
*   improve efficiency in land administration and land disputes resolution
*   decrease land tenure insecurity in both customary and state land
*   increase equitable access to, ownership of, and control of land resources
*   convert more customary land to state land to address increasing demand for land

The Process of Land Policy Review

The government that came into power in 1991 planned to liberalize the economy and encourage local and foreign investment in mining, agriculture, and tourism. To facilitate such developments, land policy needed to be reviewed. Before the new government came to power, land in Zambia could not be bought or sold like a commodity. The new government proposed through its land bill to privatize land and develop land markets. However, traditional leaders, civil society, and other key stakeholders rejected the bill, arguing it would disadvantage the majority poor people and undermine the authority of traditional leaders with regard to administration of customary land. However, the government quietly proceeded to make the bill law in 1995 (the Lands Act). Since then, however, the heated debates and controversy have made it difficult for government to implement the new land law.

In 2000 the Ministry of Lands drafted the land policy, which was approved by the cabinet in principle. However, the cabinet directed the ministry to subject the draft policy to further public consultations. In 2001 the ministry initiated a countrywide draft land policy review consultation process with various key stakeholders. Unfortunately, the consultations did not adequately provide for the participation of the poor, women, youth, and other disadvantaged groups who largely depend on land for their livelihoods.

Getting the Process Right

To effectively participate in the land policy review process, civil society in Zambia formed an alliance, the Zambia Land Alliance (ZLA). The alliance aimed to advocate for fair land policies and laws that would protect the interests of poor communities and marginalized social groups. The alliance worked to coordinate civil society participation and facilitate popular participation and advocacy on the land policy reforms. To begin the process, civil society undertook countrywide sensitization programs in communities about the draft land policy and the 1995 land law. In 2001, ZLA lobbied government to let it join the Technical Committee that was spearheading the land policy consultations. Civil society is currently represented on the committee by four organizations.
Due to limited resources to undertake a countrywide consultation process, the process stalled for some

time. Concerned by the possible lack of wide consultation and to push the process forward, the ZLA began negotiations with the Ministry of Lands to form a partnership and undertake the consultations jointly with civil society, which would contribute financial and human resources to the process. In this arrangement, civil society influenced the approach of consultations into a broad-based consultative process that involved the poor and ordinary citizens. The earlier approach had not provided for the active participation of poor people and ordinary citizens in the villages that would be directly affected by land policies. The previous approach was instead aimed at the provincial level and involved heads of government departments and representatives of NGOs and churches. Civil society lobbied for community-level workshops and debates; workshops with traditional leaders; and meetings of representatives of various government and nongovernmental organizations. They also wanted to include targeted consultations with interest groups such as women, youths, people with disabilities, people living with HIV/AIDS, etc.

> The earlier approach had not provided for the active participation of poor people and ordinary citizens in the villages that would be directly affected by land policies.

ZLA compiled the views and recommendations of communities during the consultations in form of a booklet for transparency, community feedback, and further advocacy. ZLA also collected and documented land cases and problems affecting communities for use as evidence in its advocacy campaign.

In addition to coordinating civil society participation in the land policy, ZLA coordinated participation in the Republican Constitutional Review Process, where it made numerous proposals on land issues aimed at securing land rights of the poor and disadvantaged. These proposals are reflected in the draft republican constitution.

Key Recommendations to Improve Land Rights for Development in Zambia

- Allow the current dual nature of the tenure system to continue and to develop into systems that provide better security of tenure and access to land.
- Establish registration of individual and/or communal rights to land such as "traditional titles" in customary areas; this will improve security of tenure and access to financial and other resources.
- Introduce and register simple, affordable, secure "certificates of title," to be issued by traditional authorities under customary tenure to benefit rural communities.
- Add an explicit clause to the Zambian Constitution providing that land rights are a fundamental human right.
- Enhance governance in the administration and management of land through democratic structures that are easy to access and close to the people.
- Raise awareness and enlighten traditional leaders and communities on the procedures of processing title deeds.
- Maintain mandatory and affirmative action to ensure that at least 30 percent of land available for distribution is allocated to women and that women can also compete for the remaining 70 percent of land.

Challenges, Experiences, and Lesson

- The pace of the land policy review process has been slow for a number of reasons, such as inadequate financial resources and political will to speed up and finalize the process.
- Although civil society was supposed to be an equal partner in the process, it was not considered to be so by the Ministry of Lands; therefore, civil society had only limited influence on the pace and process.
- Countrywide consultations revealed a large information gap between government officials and communities on land policies and laws. Most communities were not aware of the consultation process and provisions of the land laws and policy.

- Public sensitization is an important component in any policy review process, as it enables greater and more meaningful participation.
- There was a general limited capacity of civil society to effectively engage in the policy review process.
- There is a need to broaden representation of stakeholders in the Technical Committee spearheading the consultation process.
- The active participation of civil society in the reform process enabled the poor and other marginalized groups from remote areas to freely participate, debate, and present their views on the land policy. This also enabled greater participation of other key actors such as the traditional leaders, community-based organizations, farmer groups, the private sector, professional associations, and other government institutions.
- The civil society–governmental partnership created a sense of confidence, transparency, and accountability.
- Since the process is ongoing, civil society and government have agreed that the final product of the process should be adopted at a national conference of stakeholders.

Joseph Mbinji (*land@coppernet.zm*)
Joseph Mbinji is Program Officer for Zambia Land Alliance

The Land Policy Process in Burkina Faso: Building a National Consensus

Ouedraogo, Hubert M.G.

If the policy dialogue leads to a consensus, the land tenure laws drafted will have a greater chance of being accepted and therefore of being effective.

The process of developing land policy documents is new to West Africa. While Ghana adopted a land policy document in 1999, others are still only in the preparatory stages. In the 1990s, countries had tried to formulate land codes with little success. At that time, much of West Africa was governed by regimes that monopolized land ownership and did not allow genuine consultation. The land laws that emerged were technical, complex, and poorly adapted to local realities. As a result, they were ineffective, and land tenure insecurity has become prevalent among rural stakeholders and the numbers of land conflicts are increasing.

The recent wave of democratization and decentralization in the region has led to the development of civil society organizations (CSOs) calling for broader participation in decisionmaking on land issues. The need to build consensus has also been endorsed by West African intergovernmental institutions and by governments. The process of preparing land policy documents requires the state to engage in dialogue with all stakeholders. In this process, policy options to promote land tenure security or access to land are made clear and discussed by all. If the dialogue leads to a consensus, the laws drafted will have a greater chance of being accepted and therefore of being effective.

Land Issues in Burkina Faso

Prevailing land law in Burkina Faso does not recognize customary land rights: all land is considered state property, and anyone seeking access to land must apply for use rights. On the other hand, local communities do not recognize this monopoly ownership and regard themselves as the true owners of their land by virtue of their ancestral rights. While the state's monopoly of landownership is theoretical, it has resulted in great insecurity with regard to land tenure for the 90 percent of the population whose rights to land are customary. It is also at the root of the enduring conflict between the legality of state monopoly of land and the legitimacy of communities' land claims.

Land conflicts are developing everywhere at the local level: between herders and farmers over grazing areas and water; between villages over boundaries; between autochthonous people and migrant farmer populations over agricultural lands; and between state and local communities over incursions into reserved forests. Complicating matters is that most regions in Burkina Faso deal with very diverse local realities: the northern pastoral part of the country, for instance, has nothing at all in common with its forested south. This wide variation rules out a one-size-fits-all solution. The judiciary system is not prepared to address land disputes at the local level. Hence, many conflicts are settled through alternative dispute resolution mechanisms involving traditional chiefs and other local institutions.

Rapid change is part of the complexity of the situation in rural areas. There is a trend toward land concentration among the urban elite and agro-businessmen. These groups take advantage of people's poverty and lack of information to buy communal rural lands at below-market prices. The state encourages this trend because it believes that smallholder farming cannot meet the country's food production requirements. It thus provides incentives to agro-businesses by giving them access to credit facilities as well as political support. Rapid population growth is strongly affecting land relationships in rural areas. The population of Burkina Faso is expected to increase dramatically in the next few decades, and such growth will create land scarcity for agriculture, increase competition for land, and create more land conflicts. It also will put more

pressure on natural resources and the environment. Another major change trend is rapid urbanization. By 2025, the majority of the population of West Africa will have moved to major cities in search of economic opportunities. Such a change will greatly affect land issues in rural and peri-urban areas.

The Process of Developing Land Policies

In Burkina, it was agreed early on that in the process of developing the land policy, all stakeholders should participate equally. While the state is ultimately responsible for preparing the land policy, it must share this role with farmers, local communities, local governments and the private sector, all of whom have legitimate rights to access land. Among farmers and communities, both traditional chiefs and leaders of farmers' organizations should have equal footing in the debate. Women in particular should be included, and furthermore, their rights should be discussed among community representatives, as many local customs do not recognize women's land rights. State and local government support for women's access rights is crucial, as they have authority over a part of rural lands. Private sector representatives should also be present, but it is important to ensure that their land access procedures are transparent and that their land claims do not infringe on the rights of communities.

> In Burkina, it was agreed early on that in the process of developing the land policy, all stakeholders should participate equally. While the state is ultimately responsible for preparing the land policy, it must share this role with farmers, communities, and the private sector, all of whom have land rights.

The land policy dialogue is being organized by a consultative group (the National Committee for Rural Land Tenure Security) whose members represent key ministries, farmers' organizations, and CSOs representatives. The committee provides policy guidance to the process and uses independent experts to conduct the policy dialogue on the ground.

Each stakeholder group organizes specific dialogue sessions, the objective of which is to allow each group to formulate its own vision of land tenure and land access. Common sessions are then organized at the local and regional levels where each stakeholder can challenge the views and interests of other stakeholders. A national forum will follow these local and regional sessions and final agreements on the land policy options will be drafted. The proposed land policy will then be submitted by the National Committee to the government for consideration and adoption. Once it adopts the policy, the government will prepare a framework land law—guided by the consensus points in the land policy document.

Main Options in the Current Debate

- Which customary land rights should be recognized? In particular, how should rights claimed by traditional chiefs be considered?
- How is it possible to secure collective customary land rights and on behalf of whom?
- How can women's land rights be protected in the context of dominant customary local practices that exclude women from land ownership?
- How can access of pastoralists to natural resources be improved and protected?
- How can the land concentration process be controlled to protect the land rights of the poor?
- How can land management capacity be established and developed locally?
- How can governance in land management be promoted locally and nationally?
- How will future rural land policy and law be implemented?

Guiding Principles of Consensus Building

The experience in Burkina Faso has shown that a number of principles must be observed in holding a policy dialogue to help build a national consensus on land. First, it is key that the dialogue involve all stakeholders. Second, the dialogue must be informed. In particular, it must be based on a clear analysis of the primary

land issues. Moreover, the analysis should not be monopolized by land experts; rather, it must be a shared diagnostic based on consultations with communities. Third, the dialogue should be based on lessons learned on what is working in land tenure security and what can guarantee access of the poor to land. Finally, the land policy dialogue should be linked with the ongoing debate on other major development policies, mainly in the field of agriculture, decentralization, and poverty alleviation strategies.

Further reading:

Hubert Ouedraogo. 2004. Land Research, Politics and Advocacy. In: Securing Land Resource Rights in Africa: Pan-African Perspectives. Cape Town: PLAAS, University of the Western Cape.
Philippe Lavigne Delville, H. Ouedraogo, C. Toulmin. 2003. Pour une sécurisation foncière des producteurs ruraux. Paris, GRET.
Philippe Lavigne Delville. 1998. Quelles politiques foncières pour l'Afrique rurale: réconcilier pratiques, légitimité et légalité. Paris, Kathala.

Hubert Ouedraogo *(o.hubert@fasonet.bf)*
Hubert Ouedraogo is Coordinator LandNet West Africa

The System-Wide Program on Collective Action and Property Rights (CAPRi), one of several intercenter initiatives of the Consultative Group on International Agricultural Research (CGIAR), fosters research and promotes collaboration on instititutional aspects of natural resource management between CGIAR centers and National Agricultural Research Institutes. CAPRi contributes to policies and practices that alleviate rural poverty by analyzing and disseminating knowledge on ways that collective action and property rights institutions influence the efficiency, equity, and sustainability of natural resource use. For additional information, email **Capri@cgiar.org** or visit our website at **www.capri.cgiar.org**.

CAPRi

CGIAR System-wide Program on
**COLLECTIVE ACTION AND
PROPERTY RIGHTS**