United Nations Development Programme

Land Rights Reform and Governance in Africa

How to make it work in the 21st Century?

Draft Discussion Paper

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Abstract

The main argument of this paper is that insecurity of land tenure is a socio-political condition that can be made – and unmade. Its origins lie in 19th and 20th century policies which failed to accord indigenous and customary occupancy their deserved status as private property interests. This has deprived millions of poor of the protection they need to withstand the worst effects of social transformation and the commoditisation of land. Lands and resources owned in common have been most affected, the more valuable having been withdrawn from local custodianship or reallocated to outsiders and investors. Reforms of the 20th century often improved the general access of poor to land but made customary rights less secure. Entitlement programmes that converted customary occupancy into individualised European-derived tenure forms have widely extinguished secondary and common property interests.

In Africa (the focus of this paper) over 90 percent of the rural population gain access to land by custom, and around 370 million of them are definably 'poor'. With exceptions, customary access to land has been no more than permissive and often remains so. People with customary rights to land often live on land that is actually classified as government or public land. While rights over farmland and houses are not routinely interfered with, common property ownership of pastures, forests and woodlands see constant attrition through state appropriation and reallocation to investors or interest-holders of its choice. Yet these lands provide substantial support to livelihoods, especially of the poor who often have no or little farmland. The lucrative and rising values of pasture, forest and woodland are still typically captured by governments in the form of logging, agribusiness land leasing and other fees. This deprives poor communities of a crucial capital base which could help them escape poverty.

A new wave of global land reform is underway within which the legal status of customary rights held by rural Africans and other indigenous populations around the world is improving. In a small but growing number of cases in Africa, customary rights are now accorded equivalent legal force with those acquired through non-indigenous systems under state law and may be registered under state law. Support for the devolved governance of these rights at local levels, and building upon customary norms, is also growing.

Constraints upon the delivery of real security abound. The paper points to the need for a more action-based and community driven evolutionary process. This, it is argued, will better resolve conceptual confusions that still surround customary tenure and which frustrate sound policy development and will trigger the empowerment and institution building that are needed to engender the public ownership of reform. This will help develop political will (which has otherwise often been transient) for the genuine removal of the chronic tenure insecurity of the rural poor. It will also help limit the impacts of reform that is broadly market-driven and in the African context, often primarily seeks to bring as much unoccupied customary land as possible into the market-place for investor acquisition. Approaches which work from the community level will also bring threatened commons to the centre of reform, facilitating the evolution of stronger constructs for the ordering and protection of collective rights. Securing those rights in clear and inclusive ways will lay a foundation from which their generally poor shareholders may begin to reap the benefits.

Resumo

A principal hipótese deste documento é que a insegurança quanto a posse da terra é uma situação socio-política que pode ser construída – e desfeita. A sua origem encontra-se nas políticas dos Séculos XIX e XX, que não concederam à ocupação indígena e tradicional o estatuto de propriedade privada que mereciam. Esta situação privou milhões de pobres da protecção de que tinham necessidade para resistir aos piores efeitos da transformação social e da comercialização da terra. As terras e os recursos detidos em comum foram os que mais sofreram e os mais valiosos foram retirados à posse local ou atribuídos a pessoas exteriores ou a investidores. As reformas do Século XX melhoraram muitas das vezes o acesso geral dos pobres à terra, mas tornaram também os direitos tradicionais menos seguros. Os programas de criação de direitos que converteram a ocupação tradicional em formas de posse individualizada de tipo europeu extinguiram quase totalmente os direitos de propriedade secundários ou comuns.

Em África (centro de interesse deste documento), 90 por cento da população rural tem acesso à terra por tradição e aproximadamente 370 milhões dessas pessoas são definidas como "pobres". Salvo algumas excepções, o acesso tradicional à terra foi só tolerado e continua frequentemente a sê-lo. As pessoas que dispõem de direitos tradicionais sobre a terra vivem muitas das vezes numa terra que é terra do Estado ou pública. Enquanto os direitos sobre a terra de cultivo e as casas são raramente postos em causa, a posse em comum de pastagens, florestas e bosques é muito pouco segura. No entanto, essas terras proporcionam meios de existência importantes aos pobres que, normalmente, ou não possuem terras de cultivo ou possuem poucas. O valor lucrativo crescente das pastagens, florestas e bosques ainda é normalmente capturado pelos Estados sob a forma de direitos de corte de árvores, de agro indústria, de arrendamento e outros. Isto priva as comunidades pobres de uma base de capital essencial que as poderia ajudar a sair da pobreza.

Está a surgir uma nova onda mundial de reformas agrárias que melhoram o estatuto legal dos direitos tradicionais das populações rurais africanas e outras populações indígenas do mundo. Num número pequeno mas crescente de casos em África, os direitos tradicionais estão a obter uma força legal equivalente àqueles adquiridos por sistemas não-indígenas segundo a legislação nacional e podem ser registados segundo esse mesmo quadro legal. Está igualmente a desenvolver-se o apoio a uma boa governação desses direitos a nível local, bem como a aplicação de normas tradicionais.

São muitos os constrangimentos que travam a concessão de uma verdadeira segurança. O documento realça a necessidade de processos evolutivos baseados na acção e orientados para a comunidade. Pretende-se que esses processos resolveriam melhor as confusões conceptuais que ainda rodeiam a posse tradicional e que frustram um desenvolvimento político são. A clarificação desta confusão conceptual vai disparar o fornecimento de meios às populações e reforçar as instituições necessárias para que o público se apodere da reforma. Isto vai ajudar a desenvolver uma real vontade política (que, por agora, tem sido efémera) de abolir a insegurança crónica da posse pelos rurais pobres. Vai igualmente ajudar a limitar o impacto da reforma que é em grande parte orientada pelas leis do mercado e que, no contexto africano, procura antes de mais levar para o mercado o máximo de terras tradicionais desocupadas, para aquisição pelos investidores. As abordagens comunitárias vão ajudar a levar as terras comuns ameaçadas para o centro da reforma, facilitando dessa forma a criação de uma estrutura mais fortes para organizar e proteger os direitos colectivos. A garantia desses direitos de forma clara e inclusiva vai lançar os alicerces de uma estrutura, da qual os interessados geralmente pobres podem começar a colher os benefícios.

Resumen

La premisa principal de este documento es el hecho de que la inseguridad de la tenencia de la tierra es una condición sociopolítica que puede fomentarse, y también evitarse. Sus orígenes se remontan a las políticas que los siglos XIX y XX que eran incapaces de conceder a la ocupación autóctona y consuetudinaria su merecida condición de intereses de propiedad privada. Ese hecho ha privado a millones de personas pobres de la protección necesaria para hacer frente a los peores efectos de la transformación social y la conversión de la tierra en un bien de consumo. Los más afectados han sido las tierras y los recursos de propiedad común, habiendo sido los más valiosos de ellos retirados de la custodia local, o reasignados a extraños e inversores. En muchos casos, las reformas del siglo 20 han mejorado el acceso general de los pobres a la tierra pero han contribuido a que los derechos consuetudinarios sean más inseguros. Los programas de ordenación del suelo por los que la ocupación consuetudinaria se ha configurado según modalidades de tendencia individualizada según modelos europeos, han obliterado en gran medida los intereses inmobiliarios secundarios y de propiedad común.

En África, lugar que se refiere este documento, más del 90% de la población rural obtiene acceso a tierras de forma consuetudinaria, y en torno a 370 millones de ellos pueden catalogarse como personas "pobres". Salvo algunas excepciones, el acceso consuetudinario a la tierra ha sido meramente permisivo y frecuentemente sigue siendo así. A menudo, las personas que gozan de derechos consuetudinarios a la tierra viven en terrenos clasificados de hecho como tierras gubernamentales o públicas. Aunque los derechos respecto de los campos de cultivo y las viviendas habitualmente no se ven menoscabados, la tendencia de los pastizales de propiedad común, los bosques y los prados es sumamente insegura. Pese a ello, esas tierras suponen un apoyo sustancial a los medios de vida, especialmente de los pobres que, a menudo poseen muy pocas tierras arables o ninguna. El valor lucrativo y en alza de pastizales, bosques y prados benefician habitualmente a los gobiernos en la forma de tala de árboles, agrocomercio y tasas por arrendamiento y usos varios. Esa práctica priva a las comunidades pobres de una base de capital fundamental que podría ayudarles a escapar de la pobreza.

Caber señalar que está emergiendo una nueva ola de reforma inmobiliaria global, en cuyo marco se está mejorando la condición jurídica de los derechos consuetudinarios de la población rural de África y otras poblaciones indígenas en todo el mundo. Aunque a pequeña y creciente escala en África, los derechos consuetudinarios han adquirido ya un valor jurídico equivalente de los adquiridos en virtud de sistemas no autóctonos con arreglo al derecho estatal y pueden registrarse de acuerdo con ese derecho. Asimismo, va aumentando el desarrollo de la gobernanza de esos derechos a nivel local, apoyándose en normas consuetudinarias.

Existen muchas trabas a la realización de una seguridad efectiva. El documento expone la necesidad de un proceso basado en mayor medida en la acción e impulsado por la comunidad. Se argumenta que ello, resolverá más adecuadamente las confusiones conceptuales que todavía existen respecto de la tenencia consuetudinaria y que frustran el desarrollo de políticas idóneas. La resolución de esta confusión conceptual redundará en el empoderamiento y la creación de instituciones necesarias para generar un sentido de propiedad pública de la reforma. Asimismo, ayudará a fomentar la voluntad política (a menudo ausente) para una remoción real de la inseguridad crónica a la tenencia por parte de los pobres de las zonas rurales. Ayudará también a limitar los efectos de la reforma que, en general depende del mercado y que, en el contexto africano, tiene por objeto primariamente colocar en el mercado la mayor extensión posible de terrenos

consuetudinarios no ocupados para su adquisición por inversores. Los enfoques que se basen el nivel comunitario ayudarán a que la reforma se centre en esos precarios derechos, facilitando la evolución de estructuras más idóneas para la ordenación y protección de los derechos colectivos. La seguridad de esos derechos de forma clara e integral sentará una base a partir de la cual sus interesados, generalmente pobres, puedan comenzar a recoger los beneficios.

Résumé

La présente analyse part de l'hypothèse que l'insécurité des régimes fonciers est une situation socio-politique que l'on peut faire et défaire. Elle trouve son origine dans les politiques du XIXe et du XXe siècles qui n'ont pas accordé aux systèmes autochtones et coutumiers d'occupation des terres, le statut qui leur revenait en tant qu'intérêts privés. Ainsi, des millions de pauvres se sont vus privés d'une protection indispensable pour lutter contre les effets les plus néfastes de l'évolution sociale et de la commercialisation des terres. Les terres et les ressources collectives ont été les plus touchées, les plus intéressantes ont été soustraites à la tutelle locale ou attribuées à des non-locaux et à des investisseurs. Les réformes du XXe siècle ont souvent amélioré l'accès global des pauvres à la terre mais elles ont aussi accru l'insécurité des droits coutumiers. Les programmes mis en place pour transformer des droits de propriété coutumiers en droits fonciers individualisés dérivés des régimes fonciers européens ont contribué à l'extinction quasi-générale des droits de propriété subsidiaires et collectifs.

En Afrique, sujet du présent document, plus de 90 % des populations rurales accèdent à la propriété foncière par des usages coutumiers et plus de 370 millions de ces ruraux peuvent être considérés comme « pauvres » par définition. A quelques exceptions près, les normes coutumières régissant l'accès à la terre étaient plutôt laxistes ce qui demeure généralement le cas. Les personnes titulaires de droits fonciers coutumiers vivent souvent sur des terres relevant du domaine public ou appartenant au gouvernement. Même si les droits sur les terres agricoles et les habitations ne sont habituellement pas contestés, il n'en va pas de même pour les droits de propriété collective sur les pâtures, les forêts et les terres boisées. Et pourtant ces terres contribuent largement aux moyens de subsistance, notamment des pauvres qui, dans la plupart des cas, ne possèdent pas ou peu de terres agricoles. Ce sont généralement les gouvernements qui s'emparent des profits lucratifs croissants générés par les pâtures, les forêts et les terres boisées par le biais de redevances sur l'exploitation du bois, la location de terrains à l'agro-industrie et autres taxes. Les communautés pauvres sont donc dépossédées d'un capital crucial pour les aider à sortir de la pauvreté.

La nouvelle vague de réformes foncières en cours améliore le statut juridique des droits coutumiers des populations rurales d'Afrique et d'autres populations autochtones dans le monde. Dans un nombre de cas encore restreint mais en augmentation, en Afrique, les droits coutumiers bénéficient dorénavant de la même force juridique que ceux acquis par des systèmes non autochtones en application d'une législation nationale et peuvent être enregistrés au regard de cette législation. Le retour à une gouvernance locale de ces droits, en s'appuyant sur des normes coutumières, recueille un soutien croissant.

L'octroi d'une véritable sécurité doit faire face à de multiples contraintes. Le document souligne la nécessité d'un processus évolutif plus orienté vers l'action et piloté par les communautés. Il devrait permettre de dissiper le flou conceptuel qui entoure toujours le droit foncier coutumier et qui entrave l'élaboration de politiques judicieuses. La clarification de ces concepts permettra d'assurer la maîtrise et le renforcement des institutions nécessaires à un contrôle de la réforme par les autorités publiques. Elle permettra de susciter une réelle volonté politique (laquelle a souvent été passagère) d'élimination de l'insécurité chronique du régime foncier dans les communautés rurales pauvres. Elle pourra également limiter les incidences d'une réforme largement dictée par les lois du marché et qui dans le contexte africain vise essentiellement à mettre sur le marché le plus grand nombre de terres coutumières inoccupées pour acquisition par les investisseurs. Les approches communautaires permettront de mettre les biens collectifs menacés au centre de la réforme, contribuant à la mise en place d'une structure plus solide pour la classification et la protection des droits collectifs. C'est en sécurisant ces droits de manière claire et inclusive

que l’on pourra jeter les bases sur lesquelles les intéressés, pauvres dans l’ensemble, pourront commencer à s’appuyer pour en récolter les fruits.

Summary

The Context

Tenure insecurity is a socio-political condition engineered intentionally or otherwise by policies – and is remediable by policies

In matters of tenure we have failed the world's agrarian poor even at the turn of the 21st century. Insecurity of tenure to land and natural resources is still rife. Moreover for many, insecurity is a creation of the 20th century, arising from colonial and post-colonial policies.

This presentation focuses on Africa but also draws examples from other poor agrarian areas for comparison. It asks why mass insecurity persists into the 21st century and why policy-makers have failed to better limit predictable effects of social transformation and commoditization of land upon the rural poor. This interrogation is essential if Millennium Development Goals relating to sufficient means of production may begin to be met. It is also essential for peace; although governing bodies in the world community have been slow to acknowledge the centrality of tenure injustice in triggering conflict and civil war, this is demonstrably the case in many agrarian settings.

Looking to Root Causes

The denial of customary lands as private property lies at the heart of insecurity

This interrogation leads us directly to analysis of the status of customary rights in land. Virtually all, if not all, rural poor in Sub-Saharan Africa secure land access through customary means, as do many other indigenous populations in agrarian states around the world. While causes of insecurity are many, the way in which customary tenure has been legally and administratively treated over the last century is a root cause of sustained tenure insecurity among the poor today.

The centralising force of state-making, of both colonial and post-independence states, has been an important context, undermining both the status of existing local rights to property and withdrawing authority over these into the hands of governments. Rights to land and indigenous regimes for ordering and managing those rights have been weakened or suppressed.

The drivers towards this state of affairs have varied. In Sub Saharan Africa there is plenty of evidence to suggest that misdirected paternalism, and especially incomprehension of complex and sophisticated customary land ownership and land access norms, have been important factors, and important misunderstandings of the latter persist. Political and administrative convenience has just as clearly played a role.

The primary result has been almost uniform denial of all customary land interests as having the attributes of private property ownership, therefore condemning those interests to inferior status as temporal usufruct under the landlord-like tenure of the state. Often the entire customary sphere (unregistered land areas) have been rendered government or public land, legally entrenching all customary occupancy and land use as no more than permissive use rights, able to exist for only as long as government dictates.

Wrongful attrition has especially affected common properties and the poor

Conceptual difficulties have been particularly experienced with the collective nature of customary ownership at village or community levels. These are estates like pastures and woodlands, sensibly owned in undivided shares by all members of the community. Because they are unoccupied and not always visibly used, unlike farms and houses owned by identifiable individuals or households, 20th century administrations widely entrenched these commons as un-owned public land. Accordingly, they have been much more voraciously interfered with than homesteads, which has better fitted European centric notions of 'private property'.

One effect of this dispossession has been to undermine and often disable such community based mechanisms for their use regulation as existed. This has helped generate the self-fulfilling 'tragedy of the commons'. Another has been to enable governments and aligned private sector agencies to capture the benefits of commercial use of these community properties in the form of logging, rental and other fees.

The most serious effect has been to legally enable practical realisation of this dispossession through outright appropriation of these lands and their reallocation under statutory tenure regimes to government's own agencies or interested entrepreneurs of its choice. Some of this has been in genuine pursuit of assumed greater public purpose, such as in the creation of national forest and wildlife parks and reserves. Much of it, however, has been wilful expropriation for private purpose, justified as supporting the national economy. While eviction from houses and farmlands has generally seen payment of at least compensation for the loss of standing crops or buildings, the 20th century entrenchment of community owned lands as unoccupied, and therefore even customarily un-owned, estates has seen not even this low level of compensation paid.

This dispossession amounts to several hundred million hectares in Sub Saharan Africa, and has echoes globally where indigenous tenures have similarly not been accorded their rightful status as private property regimes. Fortunately several hundred million hectares of customary commons remain accessible to the rural poor. Less fortunately, persistent failure to accord these properties recognition as the private group-owned property of communities renders them still highly vulnerable to wrongful loss and occupancy. This threat most impacts upon poorer community members, who not only depend disproportionately upon common assets for livelihood, but whose shareholding in the community property may be their only real asset.

Attempts at remedy

There have been exceptions on all continents and attempts at remedy, mainly through widespread redistributive land reforms targeted at tenants and workers. In Africa 20th century reforms were mainly in the form of titling initiatives, designed to convert existing customary occupancy into European-derived forms of land holding and to register these on the basis of formal survey. This has been most systematically pursued in Kenya, primarily intended to provide a basis upon which 'progressive' farmers could obtain loans. Fifty years on, and with still under half the rural domain titled, it is apparent that conversion has not done away with customary norms in those areas, that titling has not prompted significant mortgaging, and

that the security of tenure that widely exists in the farm sector does not derive from the often corrupted registration or the holding of title deeds. Nor has the promised reduction in land conflict occurred, with a whole new generation of conflict clogging the courts, due often to contrary customary and statutory norms. Like most countries in Africa, Kenya is looking to reform, and within which the real status of customary land interests is being reviewed, and those that have been attributed to it over the last century, beginning to be overturned.

The Promise of Real Reform

Liberation of customary tenure from a century of suppression

Dramatic improvement in the legal status of unregistered customary land interests is globally on the horizon. This is particularly evident in Latin America where the traditional land rights of indigenous peoples in at least twelve states have seen equitable entrenchment. It is also evident in parts of Asia and in the developed world, where the customary land rights of indigenous minorities in Canada, Australia and New Zealand are seeing fairer legal interpretation through new supreme court rulings and practical delivery on the implications.

Reform in the status of customary land rights is also taking hold in Africa where, if carried through, could remove at least the *legal* insecurity of tenure of some 500 million rural dwellers, two-thirds of whom are definitively poor or very poor.

As everywhere around the world, this is emerging less as an objective in its own right than as a consequence of market-driven strategies which seek to bring much more land into the market-place, for mainly local and foreign investor acquisition and development. Titling is again back on the agenda to enable the level of formality the market requires. This is being counterbalanced by the more socially accountable imperatives of modernising democratic governance. Together with recognition of the limitations of past titling, this is encouraging one administration after the other to look more closely at what exactly is to be registered and how.

Recognising customary land interests as private property rights

The emerging result is increasing opportunity around the sub-continent for customary landholders to register their occupancy ‘as is’; without conversion into freehold, leasehold or other imported forms. This in turn is generating new policies and laws which acknowledge customary land interests as legal private property rights and, just as important - holding *equal* legal force with rights acquired under non-customary systems, and whether they are registered or not. This has been most simply and comprehensively entrenched in law in Uganda, Tanzania and Mozambique. It is more circuitously a legal fact in several other countries (e.g. South Africa, Botswana, Namibia, Ghana), and in different forms the legal fact (e.g. Ethiopia), or moving partially or fully towards these positions (e.g. Lesotho, Malawi, Niger, Mali, Benin, Guinea, Cote D’Ivoire) or ‘under consideration’ (e.g. Zambia and Kenya).

Other elements of land reform are contributing, including some release in widespread co-option of ultimate property title and powers by the central State, so far only totally done away with in Uganda (and never having existed in Botswana, Namibia or South Africa). Wider attention to the rights of women are gradually ensuring that new constructs recognising ownership at household level are under consideration, prominently including better provision for family title, a presumption of spousal co-ownership and imposition of consent conditions, requiring both/all spouses to agree to disposal of the primary family home and farm.

The helping hand of governance and natural resource management reforms

Corollary reforms in the local government and natural resource management sector are contributing drivers. 'Local conventions' (state recognition of locally-brokered land access and use agreements) in Sahelian states help regularise conflicting use of pastures and trigger more attention to how those resources are owned or not owned. The forestry sector is playing a special role in giving practical frameworks to forested common properties as Community Forest Reserves, now provided for in upwards of 20 states, and urging delivery of new property class constructs to enable local ownership of these to be embedded. Aided by the democratizing trends of local government reform, community level institutions specifically for land administration are beginning to be established, building variably upon customary norms.

Constraints

Constraints and limitations abound. In practice there is more deconcentration of state agencies at the local level that real devolutionary empowerment of community level bodies. Delivery or assisted uptake of opportunities is also limited. Much of the impressive progress remains on the written page. Programme design is distinctively unwieldy and tends to rest upon costly state-driven institution reforms. Backtracking on important commitments, even before policies and legislation are finalised is common, political will blanching less at costs, than the implications of losing authority over land and constraints that may limit private sector access to land.

Helping customary owners get hold of investment -or helping investors get hold of customary lands?

On the ground, insecurity of tenure is little changed. The security of common properties is particularly threatened as investment interest in these unfarmed lands grows with economic liberalism. The idea of unoccupied land as un-owned public land is seeing resurgence. These lands possess enormous current and future production and rental real estate values which could help the poor clamber out of poverty; a fact not lost upon governments and investors, who continue to be the beneficiaries for as long as these are not defined and entrenched as community property. Many constraints upon progress in this and other areas exist, including those that stem from routine difficulties facing social change and/or are country specific. However, analytically, the following fundamental inhibitors need particular attention:

i. Unresolved policy contradictions arising from the dominance of land market promotion objectives over and above mass securitisation of tenure

ii. Revived justification of rights certification for the purpose of collateralisation, narrowing the target to individually-held properties, and shaping process and persistent requirements for formal survey of properties; driven by what lenders need (or think they need) rather than what are necessary or viable for majority interests to be secured

iii. A still incomplete understanding of customary rights and their embedded systems, producing confused strategies and limiting legal provision for needed constructs to embed distinctions reflecting collective and family tenure

iv. The time-old problem of poor process, in both the formulation of policy and delivery; largely through the absence of a sufficiently community-based approach to deliver relevant and realistic proposals and procedures, and to engage the popular ownership of changes required to drive and sustain political will.

The main effects are:

i. Continued and even increasing vulnerability of unoccupied customary lands – the commons – to wrongful attrition and formal appropriation

ii. Over-attention to classical registration and the search for innovative technical tools within this limited framework, at the cost of building upon locally tried-and-tested and socially legitimate mechanisms for ownership certification

iii. Growing divides among what policy promises, law entrenches and what occurs on the ground; flagging political will and rising popular disenchantment - ultimately leading to conflict.

Enabling Reform

Adopting developmentally-sound and poverty-focused change

Two lead and integrated strategies are advocated towards the much proclaimed objective of current land reform to increase the tenure security of the rural poor: *first,* restructuring reform in strict accordance with prioritisation of levels of threat to the security of the rural poor, and *second*, adopting a devolved and landholder-driven approach to reform in general, thereby generating a focused and *action-based process* to ensure relevance, client control and real relief.

Both will have the effect of bringing the security of common properties over and above less-threatened individually held estates (houses and farms) to the centre of reform. This will necessarily be made real within the context of a facilitated process of inter-community agreement as to respective limits of jurisdiction in the form of distinct communal domains, and within which properties owned in common exist as one category of estates, with family and individual estates being other main categories. Such exercises lead logically to establishment (or reformation) of community based institutions for the regulation of land relations within these domains, and in whom ultimate or symbolical community title may be vested. These steps alone can sharply raise the protection of commonage against wrongful designation as un-owned government or public land. On-the-ground demarcation of specific common estates within the domain should follow, each entrenched along with agreed upon access rules as the private group owned property of all members of the community, including the poor.

In the process, persistent conceptual confusions around distinctions between collective authority and collective property ownership, between symbolical and real property rights, between ownership and access rights, and intra family distinctions as to decision-making rights, will be better ironed out and appropriate new tenure and governance norms entrenched.

Reform overall will be better instructed. Through local ownership of changes, the poor will be better able to protect their interests and popular will better engage, shape and sustain political will. Opportunities to realize the commons as the capital of the poor will be realized.

I The Setting: Tenure Insecurity, Poverty and Power Relations

Tenure insecurity is a socio-political condition engineered by policies – and remediable by policies

Insecurity and poverty

Insufficient land to live on and insecure access or rights over land are recognised factors in sustaining poverty. The main thrust of 20th century reforms was towards equitable distribution, implemented in more than thirty agrarian states.[1] Current reformism – and this paper – focuses less on distribution than on security of ownership or access to land which rural people have traditionally held. This entrenches reformism yet further in the social justice spheres. Security of land tenure is arguably the most important human right of those who need that land to survive, having no other means of production.

Looking beyond the farm

While there is growing evidence that off-farm incomes may begin to rival farming as the foundation of livelihood, security of occupancy and land to use remains pivotal in the survival of the rural poor.[2] This includes secure rights over pasture and forest lands, of uniform importance to the poor in Sub-Saharan Africa and South Central Asia, where most of those defined as 'poor' live.[3] Insecure tenure or access probably afflicts half of these one billion people - and for reasons that are largely avoidable. As this paper intends to make clear, tenure insecurity is first and foremost a socio-political condition that grows from chronic to severe and may eventuate into outright dispossession in the face of changing policies – and regimes.

Insecurity and conflict

The linkages with conflict cannot be ignored – although (curiously so, given the long history of land grievances in every revolution) peace making often still fails to grasp the centrality of conflict over land in civil war, or at least to ensure that routes to remedy are explicitly laid down in peace agreements. Failure to more than superficially do this hampers post-conflict resolution.[4] Unsurprisingly, conflicts simmer and may restart war at the slightest provocation

[1] These took the form of either recognising longstanding tenant farmers as owners (e.g. Japan, Korea, Taiwan), liberating farmers in serf-like arrangements through similar recognition of ownership (e.g. Egypt, Bolivia), or breaking up large estates for subdivision into family farms (e.g. Chile, Brazil, Colombia, Venezuela) or providing new arrangements for access to land through state collectives or cooperative enterprises (e.g. Bulgaria, Romania, Vietnam, Cuba and Mexico). See FAO 2003 and Borras, Kay & Lodhi 2005 for excellent short reviews.

[2] Grace and Pain 2004, Rigg 2006.

[3] Respectively 70% and 66% of people in South Central Asia and Sub-Saharan Africa live in rural areas and 75% of both groups live on less than $2 a day (Population Reference Bureau 2005).

[4] Hurwitz et al. 2005.

– currently the case in Afghanistan, Zimbabwe, Burundi and the Democratic Republic of Congo - and threatening to be the case in Sudan.[5]

Looking for cause

Interrogation of the causes of tenure insecurity of tenure is imperative not just for peace but for fighting poverty. The bold targets of the Millennium Development Goals add urgency. The correlation between insecurity of tenure and being poor itself hardly needs review, routinely illustrated in vulnerability assessments. These throw up pertinent other correlates that need to be kept in mind. One such finding is that achieving sufficient and secure access to land could have more direct impact on poverty alleviation in the hands of rural women than men, given the well-documented prioritisation by female farmers towards feeding children and investing in their health care and education.[6] Attending to women's land rights becomes yet more important.

The product of modern policy

Setting aside historically-embedded landlessness in especially Asian pre-colonial economies, insecurity over traditionally accessed natural resources has a relatively recent history. In the forms it takes today it is primarily a 19th and 20th century phenomenon, a predictable (and sometimes intended) consequence of first, modern state-making and second, social transformation and commoditisation of resources, exaggerated by less predicted soaring population growth and a dwindling per capita resource base.

The founding argument of this paper is that allowing insecurity to grow and fester over the 20th century was partly the result of strategy and partly an analytical failure. Discussion focuses on one of the more fundamental and ill-attended to elements, one that reaches into the heart of how the right to land is conceived and governed. The root of this is historic and continued abuse of indigenous or customary tenure regimes, engendered by lack of understanding or wilful misunderstanding and manipulation. The main effect has been to deny these indigenous (or 'customary') land interests the protection they required – and still require – to withstand involuntary losses or encroachment.

In this way, significant dimensions in the insecurity and instability of land access are politically and administratively engendered. There are constructive implications in this conclusion, for in principle what has been made can be unmade. Finding the right remedies and engaging the necessary level of political will, are as ever, the material of successful reform.

A focus on Africa

In pursuing this thesis, the focus is upon Sub-Saharan Africa, where more than 90 percent of the rural population regulate their day-to-day land relations on a customary basis building upon systems that are indigenous to the area.[7] Around three quarters of these customary landholders or users are definably 'poor' (370 million people).[8] It is their interests that this

[5] Unruh 2004, Huggins et al. 2005, Alden Wily 2003a, Alden Wily forthcoming.
[6] Carter 2005.
[7] This is reflected in the fact that *by area*, statutory rights are the basis of rural occupancy and use for less than 2-10 percent of each country area (Augustinus & Deininger 2005). Many of these rights are evidenced by deeds of purchase, not cadastral registration.
[8] Population Reference Bureau 2005.

paper will focus on although those interests can of course not be separated from the interests of that quarter of customary landholders who are not so poor.

Lessons are also drawn from other regions where customary or indigenous (the terminology is interchangeable) tenure operates. This is the case in parts of Central and South Asia (e.g. Afghanistan, India & Indonesia) where several hundred million people organise their land rights by customary norms. [9] This may be integrated with religious tenure norms, Islamic Shari'a attending in detail to property matters.[10] Customary tenure is also the norm in arid pastoral zones (North Africa, Central Asia and the Middle East). In Latin America around 40 million indigenous people traditionally hold land through customary mechanisms, and represent the majority rural population several states.[11]

Customary/Indigenous tenure as community based

In all cases the exercise of customary tenure is significantly modified, regulated and/or nested within other, dominant State regimes. The nature of that support is a necessary subject of this paper. As the ambitions of mid 20th century conversionary entitlement programmes all too well illustrated, until very recently, customary mechanisms persisted only in default of the limited reach of imported tenure regimes.

The common characteristics of customary/indigenous land tenure systems are many and equally resilient across customary societies. This is largely because they share one single powerful and immovable structural foundation, and from which most norms proceed: they are community based in their reference and adherence. They are distinct therefore from other pre-State landholding systems (e.g. feudal tenure) in that the right holders are voluntary participants of the system.

Customary tenure regimes are also essentially agrarian regimes, and within which *shared* ownership and access to certain resources like pastures, forests and moors, is appropriately held in undivided shares.

II The Subordination of Customary Land Rights

From a governance rather than economic transformation perspective, three widely consistent trends affecting customary rights have jeopardised their security. The first has interfered with localised control over land relations, the second with spheres of that jurisdiction and the third with the nature of customary land rights themselves. The three combined in suppression

[9] For example around 60 million people in Indonesia self-identify themselves as 'people living by custom' (indigenous peoples) (Colchester et al. 2004).

[10] An estimate 10 million rural people in Afghanistan regulate their land relations through a mix of customary and Islamic Shari'a law (Alden Wily 2003a). A significant number of people in both these examples fall into the classifiably 'poor' 75% of rural dwellers in Central and South Asia (Population Reference Bureau 2005).

[11] They constitute the majority population in Guatemala (66%) and Bolivia (58%) and are significant minorities in Peru (47%) and Ecuador (43%) and number 12 million people in Mexico (14%). They represent large minorities in Mexico and Peru and the majority in Bolivia and Guatemala (Colchester (ed.) 2001, Kay and Urioste 2005).

and/or reconstruction of 'native' or indigenous rights. This continues unchecked in many parts of the poor agrarian world today.[12]

Disempowering localised land authority

The first has institutional dimensions delivered in the centralisation of authority over local land relations that occurred in colonial state-making and often replayed in new regime-making since. New state-makers often felt they could not afford either valuable natural resources or resource-dependent populations to not be subject to their will. In agrarian states this cannot be better put into operation than by taking control of land relations; determining exactly who may use the land and how and with what degree of security.

Needless to say, existing indigenous systems for governing land relations were widely disabled. Or they were reconstructed to the service of new central authority, a norm that was eventually institutionalised as Indirect Rule in Anglophone Africa, and which has reflective elements in Francophone Africa.[13] The transformations that occurred still make it difficult to determine how far current customary land administration is a manufacture of the colonial era.[14]

What *is* known is that consensual mechanisms for land decision-making *narrowed* throughout the continent into the hands of Government appointed 'native authorities'. Chiefs were recognised (or not recognised) according to criteria set by Administrations not their people. Their new role as tax collectors - and the source of their own new 'wages' – encouraged rent-seeking in land matters and reinforced their upward looking accountability to Governors. Landlord-like attributes were sometimes acquired along the way. This is illustrated in Ghana where land and resource deprived revenue from common properties is not even constitutionally required to be shared by chiefs with community members.[15] An important concern of current reforms surrounds the meaning of trusteeship, a problematic also of concern at higher levels where undue powers of disposition over national property have been acquired by presidents.[16]

The quality of indigenous regimes or the justice they advanced does not concern us here - except to note that they were probably sufficient for the pressures of the time, and could pragmatically evolve to meet new demands, a capacity that has been truncated through advancing State regulation, as well as recurrent enthusiastic initiatives to codify rules. Both have contributed to stultification of norms that could and should have evolved. Of more immediately concern is the community level disempowerment that has occurred in respect of land relations. Ironically, it is precisely the community consensual framework of pre-State regimes to which devolutionary good governance now looks.

Reconstructing the communal domain

[12] How far these occurred wilfully, through benign neglect, or through lack of understanding need not preoccupy us. In Africa, colonial policies, from whence subordination derives, indisputably had well-intentioned sides. A common example was to deny 'natives' the right to sell land, "to safeguard the ignorant and improvident peasant from selling his whole heritage". This can just as easily be seen as integral to the broader determination to control resources.

[13] Ribot 1999, Ribot & Larson (eds) 2005. There are also echoes in the early period of Spanish colonialism in Latin America (Colchester (ed.) 2001, Kay and Urioste 2005).

[14] And generated an enormous critical literature e.g. Biebuyck 1963 and Colson 1971.

[15] Alden Wily & Hammond 2001.

[16] Alden Wily & Mbaya 2001.

Customary domains have often been rearranged, dismantled or diminished in the process to suit the geographical logic of administrative demand. All over Africa, smaller village based systems were widely disrobed of authority during colonial periods, often absorbed into more powerful domains.[17] Areas of particular interest to administrations were simply excluded from customary aegis. A well-intentioned example has been the removal of valuable forests from local custodianship from around the 1930s onwards. Restitution of partial or full authority to community levels is an important thrust of modern forest policy today, following the broad failure of centralized management.[18]

Diminishing the right to land

It is in the treatment of the customary right itself that the strongest diminishment of the customary land interests of the rural poor has most occurred. Key elements are described below.

Reducing customary ownership to usufruct

The most fundamental was in widespread denial that customary rights amounted to private property rights that could accord with European notions of private property or even eventuate even into those imported norms, without a conversionary (and individualising) procedure. Thus while the occupancy and use of customary land holders was widely accepted (it could not be otherwise), they were in law and practice viewed as mere tenants of the State, living on what was increasingly defined as 'public land'. Thus began the orthodoxy of African usufruct, one of the more powerful instruments of subordination, and only latterly seeing change. The approach was applied throughout much of Anglophone, Francophone and Lusophone Africa,[19] and with broadly similar effect upon indigenous properties in the Indian sub-continent and Spanish and Portuguese colonised Latin America.[20]

A main benefit to colonisers was clear: customary landholders could be easily evicted at will and with compensation generally only payable for the loss of beneficial use, such as for the value of standing crops lost by the eviction. Such terms were everywhere retained in post-independence law.[21]

While the presumed prerogative of the conqueror came into play, the effects amount to much more than establishing sovereignty, spilling over into additionally appropriating all existing property rights to the land conquered. This was despite being warned that this was neither just nor permitted in metropolitan law by Spanish jurists as early as the 15th and 16th centuries, Dutch and English scholars in the 16th and 17th century, and the US Supreme Court in 1823, the New Zealand Supreme Court in 1847 and British Privy Council decisions in respect of the colonies of Southern Rhodesia and Nigeria in 1919 and 1921.[22]

Such opinions did not alter the position of colonising states, nor governments that have followed. Indeed, if anything, the evident fusion of sovereignty with proprietary has entrenched with the majority of post-independent governments securing to themselves not

[17] Salih 1982 provides a detailed case by case example of how this was accomplished in one province of Sudan.
[18] FAO 2002, Alden Wily 2000b.
[19] A main exception was in Ghana where Ashanti Chiefs managed to hold onto 'allodial title' with critical effect today (Alden Wily & Hammond 2001).
[20] Griffiths 2001.
[21] Alden Wily & Mbaya 2001.
[22] Colchester (ed.) 2001.

just control over property relations but the ultimate rights of ownership of the estates themselves.[23]

Customary tenants, with their land rights already de-secured in principle have found themselves increasingly vulnerable to involuntary loss of lands with each step of the expanding economy and rising land demand. In Uganda, for example, all unregistered land was made Crown Land in 1912, redefined as Public Land in 1969, and customary occupants redefined in 1975 as 'tenants at sufferance' and whose consent was no longer needed to evict them (since remedied as shown later).

The situation in neighbouring Sudan was, and remains, yet more pernicious. Through a new law in 1970 all customarily owned land ('unregistered land') not only became government land overnight but then government began to be systematically reallocated to entrepreneurs, both local and foreign, of its choice.[24] In one province alone, local customary owners have been so 'legally' dispossessed of 3.4 million acres. Needless to say, such blatant abuse of customary land rights was an important trigger to civil war and persists as a factor in continuing conflicts, including in Darfur.[25]

Reducing complex ownership patterns to euro-centric simplicity

The internal arrangements of customary land relations have also been interfered with. The notion of collective tenure at family, clan, village and community levels has been anathema to governments, past and present. These are difficult to squeeze into imported individual-centric norms (evolved to meet non-agrarian needs), and awkward to control in mortgage-driven ideas of how ownership should be registered.

The existence of interests customarily subordinate to ownership interests has also been jeopardized, either not provided for at all in dominating external regulation or registration of rights or incorrectly made equivalent to ownership rights, engendering a great deal of conflict in both spheres. Much has been written on how systematic registration of customary ownership where it has been advanced at scale has caused great loss especially to women's rights, usually described as secondary rights or access rights, but which are more accurately located as a not just access but a loss of a controlling right, the right to share in the decision-making as to the disposition of the property (see later).

Regulation of access rights to pasture has been particularly disturbed and important customary distinctions between rights of access and ownership have oftentimes been ignored. Depending upon political or administrative interest, shared ownership of pastures has not been acknowledged. At other times pastoral groups have been granted lands to settle in areas which they themselves acknowledge belonged to others. Many Sahelian conflicts have mismanagement of different layers of interest at their root and which may contribute to civil war, as is the case in Sudan.[26]

Not unrelated is manipulation of the principle of freedom to settle anywhere, which may be promoted or denied in accordance with political interest and generally overrides customary norms.[27]

[23] Details in Alden Wily and Mbaya 2001.
[24] Johnson 2003.
[25] Alden Wily forthcoming.
[26] Johnson 2003, Alden Wily forthcoming.
[27] See Lavigne Delville et al. 2002 for West African examples, including that resulting in the current civil war in Cote D'Ivoire.

Denying collective ownership of uncultivated lands

A common root of much of the above has been to deny or weaken ownership of property in common. The dominant strategy has been to administratively treat these as ownerless lands, and for these to be accordingly co-opted by the state. In Sudan for example, an early proclamation by the British-Egyptian Condominium was to declare all 'waste, forest and unoccupied lands' the property of Government (1905). In one fell sweep, more than 150 million hectares of invaluable (albeit often arid) pasture and woodlands of property were lost to communities, in law, and progressively activated in practice.[28]

In practice, a certain amount of cherry picking occurs: normally settlements are left with their nearest commonage into which to expand settlement and farming, and the rest is definitively treated as government or public lands. Local use generally continues, reinforcing the idea of customary tenure as amounting to no more than usufruct. At the same time the deprivation of acknowledgement of tenure removes the incentive for community based regulation to evolve to meet advancing pressures.

The orthodoxy of public land as un-owned community use lands has led inexorably to self-fulfilling open-access problems, as inexorably rebuked as 'the tragedy of the commons'. A little imagination combined with less rapacity would have located these lands as not ownerless at all but very much the customarily shared estate of all members of a definable community – and provided the framework for evolving purposive protection and management over a transforming 20th century.

Misunderstanding the foundations

A contributing factor has been lack of conceptual distinction between communal property (or common property) and communal tenure. Broadly the first is best seen as real estate (i.e. properties which have boundaries and owners and which may be mapped and described). In contrast communal tenure is best glossed as a regime of land administration (and less confusingly referred to as *customary* tenure). Like all land administration and management regimes, it comprises norms, regulations and enforcement mechanisms.

The distinction manifests at the local level in the following manner. Customarily a community (or chief on its behalf) will generally have an area over which it claims authority and this may be referred to as communal domain, or most clearly as a 'community land area'. This is an area of jurisdiction, not a property per se. Characteristically, this comprises a range of different properties; houses, farms and shops that are customarily owned by individuals or families; group assets which may be owned by a sub-set of the community such as a sacred forest being owned by certain male elders; and common properties – resources like swamps, forests and pastures, regarded as common property in which all members of the community have an equal shareholding.

III Attempting Remedy: 20th Century Reform

The upshot of the foregoing is that even as recently as 1990 most customary and indigenous owners around the world did not legally own their land or did not legally own *all* their land.

[28] Alden Wily forthcoming.

In Africa, the majority were tenants of state, living permissively on State Lands, Government Lands, Public Lands, Homelands, Communal Lands or Trust Lands – all distinguished by being under the *de jure* or de facto *ownership* of the state and in all cases under the *control* of government, either directly or through local authorities designated for that purpose.

This is not the say that that attempts to remedy the situation had not taken place. On the contrary, the 20th century was replete with reformism. This occurred in waves, from early Russian and Mexican reforms before the First World War, to those in the Soviet Socialist Republics after that War, to a flurry of reformism from the 1940s to 1980s involving Latin American and Asian states. These had redistribution of unequally owned farmland as their objective and were usually targeted at tenants and farm workers, and mainly delivered in subdivision of large estates or the creation of large state collective or cooperative farms.[29]

Securing customary holdings through conversionary titling

Excepting Ethiopia (1975) and Zimbabwe (1980) redistributive reform passed Sub-Saharan Africa by. Such action as there was mainly focused upon securing existing rights of small farmers through systematic registration, an emerging theme of land reform in itself, and implemented in a number of countries including at scale in Afghanistan between 1963-1878.[30] Customary interests were converted into European-derived freeholds or leaseholds or other such ownership rights. This was intensively implemented only in Kenya (from 1954) with smaller initiatives in a number of other states including Uganda, Senegal, Ghana and Somalia).[31] Despite enormous investment and effort, particularly in Kenya where rural titling continues 50 years on, less than two percent of rural lands in most countries is today covered by formal survey and entitlement, and only 15 percent of Kenya.[32]

As elsewhere these titling exercises gained the correct denotation as ITR - individualization, registration and titling - given their uniform effects of registering ownership of family houses and farms in the name of (mainly male) household heads (see below). The success of first-world property mortgaging drove the programme: the idea that farmers needed loans to raise production or to buy up the unproductive farms of their less progressive neighbours, and to get loans they needed certificates of formal entitlement as collateral. Disputes would decline as everyone would have fixed boundaries.

In hindsight, the mortgaging of peasant farms in Sub-Saharan Africa has proved largely a non-starter. In Kenya for example, farm production has risen or not risen to similar degree in both the titled and un-titled sectors.[33] Rates of rural mortgaging remain very low, partly due to low demand, partly due to availability of less risky alternatives than possible foreclosure threatens, and in any event, limited access to mortgages in rural areas, given the reluctance of banks to destroy the entire livelihood of a family in the event of foreclosure and fears of

[29] See Cox et al. (2003) & Borras, Kay & Lodhi (2005) for excellent overviews.

[30] Under a massive USAID programme, expending what in today's terms would have been billions of dollars, involving over 400 Ford vehicles in the field at any one time and 645 technicians, and yet covered (in non-cadastral survey) only 45% of farmers. The exercise was also used to entrench government ownership of all pastures and 'barren' land and over 800,000 ha of farmland for which peasants could not pay taxes was made government land (Alden Wily 2003a).

[31] Bruce & Migot-Adholla (eds.) 1994.

[32] Augustinus & Deininger 2005.

[33] Cotula et al. 2005.

repercussion against such attempts from within the community.[34] Nor did the promise of decline in disputes through titling materialize; while boundary disputes have fallen, a new generation of conflicts has arisen due to titling, mainly given contradictory customary and statutory routes of sale and inheritance and clogging up the courts.[35]

The delivery of security itself is in doubt. The promised sanctity of title deeds has dwindled with corrupted procedure. The register is Kenya is famously out-of-date due to erratic recordation of transactions and the greater proportion of original title deeds not even collected, partly because of the high cost and effort involved in doing so, but partly because it is not considered necessity for security.[36] Research has shown that farmers find the process of adjudication positive for it clarifies and confirms who owns what, but once this is achieved, the incentive to collect title deeds is diminished.[37] This reflects the importance of social-embeddnessness in tenure security and from whence, for customary owners, it derives - the consensus of neighbours and community, not a remote and manipulable title deed.

As Bromley has remarked:

> "the issuance of formal title to the poor means that they must now decide to exchange their embeddedness in one community for an embeddedness in another community. In the absence of reasonable assurance that the new community (the government) can offer more effective protection than the current one, the switch may not be obviously superior" (2005:7).

Ignoring or abusing collective titling

It is also now well known that many land rights have been lost or de-secured through conversionary entitlement. As noted earlier, women have been a main group of losers, their spouses, brothers or fathers conventionally named as owners. Secondary rights as held by customary access right holders to the registered property were extinguished by failure to record these on the title, much later now upheld by the courts.[38]

Most shareholdings in collective properties also disappeared, commons in the community often being subdivided among the better-off few who have the capacity to expand farming into these lands. The larger and more valuable commons of the community such as natural forests, have generally been handed over to local government authorities to manage, and who in turn have frequently disposed of these valuable lands to local authority or alleged personal benefit.[39]

Even where collective titles *were* provided, such as through the creation of over 300 group ranches for pastoral Masai, the fashioning of these around raised livestock production saw the poorer non-livestock owning members of the clan often excluded as members.[40] Subsequent subdivision of most ranches has seen further losses.[41] Broadly similar effects have been experienced elsewhere, including South Africa[42] and Botswana where group

[34] Bruce & Migot-Adholla 1994, Platteau 2000, World Bank 2003a.
[35] Hard data on this in Alden Wily & Mbaya 2001.
[36] KLC 2003.
[37] Hunt forthcoming.
[38] Kameri-Mbote 2005.
[39] Alden Wily & Mbaya 2001.
[40] Mwangi & Dohrn 2005.
[41] Ibid.
[42] Cousins et al. 2005.

ranches on communal land may be seen as no more than cooption of common resources by elites, often not even from the area.[43]

IV An End of Century Turn-Around: Towards the Liberation of Customary Land Rights

Nonetheless, a turn-around in the land security of the rural poor of Africa began to occur in the last decade of the century. Many (but not all) who traditionally access land through customary mechanisms could benefit. And of course the consistent route is through better treatment of the customary right to land itself, generally aided by growing support for community-based mechanisms to deliver and sustain those rights.

Such changes are not limited to Africa. In Indonesia, for example there are signs that many millions and particularly those 60 million who self-identify themselves as 'people living by custom' (indigenous groups) could also begin to benefit from the rising legitimacy of custom in land tenure and governance, and more specifically from improving opportunities to put the accepting principle of collective title (*hak ulayat*) into practice.[44]

A more advanced wave of reform is affecting the rights of millions of people who 'live by custom' in Latin America (indigenous peoples). Twelve countries have passed new constitutions and land laws which directly protect indigenous land rights in ways not embraced before (nor provided through redistributive access reforms).[45] These changes allow for mainly collective forms of root entitlement, leaving community members to parcel out rights within those domains.

In Bolivia for example, where indigenous people constitute over half the rural population, a new land law in 1996 creates the concept of Community Lands of Origin and enables the restitution of large territories in favour of original inhabitants. As Kay and Urioste describe, this is a complex matter, requiring review and regularization of land titles handed out by the agrarian reform since 1953, and is slow and inevitably contested (2005). Conflict between indigenous and non-indigenous interests is widespread elsewhere in the region as similar adjustments are made. Competition with logging, gas and mining concessionaires, backed by substantial international capital, complicate resolution.[46] Demarcation of boundaries has everywhere been slow, but with innovative community based mapping initiatives operating in Peru and Belize.[47] Colombia and Mexico are advanced in recognizing customary regimes and their authorities as the lawful administrators of these lands.[48]

The global aspect of the shifting position is also seen in relevant first world states, in Supreme Court rulings in Canada (1973, 1997), Australia (1992, 1998) and also Malaysia (1997, 2001). These respond to demands for land rights recognition by indigenous minorities in those states. Significantly these rulings less overturn existing law than reinterpret it. They concur that customary land rights are private property rights that must be respected and upheld and continue to exist for as long as they are purposively extinguished.[49] Establishing

[43] Cullis & Watson 2005.
[44] Colchester, Sirait and Widjardjo 2004.
[45] Griffiths 2001.
[46] Colchester (ed.) 2001.
[47] Griffiths 2001.
[48] Griffiths 2001.
[49] Colchester (ed.) 2001.

sovereignty – the main route for subordination of customary land rights throughout the world, as exampled earlier in respect of Africa – does not in itself extinguish these rights.[50]

These rulings have already begun to impact upon customary rights in other areas, notably in the constitutional court ruling in South Africa in 2003 that the Richtersveld area must be returned to the San (Bushmen) owners, and claims from comparable indigenous groups in Guyana and Belize.[51]

The origins of reform: bringing more land into the market place

Rarely are these changes emerging from policies which make the tenure security of customary or other informal occupants their priority. They arise everywhere under the embrasure of a new wave of land reform, of which they one part, or eventual consequence. Unlike the character of previous reforms towards redistribution, this new phase is distinctively market-based.[52] These drivers are clearest outside the African continent, in the privatization of the large state and collective farms of previous reform eras. In Africa it is best reflected in the 'willing buyer willing seller' mechanism being used (with limited success) in South Africa towards redistribution.[53]

In line with this shift, the flagging collateralization approach is also being widely revitalized, encouraged (once again) by international lending and development agencies. In the hands of its most famous new advocate, Hernando de Soto, it gains a stronger foothold in the land market camp with the implication that tenure security is *only worth pursuing* if the affected property can be turned to profit; the old 'sand to gold' trail now one of 'turning dead capital into live capital'.[54]

Making customarily owned land freely available for investors

However for most African states the market driver to reform in the treatment of land ownership has more straightforward origins, although eventually dressed up otherwise; simply to get a lot more of the land tied up in the customary sector into the market place, and as quickly and cheaply as possible.

This has origins in the economic liberalization policies that began to emerge in the late 1880s under the persuasive guiding hand of the World Bank and the IMF.[55] The argument was familiar: vast injections of investment (and specifically lucrative foreign investment) were needed to restart stagnant agrarian economies; investors, especially agribusiness, need land, and they need (their version of) secure title to that land. In addition they need efficient land administration systems to speedily process and guarantee that tenure. [56]

Thus the modus operandi was not helping poor farmers get their hands on investment but helping investors get their hands on the land of poor farmers.

[50] Nor does the issue of statutory leaseholds affect these rights which continue to survive, although issue of absolute title is acknowledged as having this effect. McAuslan 2005.
[51] Colchester (ed.) 2001, McAuslan 2005.
[52] Refer Borras, Kay and Lodhi (2005) for an excellent analysis.
[53] Oxfam 2005a.
[54] De Soto 2000.
[55] Alden Wily 2000.
[56] See Alden Wily & Mbaya 2001 for scrutiny of the origins of fourteen first generation reforms.

Getting hold of that land was however, not to prove so easy, despite the much-proclaimed abundance of available public land (i.e. 'un-owned') for investors.[57] Investigation tended to show that there that there was not so much 'spare land' after all, that is was widely used if not occupied and that questions of customary access rights might arise. The titling theology was revitalized; occupation needed to get transformed and certificated in ways that would not lead to challenge of bills of sale. At the same time, interrogation as to the nature of that customary occupancy gathered. Social justice and common and civil law principle began to get in the way. Putting draft policy ideas out to increasingly obligatory public consultation did not help.[58] Before they knew it, policy makers were forced to examine how properties in the public lands could be regularized from the perspective of the landholders.

Legalising custom: the quiet revolution

Investment objectives continued to be strongly catered for. Titling for market purposes remained the cornerstone of reforms that were to emerge. This is indicative in the prominent treatment eventually entrenched in new laws on foreigners rights to land, procedures for non-local and non-citizen access to land in customary areas, and widespread revision of the meaning of compulsory acquisition of land for 'public purpose' to ensure this can cover private sector development.[59]

The ground on which reforms are premised has shifted however in two critical ways: first, the purpose for titling has in final reforms been somewhat *rebalanced towards securitization*, many in the policy process more interested in using the process less to see rural lands change hands than to entrench its tenure in the hands of current owners. Second, and much more dramatically, what actually was to be titled has changed: *rights are less to be converted into statutory forms than statutory support given to customary property in its own right.*

The potential positive impact upon the land security of the rural poor is enormous. Uptake around the continent has been relatively swift. Taken as a whole, changes underway suggest that century-long subordination of the indigenous land rights and the systems that support them could finally become a story of the past. Unfortunately, a great deal of this transformation still remains on the written page and even there is inchoately formed. In the interim, 'growth without security' continues.

[57] In Uganda, the President himself publicly invited investors to come and see for themselves the vast lands they could acquire, and Tanzanian, Zambia and other administrations followed suit (Alden Wily & Mbaya 2001).
[58] Negrao 1999, Palmer 2000, Alden Wily & Mbaya 2001.
[59] Examples in Alden Wily & Mbaya 2001.

V The Framework for Reform: New National Policy and Law

Policy shifts are primarily embedded in the formulation of new national land policies and land laws in one or other stage of formulation and entrenchment in over half of Sub-Saharan Africa's 40 mainland states.

Important corollary reform is occurring, the better spirit of which is driven by the democratizing imperative.[60] This is reflected in a spate of new national constitutions in Sub Saharan Africa (around 15 since 1990) and new local government laws (over 10). Natural resource management reform is also well underway, prompted by dramatic losses of forest cover and species, and worldwide (and therefore donor) conservation consciousness. Environmental, wildlife and water laws have multiplied and new forest laws especially, more than 30 new national forest laws enacted since 1990. Without exception these make community participation a main strategy - along with private sector promotion.[61]

The interrelationship among these new bodies of policies and laws is close. Key provisions affecting customary land owners oftentimes first appear in constitutions.[62] Or, more practically, they emerge from changing resource management norms on the ground, in general triggering local government expansion and attention to customary land norms. The special role of community forest reserves has been noted earlier, in prompting and/or giving practical substance to the recognition of common property as a distinct estate class.[63] Facilitated local resource use agreements in Sahelian states have played an important role in triggering local level institutional building for natural resource management, and thence land board institutions.[64] All these initiatives share important building blocks towards the clarification of ownership and access relations at the local level, and between communities and the State.

Though widespread, new national land policy and law development is still evolving. This has moved barely beyond declamatory intent in a number of cases (e.g. Kenya, Zambia, Swaziland) and is unevenly evolving in many others (e.g. Ghana, Malawi, Burundi, DRC, Angola, Burkina Faso, Mali, Senegal, Rwanda). Significant new policies affecting customary rights have however been finalized and entrenched in new law in around ten states (Cote D'Ivoire, Niger, South Africa, Namibia, Mozambique, Guinea, Uganda, Tanzania, Ethiopia and Eritrea), and are in near-final draft in several others (e.g. Lesotho, Benin).[65]

An incomplete reformation

Even where new supporting law is entrenched, implementation or application of the law is still limited. Publicity programmes about the new laws is usually the lead activity and often the only activity, often targeted to officials. Three Regions in Ethiopia have begun to implement certification of land occupancy with some success.[66] Under Rural Land Plans in

[60] Alden Wily 2000a.
[61] Alden Wily and Mbaya 2001.
[62] For example it was the Uganda Constitution, 1995 that removed ultimate state ownership of land (with resulting effect of abolishing 'Public Land') and accorded all existing tenure rights (freehold, leasehold, *mailo* and customary) legal status, later elaborated in the Land Act 1998.
[63] Although in most cases (except The Gambia and Tanzania) this construct is first put in place to encompass community management of resources only, demand for clarification of the ownership of the reserve logically follows (Alden Wily 2003b).
[64] Yacouba 1999, Banshaf et al. 2000, Ribot 1999, Hesse & Trench 2000, Shitarek 2001.
[65] Main sources: Alden Wily & Mbaya 2001, Alden Wily 2003c.
[66] Zevenbergen 2005.

Cote D'Ivoire, Benin, Guinea and Burkina Faso, local rights are similarly beginning to be certified at community level but with yet uncertain consequence at the still-retained remote procedure of actual registration. [67] Application of new legal terms is occurring on an erratic basis in Mozambique (see below).

Local institution building is proceeding more swiftly in especially Francophone West Africa, but largely not fully decentralized to community level and/or without real devolution of authority.[68] Several new district level institutions have been established to support customary land registration in Uganda.[69] Although important steps towards simplification of procedure have been laid, this of necessity correlates with the level of institutional devolution of controlling authority over those rights – for example, in the form of community level registers –thus far limited as a construct to Tanzania and partially being delivered in Niger and other Francophone and Sahelian states.[70] Box 1 below gives examples of change around the continent.

Box 1: Trends in the Treatment of Customary Rights in Sub-Saharan Africa[71]

Improvement in the legal status and protection of customary rights

- Customary rights may now be directly registered without conversion into introduced forms in Uganda, Tanzania, Mozambique and proposed in Lesotho and Malawi. Some customary rights (not common property) may be so registered in Namibia (and this has been so since 1968 in Botswana, which has led on customary registration of at least house and farm properties).

- Some or all local rights (not defined as customary rights (constitutionally abolished 1975) and sometimes without a customary basis due to mass redistributions) held within communities (but not necessarily with a customary basis given the formal extinction of customary tenure) may be directly registrable in Ethiopia are advanced in carrying this out.

- Customary rights in Mali, Niger, Burkina Faso, Benin, Cote D'Ivoire, Ghana and South Africa may be certificated with substantial effect but with required or implied conversion into existing statutory forms on final registration.

- Described incidents of customary rights reflect 'customary freehold' and/or as customarily agreed by the modern community. Most laws allow for term in perpetuity, thus superior in this respect to rights registered under other tenure systems in some countries (e.g. leaseholds).

- Only Tanzania and Mozambique endow customary interests with unequivocal equivalency with imported tenure forms. Uganda proclaims similarly but encourages conversion of customary certificates into freeholds and Lesotho and Malawi propose similarly. And Mozambique does not practice what it preaches giving investor interest in customary lands as much support.

- The status of unregistered customary rights (90+% of all rural landholding) is often ambivalent and continues mainly to be permissive, pending registration. Customary rights that are not registered are most explicitly protected in Uganda, Tanzania and Mozambique. Customary owners in Cote Ivoire have a short time limit within which their rights must be registered.

[67] Stamm 2000, Chaveau 2003, Lavigne Delville 2005.
[68] Alden Wily 2003c.
[69] Adoko 2005, Hunt 2004.
[70] Alden Wily 2003c.
[71] Sources: Alden Wily & Mbaya 2001 and Alden Wily 2003c.

- The movement of customarily held land out of government land/public land classes has been made most explicit in law in Uganda (where public land is abolished) and Tanzania (where it becomes 'village land').

More than individual title is recognized

- Family title is quite widely provided for especially in Ethiopian law and Malawi policy.
- Adoption of procedures which limit transfers of family land without the full support of spouses is provided in Uganda and Rwanda and proposed in Malawi and Lesotho. A presumption of spousal co-ownership exists in Tanzania land law. Big efforts to get this into law in Uganda failed.
- Secondary rights as encumbrances to primary rights is not well provided for but with significant development of certificated contracts in West African states, where migrant landholders have inferior security even after generations, due to not belonging to the tribe which holds root title (Ghana, Cote D'Ivoire).

Collective title and common properties

- A number of laws provide in principle for any ownership cluster to be recognized as the lawful owner e.g. 'by a person, a family unit or a group of persons recognized in the community as capable of being a landholder' (Tanzania, Uganda) providing various levels of collective entitlement.
- Customary ownership of by all members of the community is widely recognized in principle but is not able to be registered in many cases (e.g. Namibia, Botswana, Tigray/Ethiopia, Ghana). Common property estates may be directly registered in Amhara/Ethiopia and Mozambique; through expensive and complex mechanisms in Uganda and South Africa; and indirectly registrable in Cote D'Ivoire and proposed in other Francophone states.
- Often the distinction between the community as land controller and owner of real property is not clear in new policies and laws. In Mozambique collective entitlement represents more delimitation of the area controlled by the community that shared outright ownership.
- Francophone rural land plans and mainly draft laws helpfully draw a distinction between land managers and land owners, critical given the history in West Africa of chiefs transforming jurisdiction and custodianship into outright ownership.
- Tanzania overcomes the problem by making distinguishing between the area over which the community has authority and specific community owned estates within the area. Priority is put on their registration in that no individual property may be registered until the community has defined and registered the land it owns collectively. A simple land use plan with rules for the common property must also be recorded. South Africa has adopted this route for application in former homelands.
- Collective entitlement represents more delimitation of the area of community jurisdiction than outright community ownership in most cases (Cote D'Ivoire, Mozambique). This poses problems for locating the nature of individual rights within those domains, not always clear in policies or laws.

Formal land administration over customary lands is devolving

- The logical need to recognize (and revitalize) customary land administration once customary rights are recognized and need supporting is carried through into most new policies and laws. The nature of customary regimes as *community-based* accords well with the current impetus towards

decentralized governance generally and the revival of customary tenure regimes is gaining support from local government developments.

- Devolution of real authority to community levels is limited. Tanzania is a main exception.
- Bodies at community level are being recognized or created but most are committees advising and assisting higher bodies which are generally government bodies or government dominated (e.g. Botswana, Namibia, Uganda, Benin, Cote D'Ivoire, Senegal, Mali).
- Where elected community level governments exist, these are often co-opted as land authorities (e.g. Tanzania, Lesotho, Ethiopia, Burkina Faso). Some of these bodies are only partially elected.
- Most local institutions are being remade with declining chiefly authority. In some cases chiefs are excluded or have no representation (e.g. Tanzania, Ethiopia, Eritrea, Rwanda, Uganda). In some they retain dominance (e.g. Ghana, Nigeria, Mozambique). Mostly chiefs are advisers or carry out minor functions reporting to higher bodies (e.g. Namibia, Botswana, Angola) or are members of community land bodies (e.g. Malawi, Lesotho, Niger, Mali, Senegal, Benin, Cote D'Ivoire).
- Reining in rent-seeking histories or potentials by chiefs is specifically provided in newer proposals (e.g. Malawi, Lesotho) but insufficiently managed in others (e.g. Ghana, Niger, Mozambique).

Registration of rights

- Registration of customary rights directly or in conversion is in all cases a main subject of new policy and laws.
- While some countries make some or all customary rights directly registrable, this process is rarely being devolved to community level. Only Tanzania provide for registration of all customary rights at village level (Village Land Registers). Ethiopia and Uganda provide for part of the process at sub-district level, Namibia and Botswana at district level, also proposed in Lesotho and Malawi. Registration of customary rights in Ghana and Mozambique is through a central register at provincial level.
- District level bodies are generally arms of central government and accountable upwards rather than to communities (Niger, Burkina Faso). Others are legally autonomous but still accountable upwards through other mechanisms (Botswana, Uganda).
- Accountability of community or parish level bodies and especially chiefs to community members is not well elaborated.
- Simplification of registration is occurring only where the registers are at sub-district (e.g. Uganda, Ethiopia) or especially community level (Tanzania).
- Procedures towards registration are being widely devolved to local committees but they do not have the power to actually register the rights (Benin, Cote D'Ivoire, Burkina Faso, Guinea, Ghana, Namibia, Botswana, South Africa). This includes adjudication and community based mapping of boundaries (e.g. Niger, Benin, Burkina Faso, Mali, Senegal, Guinea).
- Mapping requirements are reduced where registration is devolved (e.g. Tanzania, Uganda, Mali, Niger).
- Reluctance to abandon cadastral survey correlates with formal encouragement to private sector roles in these spheres (e.g. Ghana, South Africa, Mozambique, Malawi, Zambia).

The central issue of the value of a customary land right

Registration of rural land rights remains the dominant instrument and is a main subject in new land laws. The real change lies in what can be registered, best exemplified in the new land classes of Customary Right of Occupancy and Certificate of Customary Ownership. Without this, reformism would amount to little more than an activation and extension of the arm of the state in its efforts to capture occupation and land use into its own systems.

A highly important facilitating advantage in the Africa context is that most customary landholders in practice retain dominant occupancy and use over at least residual but still often substantial customary lands, *albeit on a permissive basis.* (There are exceptions among which the loss of customary rights and real property has been particularly pronounced in South Africa, Zimbabwe, Namibia and Sudan). This limits for most governments the discouraging implications towards mass restitution involving removal of non-customary right-holders or other mechanisms such as payment of compensation.

It also suggests that great progress may be made *simply by changing the law* to upgrade the permissive status of that customary occupancy to status as ownership rights – in short, liberating customary tenure from landlordism by the state. This is precisely what has occurred in Uganda, Tanzania and Mozambique.[72] Legally speaking, the poor in these three countries *now have no insecurity of tenure*. This sets these countries somewhat apart from others where the routes to this status are circuitous (e.g. South Africa, Ghana) or the promised integrity of customary interests as private property is incomplete (e.g. Cote D'Ivoire, Niger), such as still denying common properties the status of registrable real estate as collectively owned private property (e.g. Botswana, Tigray/Ethiopia, Namibia, Rwanda).

Knowing who owns what is still essential

Of course even in the 'model' states above the reality on the ground is not as rosy. Legal declamation has its limits, even where popular dissemination takes place. Threats to practical security abound from within and without. Women continue to be main losers in intra-household land dispute, even where their right to share in decision-making is assured in statute.[73] Unregulated expansion of farming into community lands continues, often by elites within the community in alliance with leaders, and reinforces the need for more democratic and accountable customary governance reform. The more serious threat however derives from outside the community, shortly discussed.

Whatever the source, level of certainty of ownership invariably correlates with level of threat. Certainty is high in respect of house plots and farms, given the lesser scale and clear boundaries. Social certainty around common properties is much lower, due to their expansive dimensions and because, as elaborated earlier, their status as locally-owned has been so severely undermined by their wholesale characterization as 'public lands'. It is this lack of certainty that makes ripe for elite capture from within and from without.

Rights certification in some form is inescapable

It also illustrates why clarification of owners and boundaries and entrenchment of the results in one form or another have such a role to play in customary tenure securitization, and why titling is such a main subject of reform. The issues that now confront the process are not if such formalization of certainty of tenure has utility, but how it should be established, with what level of technical requirement (and especially survey), and with what levels of written

[72] And which has been the case in Botswana for some time in respect of houses and farms.
[73] See Adoko 2005 for excellent examples of this in Apac District, Uganda.

recordation. Even more central questions are in whose hands should guarantee of security rest, and upon which types of property should securitization be first focused?

Review of emerging norms thus far suggests few of these questions are being answered innovatively and that classically-conceived entitlement of the 1950s is still very much in place, both limiting real devolution of authority over land matters to local levels and failing to target those customary estates at most risk. Conclusions on this are drawn below.

VI The Need to Assure Success

Given the extraordinary speed and uptake of a commitment to limit insecurity of rural tenure in Sub-Saharan Africa, it would be churlish to upbraid governments for the slowness with which this is being delivered outside of fundamental constraints which inhibit sound evolution in the commitment itself or the manner is which it may be concretely delivered. In this respect four key constraints impede genuine reform and achievement -

v. Unresolved policy contradictions arising from the dominance of land market promotion objectives over and above mass securitisation of tenure;

vi. Related, sustained justification of securitisation for the purpose of collateralisation, thereby narrowing its target and design more to what lenders need (or think they need) than necessary for majority interests, and particularly those of the poor, to be practically and swiftly secured;

vii. Still incomplete understanding of customary rights and their embedded systems, producing cloudy strategies; and

viii. Poor process, insufficiently grounded in the local and the practical in reform making and application, preventing necessary 'out of the box' strategising to overcome chronic constraints, the adoption of the commonsensical over the conventional, or departure from entrenched norms known to have limited resonance in the majority rural poor environment.

Rights and the market

Examples of the interrelated effects are not difficult to find. After the first flush of social justification, early market interest in the customary estate tends to resurge, and begin to suggest that real 'growth with equity' may be as difficult to achieve in Africa as elsewhere.[74]

In Mozambique for example, where much is made of the legal validity and protection of customary rights under the new land law of 1997, this was accompanied (and indeed triggered) by the introduction of local consultation exercises to enable communities to indicate where a proposed land concession to a non-local person or foreigner will interfere with their own occupation and use, at once indicating where the balance of interest is presumed to lie. This is coming to fruition with a paucity of documented community consultation, fairly routine cooption of local notables to approve investor applications to use customary land, and increasingly, use of the fact that there is nothing in the law that requires government to *not* allocate the land if it is found to be occupied or used by communities.[75] While procedures have since been introduced to enable communities to at least delimit the areas they do not want interfered with, this is in practice only undertaken where NGO or other external facilitation and funds are available, due to the high costs of formal survey and demarcation still required. The result by end 2004 was some 10,000 or more approved investor applications over sometimes vast expanses of communal property, while only 180 communities have managed to demarcate their claimed domains.[76]

In Uganda, state encroachment into the common properties of local communities is also not uncommon a decade after the landmark constitutional recognition of the legality of customary

[74] See Borras, Kay & Lodhi 2005.
[75] Norfolk & Liversage 2002, Hanlon 2002.
[76] Oxfam 2005a.

interests as private property, registered or not. Thus while thousands of Acholi in the north of Uganda have been forced to linger in protected camps around towns against threatened incursions by the rebel Lords Resistance Army, survey and development of their 'abandoned' lands are allegedly underway to provide government, army and related private sector interests scope for logging, and commercial farming and ranch enterprise.[77]

Even in Tanzania, identified as providing perhaps most explicit protection of customary rights, comparable state-supported encroachment into unfarmed commonage periodically occurs,[78] together with more formal coercion upon village authorities to surrender land for foreign investment, now proudly deposited in a growing Land Bank for investors.[79]

In these and in other cases, the notion of 'un-owned' land, set aside during policy-making periods as largely a figment of imagination ("all land is owned") is seeing resurgence. Lack of real assistance to communities to define and record the boundaries of their respective customary domains (village or community land areas) has contributed, adding to still limited awareness that the law itself supports their interests in this respect.[80] Meanwhile in both Uganda and Tanzania, some knowledgeable officials and elites within communities are making good use of the weakness of local level institution building around customary interests to themselves expand into these areas while they can.[81]

Limiting what is titled and how to what lenders want

While as shown earlier, the individual-centric collateralization driver in current reforms has not entirely prevented emergence of new opportunities for family and other collective entitlements, it does still hamper needed evolution in these areas and in relation to how derivative rights are identified and their attributes entrenched. Important developments protecting especially the rights of wives are emerging, either through a presumption of spousal co-ownership (Tanzania), the requirement that the consent of all spouses is obtained and recorded prior to disposal of primary land (Uganda) and distinct registration of men and women's land shares (Eritrea, Ethiopia).[82]

At the same time, market interests still impede; this has played an explicit role in preventing a presumption of spousal co-ownership in Uganda and continued resistance to amendment of Kenya's Registered Land Act, even after several decades of an extraordinary level of dispute clogging up the courts, stemming from the exclusion of the rights of family members and particularly wives at registration.[83] As suggested before, there also remains insufficient construct development to more precisely express the real rights of women in land, which are generally more than just a right of access and somewhat less than primary ownership.

Keeping the focus on the house and farm at the expense of the commons

Development of norms to better reflect wider contexts for collective ownership are particularly inchoate. Essential distinctions between collective tenure for the purposes of shared jurisdiction over the land, and collective tenure as a real property interest remain blurred. Many reforms simply do not yet unpack the complexities. Some laws provide for a

[77] Adoko & Levine 2004, Oxfam 2005b.
[78] Nelson 2005, Gayewi 2005.
[79] Oxfam Ireland, Trocaire and Concern 2005.
[80] Alden Wily 2003d.
[81] Adoko 2005, Oxfam 2005b. Oxfam Ireland, Trocaire and Concern 2005.
[82] See Alden Wily 2003c for details.
[83] Rugadya and Busingye (eds.) 2002, Kameri-Mbote 2005.

community to register an entire community as collectively owned (e.g. Mozambique) without clarifying the implications for individual or family-held properties as to whether this diminishes those rights and how these should be described. Conveniently this is left up to owners to determine 'in accordance with custom'. While this is all to the well and good in theory, it raises queries as much for modern customary land holders when they attempt to order their rights as is does for strategists and the courts.

In the interim, inattention to the common persists, despite abundant historical and current evidence that the insecurity of tenure most afflicts these properties and that moreover, these properties have special importance to the poor (see later). Not unrelated is the equally infrequently answered question of exactly how community based jurisdiction over customary lands is defined and entrenched. In most countries, the titling for the market orthodoxy keeps the focus upon the individual estate, and limits real attention to the necessity of helping communities define their spheres of jurisdiction and entrench new and more effective governance regimes at community level.

Mortgaging the commons has untapped potential

Nor does this individual focus in any event serve needed evolution in the titling for investment orthodoxy itself. For, ironically, the commons could have more viable mortgaging potential than the family house or farm. This is because owning communities could mortgage *one part* of their often substantial common properties and at no risk to their individual properties should foreclosure be administered (and where smaller and shorter term loans through other mechanisms may anyway be more viable).

The risks of excluding the poor from opportunity and benefit from common property mortgaging would also be more easily avoided. Loans could be raised for income-generating activities of benefit to the whole community, and among which eco-tourism developments already show returns.[84] Or a community could raise a loan on one productive part of its woodland in order to install a community-owned and managed maize grinding mill or borehole, the loan repaid through user fees, proportionately mainly paid by wealthier families as the larger users. Power 2003 provides some interesting and equally workable potentials within the clan land context of Papua New Guinea. Such potentials rest however of political and legal acknowledgement and ideally practical entrenchment that the area concerned is the common property of the community and not undefined possible public or government land estate.

Titling for collateralization *is* becoming more poverty-focused …

Within the individual focus, there has been an interesting dispersion of sub-focus in both a negative and positive sense.

On the one hand titling for mortgaging has gained a new direction in its shift away from the better-off farmer (the 'progressive farmer' of the 1950s and 1960s who had to be encouraged to not just invest in his farm buy out less productive neighbours) to the genuinely poor – although in mainly urban settings.

The De Soto thesis contributes significantly to this in its visionary faith that even the smallest parcel of land or squatter occupation may be turned into gold if only the legal title required by banks to loan money can be acquired. The alleged limited real demonstration of this

[84] Mogaka et al. 2001.

consequence even outside Sub Saharan Africa need not directly concern us here.[85] In Africa, the Institute of which he is director, has set out to demonstrate this in the city of Dar es Salaam in Tanzania where the government project it supports has remarkably swiftly registered 60,000 'poor' squatter homes and expects to register another 40,000 by the end of 2006.[86] [87]

… but also more investor centred

On the other hand, there are as strong contradictory signs of a policy shift in the focus of mortgaging away from the poor (or less poor) smallholder to the investor who procures his property in the market place. This is again well illustrated in Tanzania where cutting edge mortgage provisions in the new land law have been abandoned precisely because they are seen by private investors to interfere with their freedom to foreclose on poor borrowers.[88] Innovative provision for small mortgages precisely shaped around the needs of poor farmers and urban dwellers has also been abandoned. The effects, McAuslan writes, are that the urban middle and upper classes will benefit by the new arrangements and the poor will lose out (2005).

Limiting the devolutionary course of reform

The focus on titling for borrowing also contributes to limited real decentralization of the process or abandonment of expensive tools. As illustrated in Box 1, there have been modifications and concessions. Landholders are clearly to be more involved in early procedures like adjudication, and some of them already are actively doing so on a trial basis or otherwise (e.g. Cote D'Ivoire, Benin). In exceptional cases customary communities are empowered to conduct those processes entirely themselves with more external facilitation than supervision (e.g. Ethiopia, Mali). In Tanzania the register itself becomes a village register, managed entirely at village level.

The more dominant trend has been to retain the assumed sanctity of classical entitlement by adopting a two-stage process, the first providing for local level certification procedure, producing low-grade 'titles' which may later be converted (or must be so converted to gain status as private rights in some cases) into 'final titles' on the basis of formal survey and registration, thereby raising cost and administration and limiting mass opportunity.[89]

Agricultural investors sustain the pressure. Thus in Ethiopia, perfectly serviceable and rapidly expanding local level titling developed in recent reforms has been deemed by central policy makers 'not good enough for collateralization purposes', and now subject to formal survey which neither local administrations nor landholders can afford.[90]

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[85] Cousins et al. 2005.
[86] Ministry of Lands and Human Settlements in Oxfam Ireland et al. 2005.
[87] There are unconfirmed allegations that this was achieved only through bypassing the rigorous adjudication procedures laid down in new land law (1999) to prevent wrongful dispossession of especially women and the very, very poor at registration (Oxfam et al. 2003).
[88] Reference is made here to Chapter 10 of the Land Act 1999 and the Land (Amendment) Act 2004. Refer Mutakyamilwa 2005 for detailed documentation of the debate towards legal amendment and McAuslan 2005 for commentary.
[89] This is the case in one version or another in Ghana, Rwanda, Angola, Namibia, Cote D'Ivoire and Uganda and suggested in draft law in Lesotho, Benin, Niger and Burkina Faso. Adams & Turner 2005, Chauveau 2003, Oxfam 2005a, Oxfam 2005b. Oxfam Ireland et al.2005.
[90] Zevenbergen 2005.

The instrument of formal survey is particularly obstructive to 'out of the box' thinking. Even in Tanzania, where the Village Land Act, 1999 specifically makes it possible for definition of community domains (Village Land Areas) to be reflected in Certificates of Village Land on the basis of detailed agreement and description of the boundary by concerned communities, this has given way to administrative insistence that only formal survey is good enough.[91] This is despite the long experience of villages in this matter that only it is the detailed on-site negotiation process as to boundaries and resulting as detailed *description* that entrenches them, not maps or coordinates which cannot be re-found on the ground without rental of GPS units or hire of surveyors.[92] Experience in central Sudan is similar.[93] It also resonates with earlier noted experience in Kenya that the process of adjudication can be more important as a source of certainty than resulting documentation.

Common sense and continued failures suggest that continued promotion of first world systems of evidence of ownership and transaction is indefensible. Nonetheless, the search for more widely-applicable ways of implementing formal survey continues.[94] This inhibits identification and upgrading of sources of certainty that are more socially-embedded and localized, and the adoption of which do not involve a shift in the centre of control over this certainty away from landholders to the centre. Another consequence has been to divert attention away from the more fundamental question of whether the cadastre really does provide the security of tenure needed at the local level or is more an act of faith.

Demystifying customary tenure

Customary tenures still present conceptual challenges (for not just policy planners but academics) that also help limit real change in widespread rural poor land insecurity.

Most of the issues at stake relate to the ordering of rights without loss of nuance. Often 'custom' gets in the way to the extent that 'what *was*' gets inflated at the cost of 'what *is*' the norm today – or indeed, what *should* be the norm for justice and protection of rights to be achieved. The more empowered a chief through past and recent transitions, the more likely it is his that he encourages adherence to tradition, where this is to his own benefit, and where democratic reassessment of norms by the modern community may threaten this.[95] *Inter alia*, a fixation on rules has fairly routinely also sent policy makers up the blind alley of codification, entrenching relations that may not be fair or advantageous to the modern customary community.

Not seeing the wood for the trees

Academic investigation into the nature of customary rights does not always help. In the dedicated pursuit of 'customary truth' a research rather than facilitation approach may get tied up in knots and tie the system they study up in knots, compounding the notion that customary tenure is too complex to get to grips with it and therefore too difficult to entrench. This helps defeat what must be the primary objective, to assist modern community members to arrive at norms acceptable and useful to the majority, and in sufficiently comprehensible

[91] Ministry of Lands and Human Settlements in Oxfam Ireland et al. 2005.
[92] Alden Wily 2003b, 2003d.
[93] Alden Wily forthcoming.
[94] Augustinus & Deininger 2005.
[95] Reported in one respect or another to be the case in Malawi, Lesotho, South Africa, Ghana, Mali, Niger and probably others (see Adams & Turner 2005, Oxfam 2005a, Oxfam 2005b, Lavigne Delville 2005).

form to be easily operated and entrenched within the community and enforceable upon those from beyond the community who access their lands.

Seeing the wood for the trees

A commonsense aid to this is to get the focus right in the first instance, by not losing sight of what was described earlier as the single unchanging template of customary land tenure everywhere it is practiced: that it is a system for ordering and regulating land access at and by the community level, and only persists for as long as the living community endorses the resulting norms and practices.

Viewed this way, the location of the modern, living community as the arbiter of rules or customs is logical, and necessary. It also helps understanding customary tenure as an operating governance system and opens the way to considerations of good governance; aiding its adherents to arrive at processes which are sufficiently inclusive, democratic and accountable in their constitution to retain popular adherence in a modernizing world. As Adams and Turner remark, it may be 'necessary for tenure reform to catch up with tenure reality on the ground' (2005).

It also enables the rules or laws to be located in their proper place as no more than instruments of community will. Those that are unserviceable to the majority membership (the rural poor) are rightfully done away with, as are those customs which have demonstrably failed to award equity and justice or protection of rights to sub-sectors.

As example, the common tradition of chiefs freely allocating (increasingly for fees) unoccupied community lands to any asking newcomer who seems nice enough or to those from within the community who have most means to cultivate those lands, may have to give way to new 'customs' that first consider if there is even enough land for existing community members and their children to cultivate and whether expansion of cultivation should be halted altogether where precious wooded commonage or pasture is dwindling.

Custom need statute to more than permissively exist

The above discussion highlights other confusions in the complex relationship of statutory and customary law. Common-sense suggests the two systems are not an either-or but inseparably linked. The last century has painfully demonstrated that customary rights nested in a larger state context need that state level protection (i.e. statutory or national law) to be more than acknowledged, but actually secured.

Sorting out the relations between customary law and statutory law in useful and fair ways

The status of the rules by which a social community chooses to govern those rights - i.e. the actual customs or laws - is less straightforward once they are made equal in force as provisions about land in national laws, such as current reforms is availing. The historical strategy of avoiding conflict between the two regimes by keeping them geographically separate still has utility but is decreasingly foolproof as statutory interests gather in customary domains (usually rural) and where, less commonly, custom may dominate in some urban areas.[96] The need for continued integration of basic principles at one level of

[96] This mainly occurs where actively administrating chiefs have refused to have their authority or the rights they supervise subordinated to national authority or statutory tenure regulation and gain constitutional support for this due to historical recognition of the primacy of traditional

another is easier to see when a third regime is added to the equation, such as in the case of *mailo* tenure in Uganda (a proto-feudal system developed in the 1900s) or more widely, where religious land rules apply, widely the case in Islamic states, given that Shari'a has a great deal to say about how property is owned and transacted.

A degree of reordering will always be required, and appropriately preoccupies jurists. In different ways Okoth-Ogendo and McAuslan argue for the dominance of customary land law where it exists (most of rural Africa). Okoth-Ogendo recommends that customary law needs to be raised above received law in the hierarchy of applicable laws and that the courts should be required not just to "be guided by it" where inter-system dispute, arises but "to apply it". This would, he says –

> "*eliminate the tendency to hop in and out of foreign law on grounds that the application of customary law is inappropriate in certain contexts*" (2001).

McAuslan puts the case more bluntly:

> "*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*" (2005).

Distinguishing between administrative domain and real property

Conceptual and structural problems relating to the status and treatment of collective rights under customary tenure have been touched upon above. Drawing a distinction between communal domains as implying community jurisdiction and common properties as indicating real estate owned by that community, has been argued as useful to unravelling some of these.

Distinguishing between root ownership by the community and real property ownership

In cases where collective ownership of an entire community area is meant as outright community ownership, the issue is more complex. In order not to diminish property rights held at the sub-community levels by individuals, families and clans, it is helpful to conceive of community tenure as symbolical root title. However this has echoes with the radical title to the soil that sovereignty endows. It also runs afoul of the fact that in so many African countries, the state has made itself ultimate owner of all property rights (a matter of property, not sovereignty).

Still, in unpacking and ordering their collective land interests, it is again behoven upon customary communities to devise new and more exact constructs that reflect these different levels of ownership as they themselves perceive it. Such considerations will be important in gradually democratizing this fundamental element of property rights, leading to the eventual surrender of ultimate title by the state in favour of citizens or groups of citizens like communities, such as achieved thus far only in Uganda (1995).

Boundaries do exist and do matter

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tenure in those areas – often the case in peri-urban areas and small towns in Ghana (Alden Wily & Hammond 2001).

That customary regimes typically include overlapping interests is a well-established fact. Where these are multiple, it sometimes seems easier to policy makers and development workers to assume that boundaries do not exist or are too fluid to identify and to instead advocate rational and fairer management regulation of *access* – and leave ownership up to government.[97]

Such positions flourish in respect of arid lands like the Sahel where mobile pastoralism dominates and where several groups may share ownership of one resource or one part of a resource, or share rights to another domain, otherwise owned by a settled community.[98] It may also be the case such as in the former homelands where through years of malign dumping policies, old rights and new rights may be intensively over-layered.[99]

Where access is accepted as entirely fair and equitably managed, and under no threat at all from external forces, it may be safe to not assist those residing within the area to clarify their respective interests. However, it rare to find a situation where these conditions apply.

[97] Which it may anyway have assumed for itself – frequently the case in respect of arid lands, such as throughout the Sahel including Sudan and Ethiopia.
[98] Mwangi & Dohrn 2005.
[99] Cousins 2005b.

Unpacking even the most layered of rights is an essential instrument of securitisation for the poor

Certainly this rarely applies in the semi-arid and arid areas of Sub Saharan Africa, where those same spaces are highly vulnerable to wrongful encroachment and even outright appropriation for other purposes, and where 'battling for space' among nomad groups and especially between nomads and settled peoples is heavily underwritten by not just contested access but by the state's habit mentioned earlier of equalising ownership rights with access rights in the process of co-opting ownership for itself.[100] Moreover early experience in attempting such clarification in both Sudan and Afghanistan suggest that contesting right-holders are themselves extremely keen to see and participate in adjudicated resolution.[101]

Such external pressures may be minimal in cases like the former South African homelands where the greater customary domain is so precisely delimited, but where it appears that land grabbing by elites is significant enough to warrant the same kind of rights clarification in order for especially those of poorer people to be secured and entrenched. To avoid these crucial issues could be to play into the hands of not just elites or the stronger parties affected, but into the hands of those who would prefer to see customary tenure self-destruct, thus confirming the wisdom of the State's capture of primary ownership of its lands in the first place.

Condemning land reform to the ills of master planning

Finally there are constraints not of substance but of development strategy associated with current land reform in Africa. Planning shortfalls abound, resulting in often unrealistic policies that will either never, or only at immense cost and difficulty, see application or implementation.[102] Poor process has also generated its fair share of strategic and paradigm shortfalls, with replay of demonstrably inadequate or inappropriate remedies to mass insecurity, many of which have been addressed in this paper. Perhaps most pernicious of all is where process towards reform has been poor enough to fail to sustain initial goodwill or political will to really get to grips with endemic tenure insecurity among the poor.

Even ahead of final policy or law making the last is evident. The much-proclaimed promise in the Peace Agreement (January 2005) and subsequent Interim Constitution to provide better legal protection for customary land rights in Sudan have already been downgraded in the two States
where its terms are being tested and have widely been abrogated in the practice elsewhere.[103] Commitment to local level empowerment in land decision-making is quite frequently truncated by governments unwilling to really surrender the extent of authority initially promised (seen in Uganda, Rwanda, Angola, South Africa and Niger).

Slow-down or even halt to new land policy development and law on variously spurious grounds is also not unknown, recently the case in Lesotho, DRC, Swaziland, Angola and Zambia. Notably, these retrenchments have in each case been at least partly driven by fears that private enterprise development may be constrained by protective provisions for customary owners.[104]

[100] Alden Wily forthcoming.
[101] Alden Wily 2005a, Alden Wily 2004.
[102] E.g. see Hunt 2004 for the oft-exampled case of Uganda.
[103] Alden Wily forthcoming.
[104] Oxfam 2005a, Oxfam 2005b, Adams & Turner 2005.

Implementation of already approved policies is similarly affected. Insufficient funding and dwindling political commitment have famously dogged South African and Namibia reforms with less than one percent of land returned thus far in the former, and only one commercial farm redistributed in the latter.[105] At war, implementation delays in Eritrea and Cote D'Ivoire are perhaps more excusable – although the causes notable for being land rights wars, the former played out at territorial level.

The Effects

The limitations upon what is basically a praiseworthy and exciting reform movement are many. Some of the more general effects being felt include -

- Continued and even increasing vulnerability of unoccupied customary lands – the commonage – to wrongful attrition and appropriation, and to the jeopardy of the rights and livelihood of the poor;

- Shortfalls in new paradigm development, less than needed reforms to really make a difference;

- Lack of engagement among those to whom land tenure reform matters most, the majority rural poor;

- Growing divides among what policy promises, law entrenches and what occurs on the ground; and flagging political will and rising popular disenchantment - and conflict.

VII Reaching Towards Remedy: A More Poverty Focused and Developmentally-Sound Approach

Two simple shifts in strategy could help: *first,* restructuring rural land reform in strict accordance with prioritisation of levels of threat to the security of the rural poor, and *second*, pursuing this and land reform in general through a more devolved and landholder-driven approach. This is necessary to generate the focused and action-based approach that is required to ensure relevance and relief.

Both will have the effect of bringing the security of common properties to the centre of rural land reform. Good governance in land rights will also of necessity be a more direct objective, conduit and output of change.

The commons really do matter to the poor

While urbanisation rates are rising globally and especially in Africa, it is also a fact that per capita farm size falling, estimated as around half what it was in the 1960.[106] While the profound inequities in farmland distribution in many Asian states is absent in Africa,[107] it remains a fact that poorer a rural household, the smaller his or her farm. Given the orthodoxy of land abundance in Africa, it is probably less well acknowledged that outright landlessness and near-landlessness in respect of cultivable land grows on the sub-continent. Around one

[105] Oxfam 2005b.
[106] Jayne et al. 2003, based on research in Ethiopia, Kenya and Zambia.
[107] Lastarria-Cornhiel & Melmed Sanjak 1999.

quarter of rural households in five African states were found to be farm landless or near-landless in 2003 and research in other countries confirms the trend.[108] What do seem to be more plentiful are lands that are broadly uncultivable by peasant farmers, either because of their character and especially their dryness and absence of potable drinking water, and their remoteness - or because of their importance for other purposes.

These are the natural forests, rangelands and woodlands, desert and non-desert pastures, the hilltops and swamplands of Sub-Saharan Africa; a significant proportion of which have been lost to communities use and/or tenure over the last century as variously state controlled reserves,[109] commercial farming or livestock schemes and mineral development, and to a great deal of reallocation to non-customary shareholders – local and foreign entrepreneurs.

We know that the residual common properties contribute in enormous ways to the livelihood of all rural dwellers who have access to them, and especially to the very poor.[110] We know for example that in Zimbabwe some 35 percent of total rural household income derived from common woodlands alone (even prior to the current sharp decline in cash incomes)[111] that the poorer the household the greater the ratio of dependency upon common resources (e.g. up to 75 percent in Zambia) and that women and the farmland poor are particularly dependent.[112] We also know, as this paper has illustrated, that many of the greater economic values of the rural commons continue to accrue to governments and private enterprise rather than to their customary owners, and can guess that this is a contributing factor in the persistence of legal and political unclarity as to their real possessors.

It is this, as well as the worrying attrition of these critical assets of the rural poor, that makes it essential to better address the crumbling fate of the commons. Forest and woodland, a major category of common property, now disappears at a mean rate of five million hectares annually.[113] Uncalculated loss of un-wooded pasturage could double total losses.

The need to secure the capital assets of the poor

It has been a core thesis of this paper that the uncertain ownership status of the commons lays at the root of the problem. This, it has been shown, has origins or support in muddled thinking about how commonage is customarily owned and the socio-institutional context in which it is embedded. It has been argued that sustenance of such positions has been purposive or at least convenient to state-making and government agendas. It manifests today – and not just in Africa, but worldwide – in overlap of ownership interests by people and state.[114]

The unresolved contradictions in current reformism reflect this, and in which the balance of favour remains upon private investment and supporting governments; and to whom the unoccupied or uncultivated customary commonage increasingly – and correctly suggests – untapped wealth that needs to be captured and activated.

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[108] Ibid.
[109] Several hundred million ha; see FAO 2003b.
[110] FAO 2003b.
[111] Mogaka et al. 2001.
[112] Emerton 2001.
[113] FAO 2003b.
[114] For example, governments and communities in both Sudan and Afghanistan claim ownership under different legal systems of respectively around 150 and 50 million hectares of semi-arid or arid pasture and woodlands, a longstanding irritant to ethnic relations and civil war (Alden Wily 2004, Alden Wily forthcoming).

Ensuring that that wealth is captured in the hands of their traditional and rightful owners, must become a more central focus of reform.

The wealth-generating potentials are indisputable, extending far beyond the important product values already enjoyed by communities and which need to be secured rather than permissively enjoyed. From time to time some of these potentials are already being realized; such as at the rural-urban interface in those still rare occasions where poorer community shareholders of common estates manage to gain a fair share in sharply rising property values, not entirely captured by land buyers or self-rewarding community leaders; an opportunity that cannot be realized however without clarification and recognition from both within and outside the community that the real estate involved *is* community property, neither the private property of the chief nor of government.[115]

Without having to sell the estate or part thereof, the potential returns to common property ownership from rental, product licensing (including up and coming bio-prospecting for medicinal and other commercially valuable products) and concession issue are immense. Should retention of natural forest (and not just replanting) earn carbon credits in future as being proposed, communities which are formally recognized as owners could gain a rightful share of credits and be assisted to sell these accordingly.[116] Mortgaging for community-based enterprise and development, structured to ensure minimal intra-community elite capture, has been mentioned above.

However, before any of this can be achieved or is even worth pursuing, the real tenure of community ownership over the commonage needs to be formally established. The practical implementation of this should become a programmatic priority.

Getting the process right

Not all the onus of reform lies upon the state. As routinely the case across successful social change, and evidentially evolving in many other parts of the customary world,[117] empowerment of the community and within the community is an essential building block.

In the Africa context this is best and most simply contexted in the prioritization of reform processes which assist communities towards orderly and managed changed of their land relations, both internally and with the outside world. In practical terms, this logically begins with assisted definition of spheres of community jurisdiction and the establishment of an institutional foundation for executing community based authority, followed up by clear identification of common estates within the domain and the establish of rules by which it will in future be accessed and regulated.

To date some of the most important reform developments begin to take precisely these steps, albeit generally with the resulting paradigms far from structurally clear or yet confirmed that they will be legally entrenched.[118]

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[115] Beginning to be seen in Ghana (see Alden Wily & Hammond 2001).

[116] Santilli et al. 2005.

[117] Such as in the growing success of indigenous communities in Latin America in securing shares of existing agribusiness and concessions on lands over which their collective rights have now been recognised (Griffiths 2001).

[118] Main reference is made here to the Rural Land Plan model of Francophone Africa, under implementation in Guinea, Burkina Faso, Benin and Cote D'Ivoire (see Chauveau 2003, Lavigne Delville 2005) and to a customary land securitization procedure underway in central

Box 2 provides a generic outline of practical process. Experience thus far suggests the results will be on the whole straightforward, delivering discrete but adjoining community domains, and within which community real estate (common properties) are precisely definable on the ground - and in the process practically defined. In more arid pastoral zones, shared ownership by several social communities may be the norm, and/or nested with acknowledged oversight by the most settled of these communities.

The challenge to new norm creation may at times be considerable and will almost certainly centre upon new tenure constructs which allow for nuanced distinctions among collective rights; distinguishing for example between the collective 'root commonhold' of the community and 'estate commonhold' to reflect different levels and/or manifestation of community ownership, beyond the easier distinction between community as land manager and community as land owner.

Heated inter-community and intra-community negotiation can be fully expected and a required task of facilitating agencies including government is to keep this at community-manageable levels. Experience thus far suggests that not only may this may be successfully achieved in nine times out of ten, but that the action of inter-community negotiation and agreement is highly empowering in entrenching clarity of tenure ("our land") and in the activation of community governance over the domain secured.

The essentiality of involving all interest holders goes without saying. In zones where significant pastoral seasonal rights of access apply, the support of these groups is needed, and in the process affords an opportunity to renegotiate and entrench agreed access rules. Devising appropriate legal constructs to reflect community dominion, and ensuring that inter-community decisions as to boundaries may be formally entrenched (registered) at accessible levels (no higher than district or county), is an additional task of facilitating policy.

Shifts beyond what was traditionally the case into what is agreed as today required will occur, in order to reflect changing community composition and settlement patterns. This will commonly be the case where communal jurisdiction has, for one reason or another, been significantly weakened, dismantled or reshaped.

Community-based ordering and entrenchment of customary rights of access will be a logical part of the procedure, purposively identified and embedded by community members. Formulation of regulatory community based management of common properties as logically follows, and for which, on the African continent, there is a wealth of operating experience.[119]

Through such action-based change, more than lip-service is paid to popular empowerment and the adoption of bottom-up approaches in both planning reforms and their application. It means beginning at the periphery, in the rural community, and through facilitated learning by doing and local institution-building, arriving at relevant tenure norms and governance procedures that are fully own-able in concept and practice by communities themselves, and thereby also easily replicable at scale.

This paper has argued that all the necessary tools are in place. Customary tenure is already premised on a community based foundation, and provides an ideal framework within which

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Sudan (Alden Wily 2005a, 2005b and forthcoming). Delimitation procedure in Mozambique is relevant to the first of the three main steps: identifying the domain and entrenching community tenure (see Norfolk & Liversage 2002 and Hanlon 2002).

[119] See Alden Wily & Mbaya 2001 for documented examples and Alden Wily 2003b.

and through which to promote and guide change. Many of the conceptual conundrums facing policy makers in their understanding of customary regimes will be relatively easily and pragmatically resolved in the hands of customary landholders themselves. And through local ownership of changes, the poor will be better able to protect their interests and popular will be better able to drive and engage political will, usually transient once words need to be put into practice.

Box 2: A Simple Ten Step Process towards Customary Tenure Security

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.

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. Their representation on the council below is essential.

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.

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