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Fair land governance : how to legalise land rights for rural development

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LAW, GOVERNANCE,
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FAIR LAND GOVERNANCE

How to Legalise Land Rights
for Rural Development

Edited by
JAN MICHIEL OTTO
ANDRÉ HOEKEMA



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Fair Land Governance

Law, Governance, and Development

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1 Legalising Land Rights, Yes But How? An Introduction

Jan Michiel Otto & André Hoekema¹

In the Face of Two Paradigms

In this volume of essays the authors reflect on legal means to improve the position of the many smallholders in the developing world who live and work on land that they do not officially own. From quite different perspectives they explore how to provide more tenure security through better land law. The authors recognise that for rural development an appropriate land law is necessary but not sufficient. They also realise that ideas about what precisely constitutes an appropriate land law have for too long been informed by two contradictory paradigms, namely the ‘install full private property’ paradigm and the ‘leave customary law undisturbed’ paradigm.

The essays in this volume demonstrate that the full private property approach, which has come to dominate international and domestic land policies over the last decades, has major drawbacks. It has often done little good for rural smallholders as it neglected existing land management and land use practices which were embedded in local circumstances. The main assumption on which it rests – legal institutions can protect the poor man’s legal rights – has unfortunately proved to be a gross overestimation of state capacities for effective and just land governance.

On the other hand, the authors do not trust approaches which recommend ‘leaving customary law undisturbed’ either. Proponents of such approaches have tended to perceive rural communities as culturally distinct and tied to their land with collective landholding as the centrepiece of their arrangements. They favour rigorous legalisation of collective holding of land, by which the land is declared collective and inalienable. In the face of large-scale dispossession of local communities by state and corporate actors, this approach is often advocated as the only effective way to protect existing land rights.

A Leiden-Based Research Project Featuring ‘Third Ways’

This book is the result of a Leiden-based research project on legalisation of land tenure. The project already resulted in a volume with studies from eight countries in Africa, Asia and Latin America entitled *Legalising Land Rights* (Ubink, Hoekema & Assies 2009).² Both volumes show a tremendous variation in local circumstances as well as in the nature and historical background of land policies and their relation to the development concepts and land laws prevailing in each of the countries under review.

This heterogeneity strongly suggests that policy-makers and scholars need to find out empirically under what circumstances particular kinds of legal innovation would be effective or not, both in terms of their responsiveness to needs and practices of the people involved as well as in terms of a legal instrument which enables agricultural growth without jeopardising legal protection of rural communities. This volume features a number of land law regimes that have taken practices of unregistered land tenure seriously and that have tried, where and when the need arose, to build new state law on this very basis, all by thoroughly participatory methods. We identified in these regimes a ‘third way’ of legalising land tenure, or rather a bundle of various ‘third ways’. These ‘third way’ experiments not only build upon practices on the ground but also try to legally remedy deficiencies and fill some legal gaps. In doing so they fit in neither of the two paradigms we mentioned above.

A First Introduction to the Chapters

All five authors in this book try to draw practical lessons from their respective experiences with developing legal protection for the rural poor in case holding land ‘informally’ really turned out to be insecure. All agree that the number of such cases has been growing fast in recent times, and that therefore the need for formalising or legalising land rights has increased. And they ask: ‘very well, but how?’

John Bruce explains that introducing full private individual property plus titling and sophisticated registration of land parcels and titles cannot be the ‘silver bullet’, as suggested by Hernando de Soto in 2000. Yet, he endorses De Soto’s views to the extent that formalisation of land holdings under certain circumstances may benefit the poor directly. Bruce, looking back at about 50 years of attempts at legalising land rights in developing countries, shows how to adapt land laws better to local circumstances. Lorenzo Cotula comes to similar conclusions from a slightly different angle. He discusses the

strong pressures on unregistered land tenure arrangements caused by large-scale buying of big tracts of land by both foreign governments and multinational enterprises. Cotula shows that local smallholders although resorting to national and international law, often lose their land. How to go from here, is explained by Liz Alden Wily. She discusses the 'learning by doing' approach she used in Tanzania. In a truly bottom-up fashion she gathered local people and government officials together in a common effort to design a legal regime that provides land and resource (forest) management rights. Paul van der Molen, cadastral registration expert, also contributes to our search for the way ahead. He looks at the problem of how to reorganise public records for registration of kinds of land rights outside the full private property ambit, like land rights granted to communities as such, and also specific use rights of individuals such as the 'secondary rights' of women and pastoralists. Finally, André Hoekema raises the question: 'If not private property, then what?'. He discusses experiences with two new land laws through which land management and land use rights are granted to communities (Mozambique and Tanzania) and one new land law securing the position of individuals (Ethiopia). Based on the strong and the weak points of these three recent laws, he provides a checklist which could be useful for any legalisation effort.

The Changing Picture: Why Smallholders Urgently Need Legal Protection

Until recently³ many law and development experts hoped that creating *legal certainty* would do away with the problem of unregistered, 'lawless' landholdings of many rural smallholders. By establishing legal certainty, it was hoped, they could speed up rural development all over the world. Individual full property or freehold rights, titles and strong forms of public registration would bring about this legal certainty, create land markets and offer farmers the opportunity to invest and contribute to rural economic growth.

Meanwhile, counter-movements of community organisations, NGOs, academics and some politicians have maintained that such unregistered landholdings do not necessarily constitute an impediment to rural development. Their advocacy has made much sense, especially when such holdings have been well protected and managed by local communities who practice local types of law⁴ and authority called customary law, *adat*, indigenous law, or people's law. Such tenure arrangements are often called 'communal'. They may provide a fair amount of tenure security and offer holders locally effective rights to use land as they see fit, to

reap the fruits of investments, to engage in some kinds of land transactions and to keep the land in the family. Many such smallholders without official legal position may expect that 'a person's right to land will be recognized by others and protected in case of specific challenges' (as the FAO 2002: 18 defines tenure security).⁵

With all due respect to these communities and their potential, the last few decades have witnessed new economic and social developments which have undermined such local land tenure arrangements at a quicker pace than before. In many areas, and particularly in isolated places, people now face both internal as well as external challenges previously unheard of. As for the internal threats it suffices to refer to the interrelated processes which have changed rural community life almost everywhere: individualisation, marketisation, population growth, migration, state formation, mass communication and transportation, education, women's emancipation, democratisation, and juridification. All of this has contributed to intra-community tenure insecurity and conflicts about land.

The external threats stem largely from business interests and state intervention. Rural areas are now increasingly incorporated in national and global economies and smallholders are pressured to make place for large-scale agribusiness, whether for food, timber, or biofuel production. Moreover their local tenure arrangements have often been affected by government efforts to replace them with new laws that should foster rural development. These included invasive agricultural policies, imposing heavy duties on peasants. Many of these government efforts have not been successful. However, under such conditions communal tenure arrangements have often lost their stability and cohesive character. Moreover, where communal land tenure arrangements are not recognised or are not functioning (any more), smallholders often cultivate land that is formally classified as state land. Often they lack official titles or other means of protection against the usurpation of their plots for large-scale agriculture, irrigation, mining business and infrastructural works. They run the risk of being branded as squatters on their own land, or at least regarded as people who can easily be evicted without an adequate compensation for the loss of 'their' land. In view of these external threats, there is indeed an urgent need to legally empower these smallholders so that they do not just rely on continued protection by unregistered customary arrangements, even if their communities still seem resilient.

Two Types of Land Tenure Legalisation, and of Legislation

To grasp the full spectrum of legalisation of unregistered land tenure arrangements, we should, to begin with, distinguish two types, i.e. the *communal* type, and the *individual* (or family-based) type. The communal type refers to community-based arrangements in which the (usually unregistered) right to manage and control the land – and often the right to rent out the land to outsiders – rests in the hands of a collectivity, a corporate actor, represented by for instance a village head, a chief or another community leader. Rights to use and exploit the land, sometimes also the right to bequeath, are in the hands of individuals and/or families.⁶ Such community-based land tenure arrangements regularly lack official recognition.⁷

But not everywhere customary law functions in such ways, and not all customary law embodies communal land tenure arrangements.

This brings us to the individual type of unregistered land tenure arrangements. Such individual rights may concern communal land, privately-owned land, or, as is very often the case in the developing world, land which has formally been declared to be state land. Such *de facto* ways of individually using and exploiting state land are often not recognised nor legally protected. In some places such individual land use practices are reminiscent of age-old customary practices, whereas elsewhere such individual tenure can be a recent phenomenon, for instance resulting from large-scale land invasions, allocations to private companies or public use, or other drastic state measures.

As a consequence of these two existing types of land tenure, the efforts of countries who have engaged in experiments to define, title and record customary rights and give these legal status,⁸ reflect two corresponding types of legalisation. The first focuses on the group or community level, and the second on the individual or family level, according to the specific context. In the first case, groups and communities are the potential subjects of rights and in the second case individuals. This distinction runs through all the present-day efforts of legalising land tenure.

In both types of arrangements the search is for ways to provide real tenure security for the smallholders. In the communal type of legalisation, the legislator first has to dress up the nature and competences of a management and regulatory local agency out of the contours of locally existing entities like a ‘village’, a ‘community’, a ‘tribe’. Next, given the role of this entity, rules of use, heritage, transactions etc, must be recognised and defined.⁹ Thus, issuing of new land law at the same time calls for the creation of new, or amendment of existing, management authority over land. This state-imposed change of locally

existing institutions of land management authority may give the legalisation an ambiguous character: on the one hand there is recognition and state-sanctioned legal support for local authorities (often for the first time ever), on the other hand local institutions are regularly changed to such a degree that – if the changes are implemented at all – these institutions change into something that might be far away from the original. This in its turn may cause certain problems of legitimacy and effectiveness in the actual functioning of the new regime.

In the individual type of legalisation, the legislator primarily defines the nature, scope and conditions of the use rights as well as the ways of registering and public recording of these rights. Regarding the land management authorities, often no more seems to be needed than some changes to already existing state land management agencies and/or decentralised public entities.

Capturing both types of land tenure legalisation in our study, our proposed definition of land tenure legalisation would be as follows: ‘a process whereby possession (including use) and management of a tract of land are incorporated into a national legal system – either directly, or indirectly through recognition of community-based rights and authorities – whereby the rights and obligations of the individuals and entities concerned are defined.’

Land Tenure Legislation in Context

Both paradigms mentioned in the first section, namely ‘install full private property’ and ‘leave customary law undisturbed’ have put their marks on more than a century of designing, implementing and evaluating land policies and land laws in Asia, Africa and Latin America. Much can be learnt about this history on a country by country basis from our previous study mentioned above (Ubink, Hoekema & Assies 2009). In the country chapters of that study we can also see how a third paradigm, which we might summarise as ‘state and party for the people’s development’, came to dominate land policies and laws in countries as diverse as China, Ethiopia, Mexico, or Indonesia, during certain periods. In the remainder of this introduction, we will roughly sketch this historical *Werdegang* of land tenure policies and law, from the colonial era until today. The overview will pay some attention to trends in foreign aid. For, land policies in most developing countries have been informed not only by domestic considerations but also by international and transnational assistance. This book is mainly based on the experience of the authors of this book as partners in such projects.

Prior to this historical overview, we will first look at some recurring themes concerning the broader context of land tenure legalisation. First

we will briefly look at the importance of some 'governance' issues, next at 'land policies', and finally at some underlying ideologies and theories aiming at economic and social development. Thus we try to provide a context which should help to understand the background of land tenure legalisation, especially how the long struggle between 'legal centralists' and 'legal localists' has evolved over time and seems now to be leading into 'third ways'.

Swinging Pendulums of Governance

Since the World Bank's 1992 report on good governance and development, the concept of governance – and especially 'good' governance – has taken centre stage in development policy, both internationally and domestically. The concept refers to the role of the state in development processes, and covers aspects of politics, administration, law, and state-society relations. All of these aspects are manifest in land policies in developing countries, both in past and present. In the late colonial era, European and domestic businesses were able to extract much profit from their control of land and agricultural labour. When after World War II most developing countries gained their independence, colonial governance was succeeded by national regimes who tried to build the nation and promote development by exercising strong, centralist and authoritarian leadership. Employing such top-down approaches governments initiated ambitious programmes for unification of land law, land registration, as well as 'land reform' inspired by socialist models.

Over the years this style of governance has caused much resistance, and led to demands for political participation, economic freedom, democratic decentralisation, human rights and rule of law. Around the globe, recent decades have seen the emergence of strong business communities, decreasing distributive capacities of the state, and a rise of civil society organisations representing weakened social groups. Since the demise of the Soviet Union international and national development policies are clearly focused on market efficiency rather than social justice. This is to some extent an ideology by default, born out of the recognition that 'big government' and 'legal centralism' of the 1960s and 1970s have not been able to deliver.

Whatever the position is on the broad spectrum between the poles of centralisation and decentralisation, policies cannot be carried out without a sound public administration, an effective civil service. Also the realisation of Hernando de Soto's ambitious plans would fully depend on the administrative capacities needed to run an efficient land administration. Similarly, a proper rule of law environment is key to the success of any land policy.

Land Policies and Land Tenure Law in a Broad Sense

There is still one other important matter which deserves mentioning. This book speaks mainly about the legalisation of unregistered land tenure. We might seem to suggest that this is the single most important and effective recipe for strengthening the position of rural smallholders. It is not. Rather, it is one of a dozen or so interrelated policy options concerning land management. Here, we cannot do more than touch upon some of them briefly. They include the definition and allocation of the various rights to land. Measuring and mapping land raises another set of issues. Then there is the issue of land use planning, which calls for balancing many different interests, and its implementation by land use licensing. Here intersectoral relations are key: besides balancing the needs and demands of agriculture, forestry, environmental protection, industry, mining, energy, housing, and public works, to mention just a few, coordination with other spatial planning and environmental management policies is necessary. Land acquisition policies for public and private interests, enabling state agencies and corporate actors to acquire land without a painstaking process of expropriation is also an important issue.

Then there is the issue of land reform, in the sense of redistribution of land to the needy. There are many different models of land reform. In the 1960s the popular model consisted of seizing land from large private landowners on the basis of certain land ceilings (maximum) for redistribution to landless labourers, tenants, or smallholders, who would form cooperative societies. Today, there is more interest in the privatisation of state land. Some experts and donors now promote the allocation of much smaller plots as a feasible way to support the rural poor (Prosterman 2009). Recent studies show trends of large-scale dispossession of smallholders throughout Asia (Li 2009). In as far as urban areas are unable to employ and absorb them, solutions require changes in access to land in rural areas.

The resolution of land conflicts has also become a major policy concern in itself in most developing countries. Different types of conflicts (within families, between communities, between communities and the state, between communities and enterprises) are often difficult to solve, and have the potential to develop into larger conflicts threatening stability and security. Whatever land rights are allocated, other factors are as crucial for small farmers to benefit from their land, including water, seeds, fertiliser, agricultural extension, access to markets, market information, transport, and fiscal incentives. This calls for integrated agricultural support policies and infrastructure. Obviously, the scope of this book does not permit us to further elaborate on this, nor to go deeper into land policy issues concerning the urban poor.

Underlying all of these related elements of land policy and law, two more ideological questions stand out: who controls the land, and how is land actually perceived? Often the issue of who actually owns and controls the land in a country – the state, private individuals, or collective entities – is highly contested. And if the answer is ‘the state’, then which national or subnational agency (or agencies) is mandated to issue rights and licences concerning land? This question of land control matters as much for agricultural land as for urban land, peri-urban land, forest land, or marginal land, and often has severe consequences.

Finally there is the question of whether land is perceived primarily as a commodity, an economic asset to be traded in an open, dynamic land market, or as the indispensable socio-economic foundation of communities and their livelihoods. In the first case, land assets should be legally fixed in order to – following De Soto’s views – be transformed from dead to living capital, to allow land holders to capture rising land values and to use their possessions as collateral to gain access to credit.

For others, however, land tenure systems incorporate an extensive set of social relations from which people take their identity and that serve their needs for securing their livelihood. Through the inherent practice of reciprocity people are encouraged to see their individual interests in the light of the needs of others and the community as such.¹⁰ The latter view emphasizes livelihood security and local food production.

Economic and Social Policy Theory: Efficiency versus Social Justice?

Much of the international debate on land governance today is conducted by development economists, as part of their general concern with economic development. Their work shows more attention for land as a marketable commodity than as a secure livelihood.¹¹ The focus on community-based local economies, as was once promoted by politicians like Gandhi and economists like E.F. Schumacher, the author of *Small is beautiful*, seems at first glance no longer fashionable among development economists these days. Yet, a closer look at De Soto’s work reveals a strong focus on the actual importance of ‘local contracts’ and ‘extra-legal relations’. Taking that seriously, requires development economics to focus on actual costs and benefits of farmers in their local contexts, bringing psychological, social, cultural and political considerations as much into the picture as rational choice calculations.

Today’s development economics are heavily indebted to the work of Douglas North (1990) who forged the neo-institutional turn, underlin-

ing the fact that economic behaviour such as selling or renting out a plot of land (or deciding not to do so), – like any other behaviour – is influenced by ‘transaction costs’ – the costs of participating in a market. These costs, in their turn, are influenced by ‘institutions’, i.e. prevailing norms, rules, rule-applying organisations, and their practices. Jean Ensminger (1997: 191), who wrote an article in a book honouring North, concludes that in the field of how to organise land rights, there is a ‘need for formal institutions to build upon informal institutions’. This actually calls for an alternative reading of neo-institutional economy, to the end that local communal regimes will be adapted rather than replaced.

In this vein economists could do more systematic research concerning the extent to which communal tenure arrangements provide smallholders with guarantees against losing their land, their means of survival and other serious risks. Introducing market-oriented private property has often led to uprooting such communal regimes and the social security that goes with it. In many regions, people have strongly resisted this, and not come forward to obtain private property titles for fear of losing this kind of social protection. Platteau (1996) gives a vivid description of these fears and problems. In an alternative reading of neo-institutional economics the concept of transaction costs might be expanded considerably. It should acknowledge the fact that in a great number of communities around the globe people’s economic behaviour is influenced by their relations with other community members, by their sense of tenure security, by their ideas of justice, fairness, and social welfare. In these communities it is not the theoretically isolated, economically self-interested person who is the main player in economic transactions and market behaviour but the social person, in his social and cultural surroundings, with all of its trust, distrust, solidarity, or the lack of it. This would help policy-makers to decide when and where it may be wise to go for private property arrangements and when and where they could do better by looking for ways to support, recognise and legalise a communal land tenure regime, or parts thereof.

Colonial Era: an Earlier and More Ambitious Leiden-Based Research Project

To understand today’s land law regimes in Asia and Africa, one needs to look at their histories. From the early twentieth century onwards colonial powers were divided regarding the best way to govern a colony, either by direct rule or indirect rule. In terms of land tenure and land law policies in the colonies this was reflected in two widely different approaches, namely ‘legal centralism’ or ‘legal localism’, to which we will

refer in short as a 'centralist' as opposed to a 'localist' approach. The centralist approach of colonial governments was quite popular with the French, for example in West Africa. They believed that European law had qualities superior to local indigenous law, assuming a natural evolution from customary forms of tenure to full private property, from status to contract. Customary arrangements were seen by such colonial regimes as backward and not offering opportunities for creative investment and development.¹²

However, other colonial governments, like the British, were taking local customary law and traditional authorities more seriously, and many colonial administrators opposed its replacement by Western concepts of freehold and private property. European legal scholars were often divided about the issue. In the Netherlands, for example, during the first decades of the twentieth century this politico-legal conflict dominated both policy and academic debates concerning laws in the Netherlands-Indies. The Leiden scholar Van Vollenhoven (1918) and his *Adatrechtschool* made a principled and empirically grounded plea for continued recognition of indigenous law and communal tenure. He developed the hybrid 'adat law' as a conceptual bridge between *adat* (custom) and law. Such unwritten flexible *adat* law differed sharply from the positivist notions of law, prevailing in Europe. Van Vollenhoven's view was eventually accepted, and enacted into Dutch colonial legislation. So, in the 1930s *adat* law became well embedded in the laws, case law and legal education in the Netherlands-Indies. A sophisticated system of inter-group laws (*intergentiel recht*) was also developed to settle cases which involved members of different *adat* law communities. In other colonies similar debates raged (Mommsen and De Moor 1992).

From 'Big Government' of 1960s to Structural Adjustment in 1980s

The centralist style of postcolonial governance which prevailed since the 1960s led in the area of land law to national codification, land titling and registration in the name of development, national unity, and legal certainty. Thus national governments worked to marginalise communal customary land tenure and community-based traditional authorities. Donors generally supported this trend, the World Bank's 1975 *Land Reform Policy Paper* being a perfect illustration. Especially through the donor-supported 'structural adjustment' of developing economies in the 1980s, central governments now began to strongly promote private property and the development of land markets as the informing

principles of rural land law policies – albeit with some important exceptions like Ghana and Senegal.¹³

But once again ‘localists’, NGOs representing indigenous communities as well as academics, legal anthropologists and others, entered the scene in the early 1980s, emphasising the tragic failures of centralist approaches. Arguing that private property was actually the newcomer in land policies, they called for attention and respect for continuing local indigenous practices and arrangements (Coldham 1978, Shipton 1988). As they have argued, existing ‘customary’ land tenure is rooted in the social life of rural people, permeating their social relationships.¹⁴ In fact, state-led reform of land tenure relations – whether socialist or market-based – has caused much resistance and avoidance and left rural areas in many countries with a most unruly pluralism of state law and a variety of local tenure arrangements, which people continued to adhere to.

Against this background, localists continued to plead for community-based tenure arrangements as the basic framework to foster (rural) development. However, a serious, balanced international debate about land, law and development did hardly take place, due to the conflict between underlying ideologies and the fact that both sides have in fact been using different concepts of law.

1990s Good Governance and Rule of Law Promotion

Since the 1992 World Bank report on governance and development, rule of law promotion has risen to unprecedented prominence in donor policies. In this so-called “‘new” law and development movement’ (Rose 1998)¹⁵ the focus was obviously on effective legal rules and institutions. Following current development economics, policymakers were of the opinion that ‘good’ governance referred to policies that facilitate the operation of local and global markets. In the area of land law this initially meant individual rights, titles and registration. Thus rule of law and good governance concentrated on ‘that part of the economy of a developing country which can be integrated in the global market economy’ (McAuslan 1997: 43). Still in line with the structural adjustment policies of the 1980s measures were aimed at downsizing the state, improving legislation, legally protecting the investments of private entrepreneurs, and strengthening courts to solve conflicts in reliable ways.

However, during the 1990s a growing number of development economists and other policy-makers reappraised the role of the state and law in development policy. In the words of Stiglitz, the former chief economist of the World Bank ‘the choice should not be whether the

state should be involved but how it gets involved' (Stiglitz 1998: 25). Support started to grow for the suggestion that serious social problems like poverty, inequalities and discrimination had to be tackled by the state, which had to make a comeback. In this line of thinking, the concept of development itself was also defined more broadly; it had to not just cover economic growth but also social justice and sustainability. Consequently, the belief in 'one-size-fits-all' type of solutions begun to shrink. Meanwhile, Amartya Sen's (1999) definition of development as freedom became widely accepted (Newton 2004: 7).

During this period, Bruce and Migot-Adholla (1994) published their evaluation of the strong and weak points of various land law reforms in Africa, promoting what they called the 'adaptation paradigm'. This new paradigm for land law reform suggested that different land use situations and contexts need different approaches to law reform. Besides state-led registration of individual private property in some areas, and leaving customary law undisturbed in other regions, there would also be areas where what we have called 'third ways' are preferred. In the 1990s Platteau (1996: 74) also argued convincingly for building land laws on local, customary practices of regulating and managing land; that is, in as far as desirable, for he also demonstrated awareness of the deficiencies of local customary arrangements, and of situations in which customary law has no local legitimacy any more.

2000s and 2010s, Mixed Donor Policies, Towards a Paradigmatic Consensus?

During the last decade international and domestic development policies, in particular on land law reform, have shown an amalgamation of the different strands of thought discussed above. It seems that donors and governments have come to realise the many pro's and con's of all 'silver bullet' approaches, whether old-style land reform, exclusive focus on state, structural adjustment and privatisation or decentralisation. Nowadays, pro-market legal reform programmes go hand in hand with complementary programmes to promote access to justice, legal empowerment, and justice for the poor. Programmes for training paralegals at village levels are reminiscent of the community development projects of the 1970s with their basic health workers and agricultural extension staff. Donors and governments are also open to explore the potential of 'non-state justice' beside regular national legal systems. Whilst this may leave room for experimenting with 'third way' solutions, it has also created a certain ambiguity and haziness, as we may learn when reading reports which the World Bank and UNDPs Commission on Legal Empowerment of the Poor have published.

World Bank, FAO, UN-Habitat, EU

The World Bank has now acknowledged that for a transitional period it is best to recognise customary practices as this extra-legal arrangement often provides a sufficient level of tenure security (World Bank 2003). Yet, the bank seems to see such adaptive policy as a prudent road towards individualised title and rural development through the market. It assumes a gradual individualisation of land tenure rights and increased transferability of land. In contrast, international organisations like the FAO, the EU and UN-Habitat – not to speak of peasant and indigenous movements – are more inclined toward a structural approach based on community rights to land, to food security and to shelter; in short to livelihood security. In their view land seems not merely an economic asset but also a space for living and/or cultural reproduction.¹⁶ In contrast to the World Bank's title-based perspective, the rights-based approach of other institutions allows for a more permanent position of pluralist and intermediate options for the legalisation of land tenure.¹⁷ In the rights-based approach tenure security takes precedent over legal certainty, in a narrow sense.¹⁸

UNDP's Commission on the Legal Empowerment of the Poor

The various reports made by or on behalf of the Commission on Legal Empowerment of the Poor (CLEP 2008a; 2008b) also strongly stress the need to target rural smallholders – and urban squatters – and to take a series of measures to legally empower them. In fact, the Commission was initially expected to promote the exclusive individual private property title approach following the footsteps of its co-chairman Hernando de Soto. Later on the Commission seems to have modified its position.

For example, the Commission also discusses the problem of how to protect and strengthen communal land rights of indigenous peoples as well as the 'secondary' rights of women. In the final 'Agenda for Property Rights' (CLEP 2008a: 65) the Commission suggests community-based ownership of natural resources (forests, grazing lands, fisheries etc.) and recognition of traditional institutions to manage and use these resources. A similar suggestion is to strive for 'adequate representation and integration of a variety of forms of land tenure such as customary rights, indigenous peoples' rights, group rights...' (ibid.: 65).

In sum, the report does not promote one single, right way forward. Just like we set out in previous sections, the Commission also conceptualises land tenure legalisation as one element out of a series of inter-related policies for rural development. Access to justice includes in

their view ‘non-state, informal justice systems’ (ibid.: 63). So, it seems the Commission is also inclined to walk ‘third ways’ in land rights legalisation.

However, the picture remains ambiguous. The reports remain general and do not specify how in practice the Commission would seek to reconcile or combine the ‘install full private property’ paradigm and the ‘leave customary law undisturbed’ paradigm. For, the reports also constantly emphasise that smallholders need to be brought to the market, thus incorporating ‘the extra-legal economy into the formal economy’.¹⁹

So, it seems that tensions between a market-oriented policy based on titled land as an economic asset and a justice-oriented policy in which the land primarily serves ‘livelihood security’ is far from resolved. In spite of the Commission’s declared intentions, in the end it seems to emphasise the aspect of economic asset far more than that of livelihood. (Otto 2009, Assies 2009: 914)

Towards a Paradigmatic Consensus?

The localist’s promise of community-based tenure security for all smallholders has its own problems. What to do about discriminatory practices toward women and local minorities and about unfettered authoritarian power of traditional leaders? What to do when communal land tenure institutions are absent and/or do not function well any more? And how can unregistered community-based tenure arrangements survive anyway under the attack of land-hungry enterprises and foreign governments?

At present we notice a rapidly growing consensus among international and national decision makers, experts in development studies and in land tenure matters that the way forward should be based on careful assessments of the very specific local situations within a country. In this view policies should build where possible on local tenure arrangements or at least on local needs and potentialities, adopting a participatory, responsive approach. Regarding the core question of this volume of how to legalise land rights for rural development, we notice that ‘third way’ land rights regimes are now springing up in many countries, particularly but not only in sub-Saharan Africa. Solid evaluations of the effects of such novel enterprise are still rare. Recently scholars like Lavigne Delville and Fitzpatrick have sought to identify best practices among ‘third way’ experiments undertaken by several countries. Our previous study with country and case studies (Ubink, Hoekema & Assies 2009) on national land law and local implementation in a variety of countries in Africa, Asia and Latin America also provides

insights, we hope, that may help governments, civil society organisations, donors, and academics, in their search of just land governance for development.

A Closer Look at the Chapters

Bruce, the practitioner-scholar who advocated the adaptation paradigm already in 1994, tackles the question ‘does development (...) require full private ownership?’ head on (see page 33). His answer ‘Not necessarily!’ derives from decades of intensive experiences with formalisation of land rights for development, particularly the vicissitudes of registration of a person’s entitlement as a full property right of a Western type. Do or did all such programmes bring real tenure security and did it boost development for the poor? The many evaluation studies he draws in show very mixed results and this in turn leads him to the centrepiece of his chapter, key questions about the conventional policy of land formalisation as private property. Among his questions are the following: ‘Is there a provision for registration of common property, the property of local communities?’, ‘Is it possible to register customary rights rather than converting them to private ownership for registration?’, and ‘If the judiciary is corrupt and there is no use turning to the courts, what is the point of registering property rights?’. These and similar questions underscore the compelling need to rethink conventional legalisation projects and pay ample attention to other than private property schemes of land rights, particularly, but not only, to recognition and registration of communal land tenure.²⁰ In this context Bruce gives us a well-balanced discussion of De Soto’s book *The Mystery of Capital* (2000), reaching the conclusion that the old recipe of introducing full private individual property cum titling and sophisticated registration of land parcels and titles cannot be the ‘silver bullet’. In some conditions, it is, but in many others it is not. But De Soto has the great merit to have been the first to emphasise the potentialities of land formalisation for the poor, although in his plea for a particular form of formalisation he misses out on the many problematic experiences with the type of programmes he is actually advocating.

Cotula discusses the land law regimes of developing countries, mainly in (sub-Saharan) Africa, and their socio-economic effects, in a historical perspective. The sprawling of cities, demographic pressures, trade liberalisation and multinational large-scale agricultural and biofuel projects foster fierce competition in land, making just and effective land law policies difficult but all the more urgent. Particularly in rural Africa, where private registered property is rare, states often are the formal

land owning entities, while communal, 'customary' forms of land tenure dominate the scene, although often not in an official status. But this is changing rapidly. 'There is now greater recognition that land laws must build on local concepts and practice rather than importing one-size-fits-all models.' Basically these new locally adapted land laws follow two routes: one is to protect customary land rights of the communal type, and make for their simple and quick registration in land records. The second route is to introduce long term use or lease rights over (formally) state-owned land.²¹ In both cases it is crucial to provide for low-cost and simple registration procedures in a small, accessible office nearby.

Discussing some of these new land laws Cotula finds important weaknesses unsolved or not yet solved satisfactorily. Women's rights including their secondary rights, are still in jeopardy; pastoralists – often overlooked and considered backward – rarely find protection in the new laws for their grazing needs. Apart from these problems with customary arrangements (and ways to legalise these) Cotula devotes considerable attention to the recent developments that affect the land position and tenure security of smallholders in Africa, namely national governments mainly from Asia investing in African land, as well as an increase of large-scale multinational agro-investments in cash crops for export and/or biofuel projects. In this regard he pays attention to investment treaties and international investments law and arbitration. Other international impacts on national and local land rights stem from court cases brought before interregional human rights fora (such as the *Awasi Tingi* case in Nicaragua). He foresees 'an increasingly globalised system of property rights influenced by claims based on interlinked national, international and local rules'. Some of these international tendencies work towards depriving smallholders of their land, others may strengthen their position. 'Securing local land rights is today more urgent than ever', he concludes.

Alden Wily demonstrates that state-imposed top-down design and implementation of land and resource laws in Tanzania had adverse effects on the ground. In Tanzania state ownership and top-down state management of forests not only antagonised local communities, the traditional owners and users of the forests, but also turned them into forest abusers. She signals the necessity of bottom-up, participative preparation of land and resources laws for these to enjoy legitimacy and foster people's cooperation rather than resistance and sabotage. Alden Wily's story about forest use and management relates to the broader problem of how to deal with commons. More often than not in new land laws, these collectively held and used resources and their management regimes at the local level are left out of the picture – a

striking weakness given the immensity of local common resources in Africa and beyond. The author sketches the 15-year long struggle from the mid 1990s by local people, consultants (including herself), and a few open-minded authorities to arrive at new legal norms for acknowledging possession and conferring management rights on local communities in respect of Tanzania's rich forest resource. She recounts how this community-based process and the 'learning by doing', which marked its progress, eventually resulted in the new Forest Act 2002. One of its main objectives is to devolve forest authority as far as reasonably possible into the hands of ordinary villagers. Alden Wily shows how this was much fairer than previous legislation which operated on the basis that forest conservation and management could only be achieved by removing forests from the customary sector. She also adjudges the new law as providing a more viable route to sustainable forest conservation. The critical element in this, she argues, is that formalisation of village management authority rests upon acknowledgement of customary possession of these areas. If customary tenure over national forests had ceased to exist, local regulation and responsibility had been impossible.

As for the impact of the new forest law, this new paradigm is proving a success, improving relations between rural communities and forestry officials and demonstrably reducing forest degradation where communities secure controlling rights over local forests. The main focus of her chapter is however on the process of making national law. The chapter is aptly entitled 'From State to People's Law'. Alden Wily proposes that a 'learning by doing' approach is essential to modern, democratic law-making. Without this norms in new land and natural resource laws continue to be often unjust, irrelevant, unwanted, ignored or abused in application. A founding issue Alden Wily addresses is how this more genuinely participatory approach can advance rightful recognition of customary land interests as rights of real property, in the face of increasing appropriation by governments. Although this chapter was drafted in early 2008, the issue has become yet more pressing given that the current global land rush affects unfarmed communal lands of rural communities in Africa. Learning by doing, she argues, involves much more than cursory consultation with communities. It requires shared state-people experiential work on the law to overcome unforeseen pitfalls and problems. A learning by doing approach also challenges all those governments, public officials, consultants and donors who still work with 'star drafters' following a one-size-fits-all approach. So often this approach has been shaped around a narrow vision of private property as necessarily involving subdivision and individualisation of resources and registration processes which as narrowly focus on the farm. It is hard to imagine that consultants who

have read Alden Wily's chapter will go on advising a government about future land law on the basis of a one-week visit, producing a sketch of the contours of future land law regimes based on a draft already in their computer when they fly to their new assignment.

Van der Molen, an expert in cadastre and registration with extensive international experience, explores the various concepts and forms of registration schemes. In the field of formalising land holding outside the conventional policy of going for individual private property, one meets three stages. For one, governments need to engage in the development – through learning by doing – of specific 'third way' holding rights, like the community-based ownership of forests, like community titles in the hands of traditional communities, or like individual long-term use or lease rights. Secondly, one needs accessible, transparent and fast ways to assign such rights to either individuals or corporate entities, and thirdly, there is need of simple quick ways of registration, public recording of these rights. It is in this latter domain that Van der Molen shows us the contours of a 'third way'.

The author explains that the conventional cadastral concept is Western and not suited to serve the purposes of 'third way' policies of land holding legalisation. There is 'need to redefine the "traditional Western" basic concepts of a cadastre'. One has to see to it that any system of public recording of rights relates to 'the prevailing standards and values in the country's society (...)'(see page 114). According to him this means at least expanding and redesigning registration institutions and operations on three items, namely: 'The maintenance of records or registration of social groups with non-individualised membership, the maintenance of records or registration of the various forms of customary and non-formal (informal) rights, the maintenance of records or registration of parcels of land which are not defined using geometrics and which possess flexible boundaries.'

Let us stress that the first item, the concept of a group with non-individualised membership, is essential in that in many new land law regimes communal land and forest tenure gets to be recognised officially. According to this author registration methods are sufficiently variable to offer space for registration of this kind of community titles. As to the second item, how to record a variety of individual customary rights, like long-term use rights, he shows that this can be done, including the so-called secondary rights such as the rights women often possess within customary systems. This is precisely a sore point in the functioning of conventional registration systems where such rights are not taken into account and therefore annihilated. Also the third element commands attention, as it is crucial to describe and establish

boundaries of land in simple ways like enumerating natural elements that constitute the boundaries of some individual or communal parcel.

Van der Molen even offers to this end a 'migration path for cadastres', analysing what rights might be registered and why one would do that, how subjects of rights may be identified, what entity best keeps the records and how and when the records can be created and kept up to date.

Hoekema continues the search for weak and strong points in those present day land law regimes that try to follow a 'third way' and do not automatically go for private individual property and large-scale Western style registration. He scrutinises a number of such new land laws. Mozambique is a very advanced case in terms of unconditional granting of communal land rights to local communities. Even without registration the law provides communities with rather strong and extensive legal title to their land. They are free to regulate the use rights over the land as well as institutionally manage all the land, negotiate with investors etc. In practice, still a lot goes wrong, promises are not delivered, but the basic legal set up is a major innovation. In Tanzania customary law is recognised, also even without the condition of registration, but in contrast to Mozambique a vast set of provisions regulates land tenure relations. In the relevant laws not much is mentioned about commons, rangeland, woodlands, swamps, and forests. Alden Wily explains in this volume about the adverse effects of state ownership and management of forests and how this crooked system after fifteen years of fighting by local peoples, was replaced by a more successful set-up with people-controlled management rights over forests. Finally in Ethiopia the Federal government and some states chose to provide the smallholders – for the first time ever – with legally backed rights to use and often also to bequeath land to their relatives, and to confirm land management authority in the hands of local government organs (the *ke-belle*). Typically the commons are left out of this new land law regime.

Hoekema dresses up an extensive list of strong and weak points of each regime, categorised along three evaluative criteria: does the regime provide real tenure security? Is there such a degree of legal empowerment that smallholders, if they wish, can access independent courts to solve conflicts? Are the local and regional land officials accountable? Many weak spots are detected among which the vast discretion awarded to land officials or village authorities to withdraw land which is not in productive use. Also sectoral laws like mining law, forest and water laws, and investment laws are often not coordinated with the new land law regime. This means that land rights can be annihilated by policies geared towards these other interests, often without adequate procedure and compensation.

This author favours recognition of communal land tenure where its institutions are still resilient, because they normally embody and foster a morale of reciprocity and solidarity and/or incorporate social and spiritual values that are part and parcel of the identity of communities.

Notes

- 1 The authors would like to thank Janine Ubink for her valuable editorial work on earlier versions of the chapters in this book, and Marco Lankhorst for his useful comments on chapter 1.
- 2 Interest in a variety of 'third ways', both in rural, peri-urban and urban regions, inspired the research project which resulted in the book *Legalising Land Rights*. The present volume follows up on this interest; this time, however, attempting to sketch in a more general way the possibilities and the weak and strong points of some 'third ways' of legalisation experiments from various places in the world.
- 3 The 2003 *Land Policy Report* written by Klaus Deininger for the World Bank brought a significant change in this respect.
- 4 Here the term law is, characteristically, used in a broad sense, including various local, non-state norms and practices.
- 5 In many African and Asian countries the overwhelming majority of rural smallholders do not possess private property or freehold rights, so we will not go into the question if and how people with private property/freehold rights enjoy tenure security, particularly against external threats.
- 6 We recognise here the distinction made by M. Gluckman (1969: 256-259) between the estate of management of land on the one hand and the estate of use and exploitation of land on the other.
- 7 In these experiments often the position of so-called commons or common property is 'forgotten', but this may well change. There seems to be a growing concern for the rights of people whose livelihood depends to a great extent precisely on access to and use of these commons. See International Land Coalition 2008.
- 8 See for countries in West Africa the report by Kandine, Koné, and Larbi (2008).
- 9 Fitzpatrick (2005) among quite a few others nowadays, pays serious attention to recognition of land rights 'at the level of the group', thus to forms of recognition of the communal variant of customary law.
- 10 A persuasive and clear sketch of the working of such a morale of reciprocity is to be found in the book *Dancing with a Ghost* (Ross 2006).
- 11 This is taken from the 2004 IIED booklet *Land in Africa: Market asset or secure livelihood?*
- 12 This evaluation of customary arrangements comes from a report by Golan describing the discussion in the 1960s among the newly independent Senegalese authorities where to go with their land law (Golan 1990).
- 13 See Ubink & Amanor (2008) about Ghana, and Hesseling about Senegal, in Ubink, Hoekema and Assies (2009).
- 14 See for example Watts (1992: 161) who deals with The Gambia: 'rights over resources such as land and crops are inseparable from (...) rights over people. To alter property rights is (...) to redefine social relationships'. Or a bit more abstract: 'Property rights are always embedded in the institutional structure of a society ...' (Ensminger 1997: 167)
- 15 The first law & development movement had its heyday in the 1960s and early 1970s but then disappeared rapidly, at least from donor policies.

- 16 In view of the discussion about the pressures on world food production caused by the large demand for land for biofuel and other purposes, the fact that in many countries almost all the food is produced by smallholders, makes pro-smallholder policies a must, if only in socio-economic terms.
- 17 In 2000 Toulmin and Quan noted the emergence of a new paradigm which does not prescribe a specific approach to land tenure reform, but is based on 'pluralism'.
- 18 The development debate that undergirds the two approaches is summarised nicely by Joseph Hanlon, when he is talking about the 'preferred' agents of development in the countryside. Hanlon (2002), writing on 'The Land Debate in Mozambique' uses as subtitle of his report: 'will foreign investors, the urban elite, advanced peasants or family farmers drive rural development?' This question hammers home the truth that any development concept implies socio-political choices, and that these choices determine the main features of the land law reform chosen.
- 19 Extra-legal in our conception would mean that a local tenure arrangement is ignored by national law. We follow here the FAO (FAO 2002: 11-12, Assies 2006: 576).
- 20 Bruce does not like the term 'communal', he fears confusion with 'collective'. Indeed as both Cotula and Hoekema explain in their contributions to this book, communal land tenure is not just about collective holding of land; individual and family rights are present too. Since in socio-legal studies the terminology of communal land tenure is current, we therefore use that term.
- 21 In the initial part of this introduction we also distinguished between these two types of land tenure arrangements that fall under the one label of 'customary law'.

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2 Simple Solutions to Complex Problems: Land Formalisation as a 'Silver Bullet'

John W. Bruce

Introduction

This paper assesses 'land formalisation', a 'silver bullet' of contemporary development discourse.¹ It is one of those ideas which, from time to time, gain currency as breakthroughs in development thinking and promise to move us beyond what often seems the hit-or-miss character of development work. Land formalisation has gained tremendous currency as a development and poverty-alleviation tool through the work of Hernando De Soto, the author of *The Other Path* (1989) and *The Mystery of Capital* (2004). It figures prominently as a strategy in the recent *Report of the Commission for the Legal Empowerment of the Poor* (2008a: 64-67, 2008b: 62-114), a UNDP-based Commission co-chaired by De Soto. His Lima think-tank, the Institute for Liberty and Democracy (ILD), has been contracted by USAID and others to conduct diagnostic studies of informality and its impacts in Mexico, Haiti, Egypt, Tanzania, and Honduras.²

Land formalisation has been lauded as providing new insights into the causes of underdevelopment and a new and promising tool to promote growth and reduce poverty. This chapter assesses those claims. It notes that there is less new about the formalisation prescription than is generally thought. It summarises the main lines of argument for land formalisation as presented in the earlier land tenure literature,³ and points out some differences between those arguments and the case made in the writings of De Soto. It next turns to an examination of the experience with land formalisation projects, long a staple of development agencies, and the results of fifty years of empirical research on their economic and social impacts. It notes the failure of De Soto to bring this experience to bear to provide a more nuanced and realistic assessment of the potential of land formalisation. It then asks, first, why experts in development agencies have not challenged more directly the oversimplifications in De Soto's case for formalisation, and second, why there has been such a dramatic uptake of De Soto's model in development circles generally. In so doing, it hopefully sheds some light

on factors that encourage the embrace of simple solutions to complex development policy problems. Finally it tries to assess what, when all is said and done, are the distinctive and important contributions of De Soto's work on land formalisation.

The Importance of Land Policy and Law

It is difficult to overstate the extent to which laws relating to land affect the lives and welfare of the populations of developing countries. Land underlies and supports much of the life of the planet, providing the physical underpinning of the environment and productive activities and playing a major role in their socio-political constructs. Land laws provide not only rules about property rights in land but also regulatory frameworks and administrative competences. Through legal enactments relating to land, the state determines the bundle of rights included in property forms and the obligations that accompany them. The rights in those bundles affect landholders' incentives to husband or neglect their land. Land laws shape patterns of land distribution and so give some superior access to development opportunities while tipping others toward poverty. In addition, land and property rights have deep resonance in cultural and political discourse because land is intimately related to kinship and identity, and its control is an important basis of power in homes and nations.

Property Rights

The argument for land formalisation begins with property rights, and the central role they are believed to play in economic development. Formalisation is a strategy for enhancing property rights. The case for property rights, summarised briefly, is that:

- 1 Secure property rights ensure that a right holder who invests will reap the benefits of his investment, even if this takes some years; this enhances incentives to invest, and thus promotes increased land productivity.
- 2 Property rights which confer broad discretion on the right holder in use of the land insulate right holders from externalities that can constrain their creativity in pursuing their propensity to use their land to better their lives.
- 3 Property rights, if readily marketable, can be transferred as a commodity, and this allows the land market to move those rights into the hands of those who can use it most profitably.

- 4 Property rights which are readily transferable improve access to credit by allowing the right holders to offer their land rights to lenders as security for loans.

Classical economists such as Smith, Ricardo, and Mill were convinced the property rights were an essential underpinning of economic growth. Smith and Mill considered that private ownership and owner cultivation were superior, and that tenancy, with its short time horizons and divided profits, dilutes incentives for investment and good husbandry (Currie 1981). These understandings have played a large role in forming the land tenure systems of Western market economies. There are strong modern advocates of property rights among economists, including Demsetz (1967) and Feder & Feeney (1981). These clearly represent the inclination of most economists, though other voices call for rethinking our conceptions of property rights (Sjaastad & Bromley 2000).

The four propositions above concerning the positive impacts of property are not entirely reliable. The theory is basically sound, and much of its power comes from the extent to which it is borne out by our own everyday experience as land users and owners. But as always with such generalisations, the propositions are conditioned on 'all other things being equal', and that is almost never the case. Their predictive value in a given context will depend on a variety of factors, to some of which this chapter will return later. That they have continuing power is evidenced by the rapid expansion of property rights in land in recent decades in Eastern Europe and the countries of the former Soviet Union, and today's progress toward fuller property rights in the People's Republic of China.

Does development then require full private ownership? Not necessarily. The recent literature recognises that appropriate forms of land tenure are those that 'mesh' with the other cogs in the local economic and social machinery to produce security and development, and that tenures other than full private ownership work well in some contexts.⁴ In the end, property rights are socially constructed ways for dealing with competition for land.⁵ Private ownership is a bundle of specific rights and responsibilities, and the sticks in the bundle vary from country to country. In some countries, such as the US, private ownership has long been firmly established and have almost mystical overtones in the political culture, but even those countries recognise the need to protect a variety of public interests from some exercises of those rights. To that end, they put in place regulatory systems to limit their exercise.⁶

Informality

'Informality' is used by De Soto to describe claims and arrangements which operate outside the constraints and protections provided by national law. Many landholders in developing countries use land for their homes or their fields without any recognition of a right to that land by the state. The term 'informality' has only recently been applied to such situations and activities outside the formal legal system, in the work of De Soto. He introduced it in the urban context of Lima, Peru, to characterise both for land illegally occupied and for business operations carried on without recourse to formal legal rules and institutions. The term is broad enough to encompass situations and activities which do involve illegality (and may even be criminal) and others which are merely carried on without recourse to legal forms and processes provided by society for those activities, which may not be illegal.

Even in the situation of actual illegality, use of the term 'informal' is arguably preferable because it is more objective, escaping the pejorative moral overtones of 'illegal'. This appears to have been De Soto's intent. He argues powerfully in *The Other Path* (1989: 49-57) for a realistic acceptance of squatter communities and the formalisation of their landholdings, however acquired. Later, in his *The Mystery of Capital*, De Soto again makes a strong case for formalisation of informal holdings. He draws upon an example of formalisation of informal holdings in the early United States. The rule of law, expanding westward behind waves of early settlers, found ways to regularise the illegal landholdings they had established through the doctrine of pre-emption.⁷

There is a range of situations of land informality. The most significant are:

- 1 Landholders whose families have been on the land for generations, holding it under well-established local custom, though that custom and even the traditional polity which enforces it are not recognised by national law.
- 2 Landholders who consider their land to belong to them by virtue of their occupying and clearing it, even though this was done without the consent of the owner, which is often the state.
- 3 Landholders who may have occupied land illegally, and are under no illusion as to their legal position, but who hope for and work politically for recognition of their right to stay on the land.

The first category deserves special attention. In the Hegelian conception of law, which sees law as a monopoly of the national state, these are simply illegal landholders. But legal anthropology and development

specialists respectful of realities on the ground have taken a broader view (e.g. Moore 1986). They recognise that a range of sub-state actors from tribal kingdoms down to villages and squatter communities manage their land through their own normative systems of varying complexity and rigor. The fact that those systems are not validated by national law does not deprive them of objective reality.⁸

Customary systems are most extensive in Africa but exist in parts of Latin America and South-East Asia as well. It is misleading to characterise them as 'informal' because they are actually an alternative formality, a sub-national alternative to the formality of the national state.⁹ The distinction is important for many reasons, but especially because reform of customary systems often requires not only changing rules but the profoundly political task of reworking the relative roles of traditional and civil authorities. Bringing all land under national law has often been seen as part of the nation-building agenda, with local systems of custom being seen as particularistic and divisive, indeed 'backward'. A notable critique from the 1970s argued that these systems have the juridical theme of 'status' rather than the more modern themes of 'market' or 'plan', and so were incompatible with development efforts (Seidman 1978). Customary land tenure systems have commonly been characterised as 'communal' but this is misleading, to the extent that those systems typically include community, lineage and individual levels of land rights (Bruce 2004a). They were once viewed as relatively static, but it has been increasingly appreciated that they evolve in response to economic and other stimuli (Bruce & Migot-Adholla 1994, Platteau 1996, Cotula 2007).

Development agencies have often frequently funded 'land tenure reform' programmes, conceived as law reform programmes. Those efforts to replace customary land tenure wholesale have usually had very mixed results, including weaker than anticipated positive impacts and unanticipated negative impacts. Partial implementation has left normative confusion and competing claims, based in competing normative frameworks, in its wake (Atwood 1990, Bruce & Migot-Adholla 1994).¹⁰ Recent analyses confirm the continuing difficulty of implementing such programmes successfully (Joireman 2008). Customary land tenure systems have in fact proved remarkably resilient and some authors have written of a resurgence of traditional authorities and customs (Englebert 2006). The basic public policy options with regard to these systems are either their replacement with Western property forms, or facilitation of their more gradual adjustment to the new economic realities of market economies. The latter option has only recently begun to be elaborated, as scholars have sought to identify best practices among experiments undertaken in several countries (Lavigne Delville 2000, Fitzpatrick 2005). The issues involved concern both

rules and institutions, and they figure prominently in any discussion of decentralisation of land administration in countries where customary land tenure is significant (Bruce & Knox 2009). Generalising solutions in this area is questionable given the very considerable diversity of these customary land tenure systems and their national contexts; flexibility and creativity are more in order.

Formalisation in Theory

The intention of formalisation is thus to extend the blessing of state-sanctioned legal structures to citizens who have been operating outside them. In our case, this means application of national land law to informal landholdings, or perhaps recognition of existing landholding by national law. Does formalisation have a particular normative content for the property rights formalised, or will any national property law do? That is, how far is a tenure reform element implicit in proposals for formalisation? In *The Other Path*, De Soto identifies 'bad law' as a primary cause of informality (1989: 158-172), and stresses that legal reforms need to accompany formalisation. He urges drawing on how things are done in the informal sector to reform law, rather than trying to force participants in the informal economy to work within the existing legal structures of the formal economy (1989: 187). Law reform is equally central to the thesis of *The Mystery of Capital* (2000: 153-206).

In *The Mystery of Capital*, however, land formalisation acquires more specific normative content. De Soto identifies the ultimate benefit of formalisation of land held informally as the transformation of its land value into capital 'with a life of its own' through the mortgaging of land to secure loans. Informal land, he urges, is 'dead capital' which through formalisation can be 'vivified' and whose value can then participate in development. 'What created capital', he explains, 'was an implicit process buried in the intricacies of formal property systems' (2000: 46). How does this implicit process work? The debts secured by mortgages, as secured rights to payment at a future date, are assets which can be put to work to finance development. In estimating the amount of land held informally, what seems to matter is that those parcels are 'held in such a way that they cannot be used to create capital' (2000: 35). He concludes that third world governments have failed to provide their citizens with 'the efficiently crafted legal right to have their property integrated into a formal legal system that allows them to use it to create capital' (2000: 149). In *The Mystery of Capital* one still finds references to the necessity of 'discovering peoples' law', described as 'the way in which Western nations built their property systems' (2000: 163), but this now appears a tactical device. Since mortgaging land is critical to

the ability to quicken 'dead capital', and this is now presented as the real promise of formalisation, formalisation appears to have become a strategy for the creation of private individual property.

How is this concept of 'formalisation' different from the 'individualisation' tenure reforms supported since the 1950s by several multinational and national development agencies and pursued by many third world governments? The novelty and appeal of formalisation lie, it is suggested, not in the novelty of the prescription (affirming informal land rights under national law and at the same time moulding them more on the model of private ownership), but in: 1) the identification of poverty-alleviation as well as growth and outputs of the process, and 2) a more comprehensive understanding of how its benefits can flow to both land users and the national economy.

The formalisation formulation of the case for property rights reform is the first that addresses frontally their potential to relieve poverty; earlier discussions usually either assume a benign impact on the poor or make rather specious 'a rising tide lifts all boats' arguments. The classical argument for property rights and their formalisation is an argument about impact on growth, which may or may not affect poverty. The earlier argumentation focuses on positive impacts on investment and access to credit and, through these, on productivity of land. But the argumentation in *The Other Path* and *The Mystery of Capital* and subsequent advocacy by the ILD give equal emphasis to the challenge of poverty-alleviation. They present informality as a disability that primarily affects the poor, and who are most disadvantaged by it. They note the prevalence of informality in many developing countries, and the high proportion of poverty within countries found in the informal portion of the national economy. They urge simplification of formal systems and lowering legal and financial barriers to entry into them as a means of economically empowering the poor. These are cogent arguments, though they tend to underestimate the advantages which the poor (and others) derive from operating informally.

In addition, they stress a potential benefit of formalisation that is understated in the earlier literature on property rights reform: the impact of formalisation on land values and the potential for the landholding poor to benefit directly from the rise in land values. Some earlier studies note the positive impact of formalisation on land values, which is the result of the property entering the formal land market instead of being discounted in informal land markets. But it does not receive much attention, and this is likely because the early studies had an agrarian focus where such increases were modest. The early apostles of property rights reform such as Adam Smith and John Stuart Mill had worked in agrarian economies, and in academia, land tenure has been much more on the minds of agricultural economists than other economists.

De Soto's thinking on formalisation, in contrast, developed in the urban context of Lima, Peru, where markets were well developed, land was in high demand, and formalisation could contribute to much more dramatic rises in land values. The poor, if they hold land, are potential beneficiaries of such appreciating values, and De Soto clearly favours the lion's share of that appreciation going to the poor, as opposed to the state.

There is another way in which the De Soto description of the mechanics of benefit generation differs from the traditional description. In *The Mystery of Capital*, land is dead capital to be vivified by formalisation, and transformed into capital through securitisation. Debt becomes an asset in the hands of the lender and those to whom it is transferred, and it can fuel other development. This line of argument was largely missing from the earlier literature, which tended to focus more exclusively on micro-level impacts on landholders. It addresses a fundamental problem of economic development: domestic capital formation.

It is an engaging scenario, but it needs to be approached cautiously. The East Asia economic crisis of 1997 began with a collapse of overheated land values in Thailand, where the impact of that collapse transmitted into the larger economy through the banking system. In the US, the current financial crisis has been triggered by the collapse of over-leveraged debt assets based on sub-prime mortgages. These experiences suggest caution; the transformation of land values into securities which are marketable is a very mixed blessing, and can encourage economic instability, from which the poor suffer along with everyone else. While the experiences noted do not deprive De Soto's argument of its basic validity, they do suggest a need for a strong regulatory framework.

Another negative impact of informality identified by De Soto and ILD is that state and local authorities are deprived of a valuable source of revenue from property taxes, and that, it is suggested, leads to a lack of basic services for the poor. Again, the potential of formalisation in this regard is clear enough, but the suggested beneficial result for the poor embodies a good many assumptions about how taxes will be assessed and how they will be used by governments.

Formalisation has been heavily hyped – for instance, portrayed post 9/11 as the 'economic answer to terrorism'¹¹ – but there is very broad and genuine interest in it as a strategy for development and poverty alleviation. It has also excited considerable controversy. Some critics charge that formalisation is a warmed-over version of a privatisation and growth-first strategy, a well-worn prescription justified on a reasoning revised to accommodate the emphasis on poverty alleviation of the

Millennium Development Goals. They point out that formalisation brings with it not only opportunities but also risks, exposing the poor who are to benefit to market forces from which their informality has to some extent shielded them (Cousins et al. 2005). Some recognise the basic case for formalisation but urge much closer attention to the circumstances in which such benefits will or will not accrue to the poor, the costs and sustainability of formalisation initiatives, and possible negative impacts of formalisation on some of the intended beneficiaries (Bruce et al. 2007).

Is it possible to assess the reliability of formalisation's promises and risks? Over the past fifty years there has been a series of formalisation initiatives in the developing world. Many have been studied, and a good deal has been learned from them.¹² In the next section of this chapter, that experience is briefly reviewed. Unfortunately, De Soto put forward formalisation largely without reference to this substantial body of experience and its lessons. A reading of that experience makes clear that formalisation is in fact quite difficult to implement successfully, and efforts in this area have often come up short of expectations. The failure to point out the problems implicit in the formalisation enterprise was misleading, and has contributed to the enthusiastic embrace of formalisation by the development community.

Formalisation in Practice

Land formalisation is the recognition by the state of a property right in a user in land previously occupied without such recognition, creating new capacities and opportunities (and perhaps risks) for the right holder. Concretely, what has to take place to achieve formalisation? The process can usefully be broken down into three stages:

- 1 The state by law creates the property right and frames an entitlement to the right;
- 2 The state realises that entitlement by 'titling' a particular piece of land to a particular individual; and
- 3 Registration creates an official, public record of the right.

The last step, land registration, is important because the ability to prove a right is an important element in tenure security. It is also critical to the operation of land markets, as a potential buyer/lessee must be assured that the person seeking to transfer a right is in fact the legal holder of the right. This process thus not only provides greater tenure security but also lowers risks of engaging in land transactions, thereby promoting the development of formal land markets.

De Soto in *The Mystery of Capital* recognises the critical roles played by registry systems, which ‘allow description of the economic and social qualities of any available asset without having to see the asset itself’ (2000: 54). ‘One important reason why Western formal property system works as a network’, he notes, ‘is that all property records (titles, deeds, securities and contracts that describe economically significant aspects of assets) are continually tracked and protected as they travel through time and space’ (2000: 61).

That said, he questions the effectiveness of much of the donor project support for property systems in the developing world. He notes that a large number of those projects had to be terminated early for poor results, and that ‘[W]ith the exception of some rural Thai property certification programs, none of these efforts succeeded in turning extra-legal assets into legal ones. We certainly found no evidence that assets were being transformed into capital’ (2000: 170). He criticises the projects for relying too much on mapping, computerisation of land records and other technological fixes, asserting the priority of legal transformation (2000: 203-205).

In fact, many of these projects have as their major component support for land titling and registration, and do transform extra-legal assets into legal assets. De Soto’s dismissal of these projects is critical to his claim to have discovered the solution to a mystery, but it prevents him from absorbing the experience under them – which is very mixed – into his programme for formalisation. That experience is rich in lessons, and because it is indeed about land formalisation, it needs to be examined here.

The primary vehicle used by development agencies to extend formality to landholdings in the developing world and transitional countries has been title registration. Title registration was developed in South Australia as the ‘Torrens System’ in the late nineteenth century, and was adopted by England and France for many of their colonies in the twentieth century.¹³ Title registration records the right itself, based on an investigation and affirmation of the right by the state, sometimes with a state guarantee of the registration. The title register is organised according to parcel files, each parcel having a unique numerical identifier correlated with a cadastral map showing the parcels.¹⁴

Initial registration may be ‘sporadic’, in which case parcels of land are brought onto the register one by one, at the request of the holder, or ‘systematic’, in which case all land parcels in a locale are demarcated, surveyed, titled and registered at one time. Systematic initial registration is sometimes legally compulsory, or at least accompanied by campaign-like suasion, and in most cases the costs are heavily subsidised by the state.¹⁵ In systematic land registration, the state goes from

door to door, providing low-cost tenure security to all; but it is often also a forced march toward formality, whether or not that is the inclination of the community and individuals affected.¹⁶

The approach was used to stabilise land rights in post-conflict situations, as early as the start of the 1900s, by the Anglo-Egyptian Condominium in Sudan after suppression of the Mahdiya, and by the British in Buganda after the Buganda Agreement ended the conflict there; today, it is playing that role in Rwanda. But most often today, its use is based on a dual growth and equity development rationale: registration ensures security of tenure, and so encourages investment, improves access to credit, and increases land values and productivity. Under this approach, security of tenure is provided free (or almost free) to all, regardless of their ability to pay. Systematic land registration is often used to implement land tenure reforms, bringing home to landholders the new content of their rights effectively, rather than those new rights remaining simply words on the legal gazette. Often, it has been used to implement individualisation of land tenure.

Development agencies have typically preferred to support systematic land registration because:

- It is a potentially effective vehicle for implementing tenure reform;
- It provides security of tenure to both the poor and the wealthy;
- It is efficient, providing major economies in survey costs by doing all parcels in an area at one time;
- It can be done in a participatory manner, with substantial community involvement, and provides important opportunities for rights education;
- It is, at its best, a public and transparent process, and thus less easily abused to grab land from smallholders and customary users, a not uncommon use of sporadic registration.

Systematic land registration is thus a well-established and time-tested mechanism for formalisation. It has been supported by both multilateral and bilateral donors since the 1950s, notably the World Bank and USAID. Hundreds of such projects have been implemented, and the World Bank alone currently has over 25 active projects conducting systematic land registration, many of which involve elements of property rights reform (Bruce 2006, Burns 2006). Some are modest local efforts, for instance registration components in urban development projects in a national capital, while others are 20-30 year, multi-tranche behemoths which aim to register all or most land within the country.¹⁷

However, concerns have risen about the effectiveness of such programmes, based on empirical studies going back to the 1960s.

There are studies that bear out the theoretical connection between land titling and investment (e.g. Feder, Onchan, Chalamwong & Hongladarom 1988, in Thailand, and Alston, Libecap & Schneider 1996, in Brazil), but there are others that report a failure of investment impacts to materialise. For example, Deininger and Chamorro (2004) found that registration increases land values but otherwise has little impact on access to credit, investment, or productivity. Other studies have also failed to find expected impacts (most recently, Jacoby & Minten (2005) in Madagascar). There are a number of broader comparative reviews of evidence of impacts on investment and access to credit by Bruce & Migot-Adholla (1994) for Africa, by Carter & Olinto (2003) for Latin America, and, more generally, Feder & Nishio (1996). They suggest that titling is more likely to be effective where robust financial markets exist and where there are incentives for investment created by factors such as proximity to urban markets and good quality land. In their absence, formalisation may have little impact. Where there are impacts, they may not be distributed evenly to all land holders. A review by Feder, Onchan, and Raparia (1988) finds that, where land collateral is permitted and interest rate restrictions are imposed, institutional lenders prefer land collateral to other forms of security, but the studies they review also suggest that large-scale farmers with high value land and more capital are more likely to use this type of collateral than small-scale farmers. The few studies that explicitly examine impacts on the poor, such as Carter and Olinto (2003), also suggest that credit and other benefits may be heavily skewed toward large landholders.

These studies should not be taken as conclusive, one way or the other. They simply indicate that contextual factors as well as land formalisation itself will determine the impacts of the process; the implication is that the prospects for both positive and negative impacts need to be examined carefully on a case by case basis before any formalisation initiative is launched. It should be noted that most of the studies cited above involve agricultural land, and that we so far have only a few good impact studies from urban environments. Few would argue with the proposition that titling and registration increase the market value of land, since secure, marketable land is going to be worth more than land held informally. The 'productivity' impacts sought in rural impact studies are less relevant in the urban context, but impacts on mortgaging and investment in the land are still critical and deserve empirical study. One study from Lima suggests that the results of formalisation may not meet expectations in terms of improved access to formal credit (Calderon Cockburn 2002). Another study in Lima found that informal holders once titled had additional time available for productive activities because they no longer needed to always have one adult present in the home to defend the plot against land grabbers (Field 2004). And

a study from Buenos Aires (Galiani & Schargrotsky 2004) found positive impacts of titling and registration on child health and education. Studies of urban formalisation will, it seems, make us aware of a wider range of impacts than those examined in earlier impact studies.

A recent study of impacts of titling in informal urban and peri-urban areas (Payne, Durand-Lesserve & Rakondi 2008)¹⁸ is a first attempt to synthesise what is known in this area, and also undertook two field studies, in Senegal and South Africa. The results are mixed, but raise important questions. The study found that while the informal settlers studied in both case study countries enjoyed significant *de facto* security of tenure, titling did make household heads feel more empowered to defend their claims to the land, based on their sense that they could appeal to an outside authority to defend their right. Titling showed strong positive security of tenure impacts for women. Titles, and the anticipation of receiving them, were found to have encouraged improvement and extensions of housing. No evidence was found that titling increased the likelihood of beneficiaries receiving credit, primarily because the households feared to risk their prime asset by borrowing against it. The studies found that titling did increase land values, but warned that households' incomes remain low and that those households may not be able to bear increased taxes and rents which may result from rises in land value.

There are studies, such as Carter and Salgada (2001), that suggest the poor tend to lose out when their land becomes marketable, and some authoritative comparative studies have concluded that this is usually the case (De Janvry et al. 2001). They suggest that the poor will participate in the formal land market primarily as sellers, rather than buyers. This is in part due to their difficult access to credit, with or without a title. From the point of view of the banks, loans to smallholders are problematic: the amounts are modest, the costs per loan high, and foreclosure and disposal difficult. A lender will generally prefer that the applicant have a reliable income stream; land security is welcome, but will not be enough in itself.¹⁹

The scenario of poor land users with low, stagnant incomes while their land rapidly appreciates and charges on land use rise is worrisome. The danger is that the poor will then be forced to sell their residential holdings. In theory, they can then buy new residential holdings, most likely on the urban fringe, but they then lose work opportunities in the informal sector which the location of their existing residences make possible.

In addition, concerns have arisen over the sustainability of the systems of formal land rights created by systematic land registration. The sustainability of the register is heavily dependent on the voluntary actions of registered owners to register their transactions and inheri-

tances. But there is evidence from some countries that many registered landholders continue to deal with their land as they always have, relying on customary norms for inheritance and transfers and failing to register either transactions or successions. Kenya and its major programme of systematic titling beginning in the 1960s is the case most often cited (Okoth-Ogendo 1986, Place & Hazell 1998), but the issue has also arisen in Uganda (Eisenhauer 1998) and Madagascar (Jacoby & Minten 2005). It is sometimes suggested that this problem belongs to older projects, but a recent evaluation of the impacts of a GTZ titling project in Cambodia (Deutsch 2006) suggests that this failure to register is not a thing of the past, and that, in spite of substantial public education activities under this project, many new titleholders are failing to register transactions and successions. A variety of factors contribute to this: lack of understanding of the benefits of keeping a registration current, social reservations about individualised ownership, and the costs (not just fees, but transaction taxes, stamp taxes, even back tax collection) imposed as part of the registration of transactions.²⁰

Key questions that critics of land formalisation now raise, based on empirical studies spanning half a century, include:

- Are those holding land ‘informally’ really insecure? For example, if they hold under customary land tenure systems, are those systems meeting their immediate needs, and is there any felt need for change?²¹
- Are there real economic opportunities for formalised right holders? Appropriate sequencing of development efforts is key. Some titling projects have been done in deep rural areas, where a farm to market road would clearly have been far more immediately useful to residents.²²
- Who loses land rights when land is formalised, especially where the process is used to implement an individualisation policy? It is not just ‘the community’, but other individuals as well. Wives, who under custom had a right to land from their husband, may find that he, as the registered owner, can sell the land out from under them and their children.²³
- Does marketability make landholding more secure? Market failures and distortions are considerable in developing countries. Economic desperation sales of land are common; a poor family then loses a productive asset or a valuable location that it may never be able to replace.²⁴
- Is there provision for registration of common property, the property of local communities? Often there is not, and in many cases this results in commons’ areas either being partitioned among the power-

ful in the community, or the commons being registered in the name of the state.²⁵

- Why is it not possible to register customary rights, rather than converting them to private ownership for registration? This is the approach taken by Ghana's Land Registration Act of 1989.²⁶
- Does a 'rule of law' environment exist? Rights need to be enforceable, or are meaningless. If the judiciary is corrupt and there is no use turning to the courts, what is the point of registering property rights?²⁷
- Will the new system be sustainable? Often registered landholders fail to register their subsequent transfers (sales and successions), and instead revert to informal transfers to avoid fees and other costs. The register becomes an historical document rather than a living, reliable record of land rights.²⁸

Are there other options for providing security of tenure? The expense and slowness of systematic land registration have stimulated experimentation with alternative approaches. Some possibilities that have been explored:

- Adapt rather than replace customary rights. In Botswana since the late 1960s, democratically elected District and Sub-District Land Boards have administered modified customary as well as statutory land rights (Adams, Kalabamu & White 2003, Quan 2000).
- Register community rights rather than individual rights. The Land Act in Mozambique and the experience under it provides valuable insights (Tanner 2002).²⁹
- Design and test simpler, community-based models. Community-based certification of household land rights in Ethiopia is a much less expensive model of formalisation than those typically supported by the donor community (Deininger et al. 2007, Rahmato 2008: 181-228).
- Engage traditional authorities and reform their processes. The multi-donor Ghana Land Administration Project has created pilot customary land secretariats in an attempt to make traditional land administration more transparent and accountable (Quan & Green 2005).³⁰

Are there ways to ensure that the poor benefit from systematic land registration programmes? Typically amelioration focuses on how to minimise risks of sudden exposure to market forces. More gradual transitions to private ownership may reduce dangers of loss of land through distress sales. Some countries, aiming to protect new landowners, have imposed moratoria on land sales after individual owner-

ship is introduced. In Armenia, for example, a three-year moratorium was enacted when land was privatised and distributed in 1991. In Ukraine, a six-year sales moratorium was imposed in 2001. A Kyrgyz moratorium on the sale of agricultural land was put into place when land was privatised and allocated, but has subsequently been lifted. The Moldovan Land Code contained a ten-year moratorium on sales that was declared unconstitutional and lifted in late 1996. Other countries have attempted to protect new landowners from the danger of mortgage foreclosure by setting moratoria on mortgages. The few years of these moratoria pass quickly, and give smallholders a chance to begin to appreciate the real value of their land. Such moratoria are more effective if the time is used for public education on land values and participation in land markets (Bledsoe 2006).

This review of problems with systematic title registration and some of the rethinking currently taking place raises serious questions. How could they be neglected in the presentation of formalisation in De Soto's work, and that of ILD? Why has the simplification implicit in those formalisation proposals not been more vociferously challenged by those in the donor community with experience in these areas and knowledge of the mixed results of empirical impact evaluation studies?

The Embrace of Simple Solutions

The World Bank is currently the international donor agency with a critical mass of expertise of land tenure. It has funded research which have produced a number of key studies (e.g. Feder 1988, Bruce & Migot-Adholla 1994, Binswanger, Deininger & Feder 1995), and the Bank's considerable experience in this area is reflected in a recent Policy Research Paper on Land Policies for Growth and Poverty Reduction (Deininger 2003). While those outside the Bank often regard the Bank as a reflexive advocate of market solutions, the Bank understands that land markets will not, left to themselves, deliver land to poor but efficient producers, and much of the recent work of the World Bank on negotiated land reform (government funding provided to groups of the poor to purchase land in the market) reflects that understanding (Deininger 1999).

When Bank land tenure experts heard that De Soto had discovered land formalisation, it was a little like American Indians being told that Columbus had discovered their continent. The Bank's land tenure researchers had always lived there. They had for years been studying the impacts of land formalisation and empirical research sponsored by the Bank has been important in both establishing the potential of land registration and in raising many of the concerns about impacts men-

tioned above. And yet their response to De Soto's grand entrance upon the land formalisation scene was muted. Why were obvious questions not raised, and raised prominently?

First, those involved in development of land policy in the Bank saw a potential advantage in De Soto's advocacy of formalisation. It was new wind in the sails of an approach that the Bank had favoured for many years, a process that the Bank saw itself in the process of refining. In these circumstances, it was not only counterproductive to challenge De Soto's assertions, but tempting to repeat them as truisms. This is part of a larger problem. In the competition for resources for programmes within donor institutions, it is often necessary for experts to overstate or oversimplify the case for the programme being advocated. The joke about an official lamenting he did not have a one-handed economist (so that he will not be advised 'On the one hand ..., but on the other...') is not a joke. It reflects reality.

Second, it has been appreciated, even by those who are not impressed by the rigour of De Soto's work on formalisation, that his presentation of his case for formalisation is highly effective and engaging. He brought great credibility to the task from his earlier work on illegal squatter communities in Lima, showcased in *The Other Path*, and his radical advocacy of regularisation of their landholdings. Some elements of the effectiveness with which he made his case in *The Mystery of Capital* are:

- 1 The historical approach adopted allowed him to make his points by telling stories. Stories, it is increasingly appreciated, are the way we best internalise knowledge.
- 2 His unearthing of formalisation parallels in early American legal history resonated with American readers.
- 3 His posing of under-development as a mystery and leading the reader to a solution intrigues. We all enjoy a good mystery.
- 4 His solution is a revelation. It was in front of us all the time, De Soto tells us, in the operations of our land market and banking system, but we never saw it until he put his finger on it.
- 5 His solution is simply stated and powerful: formalisation can release new value in land and transform it into capital.

This has made *The Mystery of Capital* a useful tool for engaging developing country officials on the importance of land law and land administration reforms.³¹

Finally, some very senior officials in the Bank had read *The Mystery of Capital* and were enthusiasts, and it was seen as risky and counter-productive to challenge that enthusiasm. The embrace was sometimes alarmingly broad: a Bank Vice-President seriously suggested sending De Soto to Darfur to resolve the land problems there at the height of the violence, and had to be weaned away from the idea by his staff.³²

Conclusion

How in light of all this should we regard land formalisation? De Soto has made a significant contribution. His work has focused attention on the link between poverty and informality, and notes a neglected anti-poverty potential of formalising rapidly-appreciating urban land to urban squatters. He highlights the increase in land value that accompanies registration, which had not been given sufficient attention in the earlier, agrarian literature. He identifies formalisation as a means of legally empowering the poor, and we are in need of effective strategies to that end. The strategy of 'vivifying dead capital', whatever its risks, addresses directly a fundamental problem of development, that of creating new domestic capital.

But if his work is motivational, it is also a serious simplification, in that it ignores a half-century of empirical studies of the highly variable impacts of land formalisation in different situations. It quite legitimately calls for urgent attention to land policy and land law reform, but is potentially misleading in that it encourages formalisation initiatives that are insufficiently thought-through and may ultimately prove to be ill-advised.

The appropriate response is to recognise the need for continuing and independent policy and legal research on different models of formalisation, both systematic land registration and alternative approaches. That research must be as empirical and critical whether assessing new models or old models. The task of developing and promoting models of land formalisation that can be deployed at modest cost and in a socially sound fashion is a matter of increasing urgency. Lack of robust legal recognition of rights for the developing world's poor has left them profoundly vulnerable to loss of their land as the world's demand grows for production of biofuels and food crops, conservation and carbon sequestration. It is equally important that it be engaged, and that where promising models are identified, they are brought to the attention of policymakers and donor agencies. This needs to be done effectively, and a lesson should be taken from De Soto about the value of story-telling in communicating information.

Notes

- 1 Wikipedia defines a 'silver bullet' as a metaphor for 'any straightforward solution perceived to have extreme effectiveness'. The metaphor originates in folklore that werewolves, otherwise invulnerable, can be killed by bullets made of silver.
- 2 Institute for Liberty and Democracy (2001a, 2001b, 2005a & 2005b), and Institute for Liberty and Democracy and Consortium for the Formalization of Haitian Informal Assets (1998). The Egyptian, Haitian and Tanzanian studies are exhaustive. As far as the author is aware, there has not been much follow-through on these studies by governments.
- 3 The terms 'land tenure' and 'property rights in land' are used interchangeably here, as when reform of property rights is called land tenure reform. 'Tenure' comes out of the property terminology of common law and while it originally has a narrower meaning, dealing with the duration of land rights, it now is used to cover all the rights and responsibilities involved in a property right (or tenure), such as ownership.
- 4 For example, see the recent World Bank policy research report on land: Deininger (2003: 52-55).
- 5 In the words of John Stuart Mill (1886: 142): 'When "sacredness of property" is talked of, it should always be remembered, that any sacredness does not belong in the same degree to landed property. No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of general expediency. When private property in land is not expedient, it is unjust.'
- 6 It is the genius of modern Western systems of land law that they achieve a balance between private and public interest by such selective regulation, rather diluting the content of the ownership right itself. In so doing, the incentive effects of property rights, which are very much a matter of belief and confidence, are preserved in the public psyche, even while the exercise of those property rights is constrained in important respects.
- 7 The Anglo-American Common Law concept of 'prescription' and the American legal concept of 'pre-emption' both allow ratification of long and open possession of the land of another, the former simply transferring it to the occupant, the latter creating a right for the occupant to purchase it from the owner. Both reflect a policy of 'use it or lose it'. De Soto (2000: 128-129) discusses pre-emption on the early American frontier as an exemplary instance of formalisation.
- 8 The evolution and manipulation of those systems during the colonial period is well documented (Manners 1964, Colson 1971, Chanock 1991), and there has been a long-running debate about whether such systems should be suppressed/replaced or recognised/reformed. (e.g. Johnson 1972, Ault & Rutman 1979, Migot-Adholla, Hazell, Blarel & Place 1991, Bruce 1993, and Bruce & Migot-Adholla 1994).
- 9 Taking this tack, Table 2.1 in De Soto (2000: 36) badly overstates the extent of land-holding in the developing world which should be characterised as 'informal'. The distinction is important because reform of these systems poses special problems, including working on the front line of competition for power between traditional and civil authorities.
- 10 The systematic land registration programme begun in Kenya in the last years of the colonial dispensation but adopted by post-independence governments has produced a large, remarkable and largely critical literature. See Coldham (1978), Shipton (1988), Migot-Adholla et al. (1993) and, in a somewhat more positive vein, Hunt (2005).
- 11 A later edition of *The Other Path* is sub-titled 'the economic answer to terrorism', and contains a substantial new forward by the author, dated 2002, developing the argu-

- ment that ILD's formalisation contributed significantly to the defeat of the Shining Path guerillas in Peru.
- 12 Dickerman (1987) provides annotations for over 500 publications on land formalisation in Africa, and Knox (2007) has annotated over 100 relatively recent empirical studies of the economic impacts of land formalisation.
 - 13 De Soto cites the 'Torrens System' as an example of breakthrough law reform (2000: 200). Title registration was developed as an alternative to an older system of records of rights in land, known as deed registration. That system allowed those engaging in transfers of land to record the deed of grant, transfer of deed, inheritance or other source of right in a public office where it is publicly accessible, but without any affirmation of the validity of those documents by the state. For a review of these systems see Simpson (1967) and Dale & McLaughlin (1999).
 - 14 For this reason the system is sometimes referred to as 'land registration' rather than 'title registration'; the former term emphasises the organisation of the register by parcels of land, while the latter emphasises the legal conclusiveness of registration under this system.
 - 15 In sporadic titling, the applicant needs to bear the actual costs, notably survey costs, which can be considerable.
 - 16 Systematic registration is used only for initial registration, and whether initial registration is systematic or sporadic, the registration of subsequent transactions is sporadic, on application.
 - 17 In first registration under systematic title registration, it is important that the time necessary to do the work well be taken. Registration legally validates the titles placed on the register, effectively cutting off other claims, pains should be taken to ensure it is done well. Attempts to measure success in systematic land registration programmes in terms of low costs per hectare or parcel are, from this angle, misguided.
 - 18 The comparative study was supported by the Norwegian Ministry of Foreign Affairs, SIDA, and UN-Habitat, and included two case studies, from Senegal and South Africa. A summary has been published by the Norwegian Ministry of Foreign Affairs (Payne, Durand-Lesserve & Rakondi 2007), and the literature review on which the synthesis is based is available as well (Durand-Lesserve, Fernandez, Payne & Rakondi 2007).
 - 19 This helps explain a conundrum that had puzzled economists: since Berry and Cline (1979) it has been broadly acknowledged that smallholders are generally quite efficient land users, but they have difficulty obtaining land in land markets, which are supposed to move land to efficient users. Why is this? Credit market imperfections are at least part of the answer (Binswanger et al. 1995). World Bank economists now accept that, for land markets to move land to the poor, targeted credit must be provided; hence a new generation of Bank projects focused on market-mechanism land reform, in which loans are provided to landless groups which allow them to purchase large parcels on the market, for later subdivision (Deininger 2004).
 - 20 Some factors have been identified that discourage registrations, and best practice is to avoid them. They include: 1) organisational arrangements that involve multiple visits to multiple offices to register transactions; 2) highly centralised systems where travel to the land registry, sometimes in the national capital, is required to register a transaction; 3) taxes imposed (in addition to reasonable fees for services) through the registry system; and 4) attempts to enforce land use restrictions (such as limits on subdivision among heirs) through the registry system (Bruce 2007).
 - 21 Cousins et al. (2005) explain why they consider formalisation an inappropriate approach to land tenure in South Africa's communal areas. Bruce and Migot-Adholla (1994) stress the need for correct sequencing of land registration initiatives in relation to other economic developments, arguing that premature registration fails to de-

- liver promised benefits but at the same disrupts local social relations reflected in existing tenure arrangements.
- 22 Many of the early registration pilot efforts were carried out in deep rural areas, rather than the higher-value urban and peri-urban land where greater impacts from the activity might have been expected.
 - 23 There is a valuable comparative study of gendered impacts of land registration in Azerbaijan, Bolivia, Laos, and Ghana (World Bank 2005).
 - 24 This emerged as an important problem in the Kenyan land registration (Okoth-Ogendo 1986, Shipton 1988), and is a concern of those examining the impact of land markets on the poor (De Janvry 2001).
 - 25 Tanzania has recognised the right of thousands of villages to manage local natural resources, in a national programme intended to promote better NRM; it is a case of a broader trend toward decentralisation of control over land in developing countries (Alden Wily 2003).
 - 26 In practice, registration of customary rights can be difficult, because however clear the legal position may be, the content of those rights may be contested on the ground by powerful interests. For an exceptionally searching study of the role of chiefs regarding land in peri-urban Ghana, see Ubink (2008). More generally, see Toulmin & Quan (2000).
 - 27 The enforceability of legal rights is the crucial unarticulated premise for most economic reasoning on the impact of property rights and formality. Enforceability is, in fact, often not present. The courts may be ineffective or corrupt, or the justice system may be hopelessly complex, its processes arcane and time-consuming.
 - 28 In Laos, a multi-donor funded programme of land registration has been unable to find a legal basis for registering land to local government entities. It is not uncommon to find that the 'village' has no legal identity in national law. In such cases, the village pasture or the village soccer field ends up registered in the name of the 'state' (Bruce et al. 2007: 35).
 - 29 Popular demand for land registration often comes primarily from the concern in local communities that if they do not register their land, the government will give it to someone else. This is 'defensive' titling, and its objectives can be accomplished by registering the community as the owner of its land, a process simpler and less costly than surveying and registering all individual claims. The Mozambique model seeks to address a key problem: how to preserve household and individual rights within community ownership, avoiding reducing community members to community tenants (Tanner 2002, 2006).
 - 30 The intention of this project component, supported by DFID, is to reduce chiefs' land dispositions to writing, to ensure their preservation in a local registry, to make them more effective proof, and at the same time to make chiefs more accountable for their actions (Quan & Green 2005).
 - 31 One Bank country economist reported to the author: 'I give copies of the Bank's policies on land and development to the Minister, and never got a reaction. I give him a copy of *The Mystery of Capital* and a few days later he had read it and wanted to talk about it.'
 - 32 In USAID, the major funders of De Soto's ILD, the sense that De Soto has the ear of presidents and congressmen has dictated that any questioning of his ideas be approached with considerable delicacy, or not at all.

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3 Securing Land Rights in Africa – Trends in National and International Law

Lorenzo Cotula

Introduction

Land is central to the livelihoods, culture and identity of millions of people across rural Africa. Rural livelihoods crucially depend on this resource. Control over land is often central to national and local political power. Land may also provide the basis for social identity and mobilisation, and for a collective sense of justice.

Although land tenure reform has been on the agenda for a long time, recent developments in economies and societies have made it an even more pressing issue. In many parts of Africa, demographic growth has increased population density and competition for valuable land. Urban settlements are growing fast, encroaching on agricultural land, attracting youths from rural areas, and fostering demand for food – which in turn boosts agricultural intensification. These processes promote change in local ('customary' but continually evolving) land tenure systems, namely towards greater individualisation and commercialisation of land relations. As 'custom' is reinvented and manipulated, weaker groups are losing out.

Globalisation is also having impacts on local land relations. Trade liberalisation makes local production systems more integrated into the global economy, with export crops expanding into areas previously used for locally consumed products. In many places, pressure on the land is growing as a result of increasing investments in petroleum, mining and agribusiness for food, fuel and other agricultural commodities. These investments translate into growing areas of land – often those with greater irrigation potential or proximity to markets – being allocated to large-scale investors.

Public policy to secure and regulate land rights is therefore more needed than ever. This chapter outlines some of the main trends in national policy and legislation. In discussing national trends, emphasis is on innovative developments, while acknowledging that promising policy or law reforms do not necessarily translate into positive outcomes on the ground. Given the very broad scope and great diversity

within and between countries, much valuable detail has inevitably been passed over. The main focus is on rural land, although it is recognised that rural and urban land access issues cannot be separated.

The next section provides a brief overview of trends in land tenure in sub-Saharan Africa. Section three discusses recent developments for a few particularly important issues concerning land rights in Africa: approaches for recognising and recording local land rights, gender, pastoral land rights, large-scale land acquisitions, and use of international bodies to protect land rights. The conclusion (the fourth section) provides a few final remarks.

Land Tenure in Africa – A Bird's Eye View

Land policy and legislation in sub-Saharan Africa are influenced by historical legacies rooted in the colonial system and in post-independence political choices. On paper, central states tend to claim a significant degree of control over much of rural land. After independence (but following a colonial pattern), most African governments nationalised or otherwise took control over land. This was to promote agricultural development on the one hand, and to seize control of a valuable asset and a source of political power on the other.

For instance, all land is owned by the state in Mozambique (under the 1975, 1990 and 2004 Constitutions and the Land Act 1997), Nigeria (where the Land Use Act 1978 vests land ownership with the governor of each federated state) and Tanzania (under the Land Act 1999 and the Village Land Act 1999). In some countries, nationalisation excluded the (usually little) land held under private ownership. In Senegal, Law 64-46 of 1964 vests all *untitled* land in a *domaine national* held by the state. Similar arrangements exist for instance in Chad and Mali.

Other countries have enabled or even promoted private property to a greater extent. Kenya, for instance, has long had a land titling programme to register private property, converting customary land rights into freehold. In Ghana, part of the land is owned by the state but most of it belongs to private entities such as customary chiefdoms, extended families and individuals.¹ In the 1990s, political democratisation and economic liberalisation have brought about law reforms introducing or strengthening protection of private land ownership in several countries that had previously nationalised land – for instance in Burkina Faso, where legislation on *Réorganisation Agraire et Foncière* was revised to that effect in 1991 and 1996 and a more recent law was passed in 2009.

However, in most cases, the state remains the key player in land relations. With a few country exceptions, private land ownership tends not to be widespread even where it is formally recognised – particularly in rural areas. The World Bank estimated that, across Africa, only between 2 and 10 percent of the land is held under formal land tenure; this mainly concerns urban land (Deininger 2003). Even where private ownership exists in practice as well as in the law, state institutions may retain important powers – for instance, through legislation requiring government approval for land transfers – although more recent legislation tends to allow and/or promote various forms of land transfers.

With much control over land vested in the state and with limited spread of private ownership, most groups and individuals in much of rural Africa enjoy various types of land use rights. On land owned or held by the state, resource users may enjoy use rights so long as they put land to productive use, for instance under *mise en valeur* requirements found in the legislation of much of Francophone Africa (e.g. Cameroon, Chad, Mali and Senegal). Outside Francophone Africa, similar land use requirements are found for instance in Tanzania's Village Land Act 1999 (section 29). In these cases, land management institutions may be mandated to monitor productive use, and to reallocate land to third parties in case of non-use. Where land use rights are withdrawn, compensation is paid for loss of 'improvements' (crops, buildings) but often not for loss of land rights as such (e.g. under the laws of Cameroon and Senegal).

This legal regime, coupled with lack of clear legal definition of what constitutes 'productive use' and with the ensuing broad discretion of government officials responsible for monitoring fulfilment of this requirement, may open the door to abuse on the part of the government officials, and undermines the security of local land rights. This is particularly so for those groups whose resource use is often not considered as 'productive enough' due to widespread (mis)perceptions, such as pastoralists (Hesse & Thébaud 2006).

In much of rural Africa, lack of financial resources and institutional capacity in government agencies, lack of legal awareness and, often, lack of perceived legitimacy of official rules and institutions all contribute to limiting the outreach of state legislation in the areas of property rights and resource tenure. On the ground, much of the rural population continues to access land through local tenure systems. These systems are based on (usually unwritten) rules founding their legitimacy on 'tradition', as shaped both by practices over time and by systems of belief. Because of this, they are usually described as 'customary' – and for easier reading I follow this terminology. In reality, local tenure systems have profoundly changed as a result of cultural interactions,

population pressures, socio-economic change and political processes (Chanock 1985, Mamdani 1996, Cotula with Neves 2007).

According to the dominant if somewhat stereotyped view of customary resource tenure systems in Africa, land is usually held by clans or families on the basis of diverse blends of group to individual rights, accessed on the basis of group membership and social status, and used through complex systems of multiple rights. In reality, customary resource tenure systems vary considerably depending on the context. Important differences exist, for instance, between pastoral and farming contexts, and between patrilineal and (in Africa more rare) matrilineal systems.

In farming contexts, for instance, customary systems usually entail collective landholding and the allocation of farming rights over specific plots by the land management authority (e.g. a 'chief') to smaller family units. The nature of these smaller units and of the farming rights they hold vary considerably from place to place. In many cases, farming rights are conditional upon the continued use of the plot. And, while such rights are often inheritable, restrictions usually exist on sales (especially to outsiders), although certain transactions may be allowed (gifts, loans, etc.) and some systems do allow land sales.

The insecurity of local land rights may be rooted in the weak legal protection of these customary resource rights – which are the entitlements through which most rural dwellers gain access to resources. While in the eyes of local groups customary rights may be real and legitimate, these rights tend to enjoy little legal protection. In Burkina Faso, for instance, legislation passed in the 1980s to nationalise land abolished customary rights – though more recent legislation has taken steps to protect them. In Kenya, the above-mentioned land registration process entailed the conversion of customary land rights into freehold. Underpinning these various legislative efforts was a design to abolish systems perceived as 'backward' and exploitative, and to establish 'modern' systems of property rights that could provide a basis for economic development. In practice, however, these attempts have had little impact on the ground, and customary arrangements remain the main mechanism through which most of the rural population gains access to land.²

On the other hand, some countries have long protected customary rights, mainly as a result of historical legacies. In Ghana, colonial attempts to suppress customary rights and vest 'waste' land with the Crown (particularly with the 1910 Land Rights Bill) were successfully resisted by customary chiefs and other interest groups. The colonial administration subsequently changed tactics, working to strengthen the customary land rights of chiefs and use them as an instrument for indirect rule in rural areas (Amanor 2005). Today, Article 11 of Ghana's

1992 Constitution specifically recognises customary law among the sources of law, while Article 267 regulates the role of customary chiefs in land administration.

Several other countries have recently taken steps to strengthen the protection of customary rights – even where land is state-owned or vested with the state in trust for the nation. Customary rights are for instance protected under Mali's Land Code 2000, Mozambique's Land Act 1997, Namibia's Communal Land Reform Act 2002, Tanzania's Land Act and Village Land Act 1999 and Uganda's Land Act 1998. In Mali, while post-independence legislation abrogated customary rights, the Land Codes (*Codes Domaniaux et Fonciers*) of 1986 and 2000 (as amended in 2002) legally recognise customary land rights and grant them (some degree of) legal protection (Articles 43-48). Mozambique's Land Act 1997 reaffirms the principle of state ownership over land but protects 'rights of use and benefit' (*DUAT* in Portuguese), which are acquired either on the basis of customary law or through good-faith occupation for at least ten years (Article 12). Under Namibia's Communal Land Reform Act 2002, customary land rights on 'communal land' are legally protected (Article 19(a)). Tanzania's Village Land Act 1999 states that customary rights of occupancy have 'equal status and effects' to statutory rights (section 18(1)). This legislation follows the landmark case *Attorney General v. Akonaay, Lohar and Another*, in which the Tanzanian Court of Appeal held that customary land rights are 'real property' protected by Article 24 of the Tanzanian Constitution (on the right to property), and as such entail payment of 'fair' compensation in case of expropriation.³ In Uganda, while the Land Reform Decree of 1975 made customary landholders tenants at will of the state (McAuslan 2000), the 1995 Constitution and the 1998 Land Act, as amended, protect customary land rights.

However, even where customary rights are legally protected, such recognition may be limited or qualified. In Mali, for instance the Land Code 2000 devotes only a few provisions to customary rights (Articles 43-48), while most provisions are devoted to private ownership and other legal concepts of European origin. This contrasts with the very limited land area held under private ownership and with the fact that customary rights are the main form of land access in rural areas (Djiré 2007). Article 43 of the Code merely states that individual or collective customary rights are 'confirmed', and that customary right holders can only be deprived of their rights for a public purpose and against payment of fair compensation. The procedure for land expropriation applies, with some exceptions, to the taking (*purge*) of customary rights (Article 47). Customary rights may be recorded (*constatés*), following a procedure specified by the law, although this provision has had no practical application.⁴ However, formal registration of customary rights

and their conversion into private ownership can only occur if there is ‘permanent and evident’ use of the land, for instance through a building or regular cultivation (Article 47).

In addition, the implementation of legislation strengthening customary land rights may not be assisted by the strong political will required for such legislation to have an impact on the ground. In some cases, governments supported the adoption of legislation on customary rights under pressure from government agencies or civil society movements but have focused implementation efforts on other issues, such as promoting land access for larger operators perceived to be more productive and efficient – or simply more closely linked to political elites.

In Mozambique, for example, recent changes to key aspects of the land legislation suggest that the political commitment to implementing the legal provisions that protect local land rights is faltering. A 2007 amendment to Article 35 of the Land Regulation 1998, coupled with a subsequent change in its administrative interpretation, have made it more difficult for new community land delimitations to go through: delimitations now require a land use plan and must be approved by the Minister for Agriculture (if over 1,000 hectares) or the Council of Ministers (if over 10,000 hectares). As ‘local communities’ can include thousands of people, it is quite common for delimitations to fall within the responsibility of the central government. In addition, the regulatory and interpretive change requires communities to show that they can use the land productively. However, new regulations adopted in 2010 following national dialogue reversed the 2007 reforms and this issue now seems to have been solved.

Some Key Land Tenure Issues – Recent Developments

Recognising and Recording Local Land Rights

Efforts to improve land tenure security have traditionally emphasised large-scale individual titling and registration programmes. Individual titles, a long-standing argument runs, would increase the willingness and ability of landholders to invest, by removing disincentives (as landholders would not invest in the land unless they can be reasonably confident that they will not be deprived of it) and by improving access to credit (as titles can be used as collateral). On the basis of these arguments, titling and registration programmes have been implemented over the past decades in many parts of Africa, Asia and Latin America.

In Asia and Latin America there has been some success with titling and registration. In Thailand, land titles are reported to have led to higher land values, greater agricultural investment and higher productivity (Feder et al. 1988, Deininger 2003). Increases in land values and

agricultural investment following registration have also been reported in Nicaragua, Ecuador and Venezuela (Deininger 2003). But in Africa, registration programmes have proved slow, expensive, difficult to keep up-to-date and hard for poor people to access. As a result, very little rural land has been registered (Deininger 2003). Where titling and registration have been implemented, greater agricultural investment has not necessarily materialised. High monetary, transaction and other costs discouraged registration of land transfers, thus making land registers outdated and undermining their ability to secure land rights. Registration may not be enough to improve farmers' access to credit where high transaction and other costs hinder credit supply in rural areas and where an unpredictable and fluctuating environment makes farmers risk-averse and hence reluctant to apply for loans. Also, many registration programmes had negative distributive effects, as those with more contacts, information and resources were able to register land in their names, to the detriment of poorer claimants (for example, in Kenya's long-standing registration programme). Where there are significant costs to registration, in both cash and time, smallholders are particularly vulnerable to losing their rights over land. Moreover, registration tends to penalise holders of secondary land rights, such as women and herders, as these rights often do not appear in the land register and are thus effectively expropriated (Atwood 1990, Migot-Adholla & Bruce 1994, Firmin-Sellers & Sellers 1999, Platteau 2000).

As experience and understanding of land registration has developed, more nuanced and appropriate approaches have emerged. There is now greater recognition that land laws must build on local concepts and practice, rather than importing one-size-fits-all models. This entails, among other things, legally recognising local land rights, which are the entitlements through which most people gain access to rural land. Land registration is now seen as a useful component of a broader and more sophisticated tenure security strategy, for example to deal with contexts where customary systems have collapsed, where land disputes are widespread, and in areas of high-value land and newly settled areas.

As a result of this shift in thinking, some recent land laws present important innovations compared to their predecessors. As discussed above, several countries have made explicit efforts to protect customary land rights and include them in land records – for instance under Uganda's Land Act 1998, Mozambique's Land Act 1997, Tanzania's Land Act and Village Land Act 1999, and Niger's Rural Code 1993. Use or lease rights over state-owned land may also be recorded and enjoy varying degrees of protection in countries like Ethiopia and Mozambique. Recognising the practical difficulties of documenting land rights across the national territory, Mozambique's Land Act formally protects

customary rights regardless of whether they have been registered or not (Articles 13(2) and 14(2)); however, in practice lack of registration does make land rights more insecure, and development agencies and NGOs have been helping local groups register their collective landholdings (Chilundo et al. 2005, Norfolk and Tanner 2007).

Simple, low-cost and accessible forms of land records have been introduced in several countries, for instance through systematic land registration programmes in the Ethiopian states of Amhara and Tigray (Adenew and Abdi 2005, and Haile et al. 2005, respectively), through the *plan foncier rural* in Benin (Chauveau 2004, Le Meur 2006) and through the *guichet foncier* in Madagascar (Teyssier 2010). In Madagascar, for example, the 2005 Land Policy and Law No. 019 of 2005 protect rights over untitled land and enable landholders to obtain certificates from land offices established at the municipal level. The procedure is significantly more accessible than the formal titling system administered by the central state, with average unit costs of about € 10 (instead of € 370) and an average lead time of six months (instead of six years; Teyssier 2010).

As for the right holder, several recent titling programmes have issued titles not only to individuals but also to families and local communities. For example, Amhara's land registration programme features joint titling for couples, though this is not systematically implemented (Adenew and Abdi 2005). And Mozambique's Land Act 1997 protects the collective land rights of legally defined 'local communities', and provides for the recording of these rights.

None of these models is perfect, of course. Implementation is often constrained by limited resources. In Madagascar, fast progress has enabled 20 percent of the 300 municipalities to set up a *guichet foncier* – but much remains to be done to scale up to the national level (Teyssier 2010). The low-cost registration system in the Ethiopian state of Tigray enabled rapid implementation and ensured that the process was accessible to farmers; but the technology used did not allow boundary delimitation, so that land registration was of limited use to solve boundary disputes – an issue that the later Amhara registration process sought to tackle (Haile et al. 2005). In Mozambique, 'local communities' can encompass thousands of people spread over large areas of land – and unless downwards accountability is ensured within the community, collective registration does little to protect the rights of more vulnerable groups. But the attention to accessibility and local appropriateness, the recognition of 'customary' rights – which are the entitlements through which much of the rural population gains access to land – and the willingness to try 'something new' compared to earlier, one-size-fits-all approaches are positive features of this wave of reforms.

Gender

In much of rural Africa, women constitute a large portion of the economically active population engaged in agriculture, both as farmers and as farm workers, and play a crucial role in ensuring household food security. However, women's access to key assets like credit is often constrained, and women tend to remain concentrated in the informal sector of the economy. In plantations, they often provide labour without employment contracts, on a temporary or seasonal basis or as wives or daughters of male farm workers.

Women's access to land under widely applied customary systems varies considerably from place to place. Substantial differences exist between patrilineal and matrilineal societies, with women generally having stronger land rights under the latter. However, in most cases, rights in arable land are allocated by the lineage authority to the male household head; women have secondary, derived rights, obtained through their relationship with male family members (husbands, fathers, brothers or sons). Under many customary systems, women's inheritance rights are limited: not only within patrilineal systems (where property devolves along the male line, to the exclusion of women), but also in matrilineal systems (where, although property traces through the mother's line, land control usually rests with male family members).

With population pressures, cultural change, agricultural intensification and commercialisation, many customary systems have evolved towards greater individualisation, extending the rights vested in male household heads and further eroding women's secondary rights (Lastarria-Cornhiel 1997). When off-farm activities or migration are usually undertaken by men, women's responsibilities for agriculture increase – what is referred to by some as the 'feminisation of agriculture'. Some authors suggest that this increased burden is accompanied by greater decision-making power for women within the household. Others note that this effect is very limited, as women tend to remain under the 'protection' of the extended family (David 1995). On the other hand, in areas with increasing land scarcity and limited off-farm opportunities, women are being deprived of their land access, including through the 'rediscovery' of norms on female seclusion based on religious or customary practice (e.g., for a study on the 'defeminisation of agriculture' in Niger, see Doka and Monimart 2004).

However, in many areas, women are increasingly keen to assert their claims over land. All over Africa, one can find examples of women negotiating rights to land and associated resources (Freudenberger 1993). For instance, women may enter sharecropping arrangements, as documented for Ghana and Côte d'Ivoire (Amanor 2001, Koné 2001).

In addition, there are growing numbers of reports of women buying land either individually or collectively. In many parts of the world, NGOs support women's groups by helping them to obtain land on a collective basis.

For a long time, land legislation tended not to directly tackle gender issues. For instance, in the Kenyan land registration programme (1954 onwards), registration was usually made to the male household head, thereby undermining women's unregistered secondary rights (Mackenzie 1998). However, some laws adopted since the 1990s have paid greater attention to gender equity, by embracing the principle of non-discrimination, abrogating customary norms, presuming joint ownership of family land, outlawing land sales without consent of both spouses, and providing for women's representation in land management bodies. For instance, Niger's Rural Code of 1993 recognises the equal right of citizens to access natural resources without sex discrimination. In Burkina Faso, Law No. 14 of 1996, revising earlier legislation, provides for the allocation of state-owned land without distinction based on sex or marital status, and under the Mozambican Land Act 1997, both men and women may have rights in state-owned land (Articles 10(1) and 16(1)).

In Tanzania, the Land Act 1999 explicitly affirms the equality of men's and women's land rights (sections 3(1)(c) and 3(2)). Spousal co-ownership of family land is presumed (section 161). Consent of both spouses is required to mortgage the matrimonial home (section 112(3)), and in case of borrower default, the lender must serve a notice on the borrower's spouse before selling mortgaged land (section 131(3)(d)). Moreover, a 'fair balance' of men and women is to be ensured in the appointment of the National Land Advisory Council (section 17). Similarly, the Village Land Act 1999 prohibits discrimination against women in the application of customary law (section 20(2)), and when a village council is deciding on an application for a right of occupancy (section 23).

Under Uganda's Land Act 1998, specific provisions ensure women's representation in the Uganda Land Commission, in Land District Boards and in parish-level Land Committees (sections 48(4), 58(3) and 66(2)). Moreover, while decisions on land adjudication concerning customary rights are to be made according to customary law, decisions denying women access to ownership, occupation or use are null and void (section 28). Although selling, leasing or giving away land requires the consent of the spouse (section 40), a clause introducing the presumption of spousal co-ownership, initially included in the Bill passed by the Parliament, was excluded by the President from the gazetted text.

Judicial decisions have also played an important role in determining women's land rights, particularly by invalidating discriminatory norms on constitutional grounds. A landmark case is *Ephrahim v. Pastory and Another*, decided by the High Court of Tanzania. In this case, a Haya woman who had inherited land from her father sold it outside the clan. A male clan member brought an action to declare the sale void, as women could not sell land under Haya customary law (as codified in the Declaration of Customary Law of 1963). The Tanzanian High Court invalidated the norm on the basis of the principle of non-discrimination, which is affirmed in the amended Tanzanian Constitution and in international human rights treaties ratified by Tanzania. The court stated therefore that Haya women could sell land on the same conditions as Haya men, and held the disputed land sale valid.

Judicial decisions protecting women's land rights appear to be increasingly common – at least in some jurisdictions. In South Africa, a recent landmark case is *Bhe v. Magistrate, Khayelitsha and Others*, concerning inheritance. While statutory succession law (Maintenance of Surviving Spouse Act 1990 and Intestate Succession Act 1987) recognises women's inheritance rights, section 23 of the Black Administration Act provided for the application of a customary law to the inheritance of property belonging to 'a Black'. Customary law and regulations enacted on the basis of customary law severely restricted women's succession rights by providing for inheritance by the eldest son. A first constitutionality challenge to these rules was rejected in *Mthembu v. Letsela and Another*. But in the *Bhe* case the Constitutional Court declared these norms discriminatory and thus unconstitutional. Most recently, a constitutionality challenge to South Africa's Communal Land Rights Act 2004 on both procedural and substantive grounds, including gender bias, resulted in the entire law being struck down due to its improper enactment; because of this finding, the Court did not deem it necessary to examine the merit of the substantive grounds for alleged unconstitutionality, which included gender discrimination.⁵

It is difficult to assess the difference that these legislative and judicial interventions have made on the ground. In many countries, the implementation of laws protecting women's rights is constrained by entrenched cultural practices, lack of legal awareness, limited access to courts and lack of resources. These implementation problems are generally more severe in rural areas than in urban areas. In these cases, effective interventions to improve women's land rights need to include not only legislative reform but also concrete steps to bridge the gap between law and practice.

*Securing the Resource Rights of Pastoral Groups*⁶

For pastoralists, herd mobility and secure access to strategic resources, such as water and dry season grazing, are critical, and require flexible arrangements enabling herders to access grazing resources rather than exclusive ownership rights over a given area. Such arrangements are at odds with the tools generally used to secure and manage land rights and raise challenges for securing pastoralists' resource rights. Land titling and registration, even at a group level, of exclusive rights over a clearly delimited area may not provide for the flexible access arrangements addressing inter-group interests, which characterise many pastoral societies – for instance in much of West Africa. Conventional common property arrangements may not necessarily work either, because of the clear group membership rules and clearly defined resources typically embodied in common property rights mechanisms (see Ostrom 1990). State ownership of pastoral resources has also proved ineffective, their interventions to regulate grazing through fencing and seasonal closures reducing flexibility and mobility (Toulmin et al. 2004).

Much past and current debate regarding pastoral rangelands continues to make reference to the article by Hardin (1968) on the 'Tragedy of the Commons'. The premise of Hardin's argument is that by holding land in common, individual herders have no incentive to limit the number of animals they graze on that land. Without such incentives, conditions are set for land degradation. Pastoral development policies in the 1970s and 1980s were heavily influenced by these negative perceptions of both pastoralism and customary tenure systems. A major preoccupation of governments and donors was thus to control rangeland degradation through the regulation of livestock numbers. Herders and the number of livestock they kept had to be controlled, as did their movements. They were encouraged to 'modernise': to settle down and raise fewer animals more intensively. The focus for all these initiatives was on capital investments and infrastructure (fencing, water, roads and markets), intensification through sedentarisation, and herd size control. Few if any of these policies in fact contributed to sustainable rangeland management or improved pastoral livelihoods.

It is now widely accepted that rainfall variability is the primary driving force behind fluctuations in pasture productivity in arid and semi-arid areas, with grazing pressure rarely a significant factor, given highly mobile, seasonal patterns of resource use. Opportunistic management, allowing pastoralists to respond rapidly to changing grazing conditions and fodder availability through mobility or the opportunity to offload or restock livestock, is now recognised as a key requirement for the sustainable management of rangelands in dryland areas. This

requires specifically tailored arrangements that secure the resource rights of pastoral groups while enabling flexibility for herd mobility.

Insights in how to do this can be drawn from recent experience in the Sahel. There, the past decade has seen a promising shift by several governments to recognise and regulate access and tenure rights over pastoral resources – first with Niger’s Rural Code 1993 and then with the pastoral laws passed in Guinea (Pastoral Code 1995), Mauritania (Pastoral Code 2000), Mali (Pastoral Charter 2001) and Burkina Faso (Pastoral Code 2002). Although the approaches taken by legislators vary considerably across countries, this pastoral legislation recognises mobility as the key strategy for pastoral resource management – contrary to much previous legislation, which was hostile to herd mobility. Under Mali’s Pastoral Charter, for instance, herders have a right to move with their herds for their production needs. In order to maintain or enable mobility, pastoral legislation seeks to protect grazing lands and cattle corridors from agricultural encroachment and to secure herders’ access to strategic seasonal resources. The tools used range from the delimitation of pastoral resources to innovative legal concepts like the *terroir d’attache* in Niger.⁷ Pastoral laws also regulate multiple and sequential use of resources by different actors (e.g., herders’ access to cultivated fields after harvest), and determine the role which pastoral people can play in local conflict management.

While these laws constitute a major step forward, some problems remain. Although some laws now recognise pastoralism as a legitimate form of productive land use (*mise en valeur*, upon which protection of land rights is conditional), the concept of *mise en valeur pastorale* remains ill-defined, and generally involves investments in infrastructure (wells, fences, etc.) that are not required for agricultural forms of *mise en valeur*.⁸ Also, rangelands are still often affected by many laws, often uncoordinated, and managed by a range of different institutions. Laws on land, water, forests and decentralisation may all have implications for rangeland management.

Regional integration processes based on free movement of persons and goods also have implications for international transhumance. Besides the ‘traditional’ bilateral or regional transhumance agreements, international transhumance is increasingly regulated by instruments adopted within the context of regional integration arrangements (for instance, in West Africa, by Decision A/DEC.5/10/98 of 1998 adopted by ECOWAS⁹). These instruments usually require a transhumance certificate indicating number and types of animals, vaccinations received and the itinerary planned. But notwithstanding these norms, cross-border movements are still often constrained by administrative practices.

Important innovations have also taken place at field level. Throughout West Africa, for instance, local conventions (*conventions locales*) – community-based agreements concerning the management of shared natural resources – have been set up, negotiated by all interested natural resource users, usually with support from development projects. These conventions are an attempt to overcome the weaknesses of previous approaches to natural resource management focusing on individual villages (e.g. the *gestion du terroir* approach), which often resulted in the exclusion of groups not resident in the village, particularly transhumant herders.

Large-Scale Land Acquisitions

Recent spikes in world food and energy prices have fostered renewed momentum for agricultural investment in lower and middle-income countries. Governments in some food-importing countries are promoting the acquisition of land overseas as a means to ensure long-term national food security. And businesses are recognising new opportunities for strong returns from international investments in agriculture for food, fuel and other agricultural commodities. Over the past couple of years, the acquisition of long-term rights over farmland in Africa (typically leases rather than outright purchases) has made headlines in a flurry of media reports across the world. Lands that only a short time ago seemed of little outside interest are now being sought by international investors by the tune of hundreds of thousands of hectares. Dubbed ‘land grabs’ in the media, land acquisitions have kindled much international debate, in which strong positions are taken on the impacts of such investments on environment, rights, sovereignty, livelihoods, development and conflict at local, national and international levels. Trends and drivers characterising this phenomenon have been amply discussed elsewhere (Cotula et al. 2009). The focus here is on trends in national legislation.

Land acquisitions are taking place in a legal context that, as discussed in the second section, tends to establish a central role for the state and only grant weak protection to local land rights. As governments formally own all or much of the land in many African countries, government leases are the main source of land for prospective investors, including 100 percent of the deals documented in Ethiopia and Mali by Cotula et al. (2009). However, direct deals with customary chiefs are common in countries where traditional authorities have retained formal control over land, such as Ghana (Cotula et al. 2009, Schoneveld et al. 2010).

Procedures for investors to access land vary considerably across countries – in terms of steps, time and costs. For instance, in Mozam-

bique all investment projects (whether foreign or national) require government approval (under the 1993 Regulation to the Investment Act), while in Ghana no such approval is required outside the mining and petroleum industries but foreign investors must register with the Ghana Investment Promotion Centre under the Ghana Investment Promotion Centre Act 1994.¹⁰

A recurring investor concern is that land access procedures in many lower and middle-income countries are seen as long and cumbersome (World Bank 2010). Some countries have taken steps to streamline the administrative process that investors must go through in order to acquire land. One-stop-shops and investment promotion agencies play a key role in this. In countries like Mali, Mozambique and Ghana, investment promotion agencies facilitate the acquisition of all necessary licences, permits and authorisations. In other countries, the investment promotion agency is mandated to play a more 'hands-on' role – for example in Tanzania, where the Tanzania Investment Centre (TIC) is responsible for identifying and providing land to investors, as well as with helping investors obtain all necessary permits (Article 6 of the Tanzanian Investment Act 1997). This entails identifying land not currently under productive use, and directly allocating it to investors. Land is vested with the TIC and then allocated by this to the investor on the basis of a derivative title. After the end of the investment project, the land reverts back to the TIC (Articles 19(2) and 20(5) of the Land Act 1999).¹¹

In order to promptly provide information to prospective investors about the nature, size and location of available land, some countries have undertaken national inventories of available land and established databases accessible to incoming investors. In Tanzania, for example, the TIC has identified some 2.5 million hectares of land as suitable for investment projects.¹² Similarly, the Mozambican government carried out a land inventory covering the whole country to identify land potentially available for incoming investments. This exercise was concluded in early 2008 at a scale of 1:1,000,000. It indicated that the country has about 7 million hectares available for allocation to land-based economic activities – a smaller area than was expected. As the scale of the mapping was too large to be useful, another inventory at a scale of 1:250,000 is now being prepared (Nhantumbo & Salomão 2010).

However, concepts like 'idle' or 'waste' land, which underpin these inventory exercises, often reflect an assessment of the *productivity* rather than *existence* of resource uses: these terms are often applied not to unoccupied lands, but to lands used in ways that are not perceived as 'productive' by government. Yet perceptions about productivity may not necessarily be backed up by economic evidence (for instance, on pastoralism, see Hesse & Thébaud 2006), and low-productivity uses

may still play a crucial role in local livelihood and food security strategies.

The nature, scope, content and duration of the land rights that investors – particularly foreign investors – can acquire varies across countries. This diversity reflects diverging political orientations with regard to land tenure, particularly as to whether private land ownership is allowed, and whether non-citizens may gain access to it. Some countries treat domestic and foreign investors differently: legislation allows nationals to acquire land ownership, but restricts foreign investors' acquisition of land ownership or even long-term use rights. Although some countries have recently come under pressure to ease these restrictions, the regulation of foreign land ownership is not just a 'developing country' phenomenon: 30 states in the United States have restricted foreign ownership, and the US Agricultural Foreign Investment Disclosure Act 1978 requires foreigners to register acquisitions of land larger than 10 acres (McAuslan 2010). In Africa, restrictions on foreign ownership are rooted in the scars left by colonial history – and regulating foreigners' access to land ownership was seen as a way to avoid going back to the colonial experience (McAuslan 2010). Examples of restrictions on foreign ownership are provided by Ghana and Uganda. In Ghana, while nationals may own land, foreigners may not – they can only acquire land leases of up to 50 years (Article 266 of the 1992 Constitution). Under Uganda's Land Act 1998 non-citizens may only be given land leases for up to 99 years, and are barred from acquiring freehold rights (Article 41).

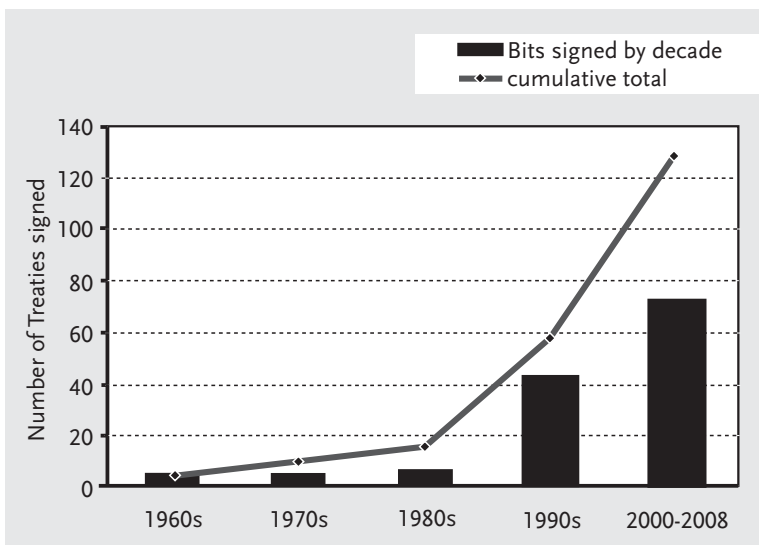
Legislation may also restrict certain forms of land *use* by non-nationals. Depending on the country context, the policy objective may be to prevent speculative land acquisitions, or to protect local producers. In Uganda, foreign investors may not acquire land for the purpose of crop or animal production, but they may lease land for other purposes (Article 10 of the Investment Code Act). In Tanzania, foreigners may acquire land use rights only for the purpose of an investment project approved under the terms of the Tanzania Investment Act (Articles 19 and 20 of the Land Act 1999). In Namibia, the Agricultural (Commercial) Land Reform Act 1995 (Article 58) requires a government authorisation for the acquisition of land ownership by foreign nationals; this authorisation is granted on the condition, amongst others, that the acquisition for an investment is eligible under investment legislation.

While much international attention has focused on the acquisition of land rights, large agricultural projects also involve other key resources, particularly water. For example, media reports suggest that some investors are seeking priority access rights over water.¹³ This may have major implications for the ability of other producers to have

secure access to water, and requires closer attention – though a discussion of water rights is beyond the scope of this study.

National and international arrangements provide ways to protect the land and natural resource rights acquired by investors. For example, international investment treaties usually provide legal protection for investment by nationals of one state party in the other state. They typically define investment very broadly, covering investment in agriculture including land acquisitions. Their provisions usually include safeguards against discrimination, expropriation and arbitrary treatment, provisions on profit repatriation and currency convertibility, and access to international arbitration as the mechanism to settle investment disputes. Recent years have witnessed a boom in investment treaties. By the end of 2008, investment treaties had reached a total of 2,676 (UNCTAD 2009), up from 440 in 1991 (UNCTAD 1992). Figure 1 illustrates this trend with regard to a sample of seven African countries that have been affected by large-scale land acquisitions – Ethiopia, Ghana, Madagascar, Mali, Mozambique, Sudan and Tanzania (Cotula et al. 2009). National constitutions (particularly provisions on the right to property), investment codes and sectoral legislation also tend to protect the investor’s land rights from arbitrary interference, and to require compensation for losses suffered. Like investment treaties, investment codes may enable investors to directly access investment arbitration to solve disputes.

Figure 1 *Number of bilateral investment treaties concluded by seven African countries, by decade and cumulative*



Data Source: UNCTAD World Investment Report online database

However, evidence on the extent to which investment treaties do promote investment is mixed (for a review, see Sauvant and Sachs 2009). Also, the formulation of some treaties has raised concerns that the policy space for host countries to take action in the public interest may be reduced, as treaty norms restricting expropriation or requiring ‘fair and equitable treatment’ have been interpreted in very broad terms (Mann et al. 2006). Some controversial, treaty-based international arbitrations have seen investors challenge environmental or other public-purpose regulation adopted by host states.¹⁴ This creates the need for caution by host governments to understand the full implications of what they are signing up to when entering into investment treaties.

From the investor’s perspective, the extent to which these protection mechanisms can be relied on in practice varies considerably, depending on factors linked to governance and rule of law. Experience suggests that even the most effective protection regimes achieve little against a determined political will to revise the terms of the investment or even expropriate it altogether. This was illustrated by the wave of renegotiations affecting natural resource investments in Latin America, Asia and Africa, when commodity prices peaked in 2008. The strong emotive connotations of land to local populations make political risk particularly acute in agricultural investments that involve the acquisition of large areas of land.

The widespread tenure insecurity affecting local land rights in Africa, coupled with growing interest in land from outside investors and government efforts to attract investment, make local people vulnerable to dispossession. Where customary systems are still functioning properly and are perceived as legitimate at the local level, they are unlikely to be effective at defending local land rights vis-à-vis investors that mainly rely on formal law and negotiations with the government. And even where customary rights are legally recognised (see second and third section), significant threats may come from *within* local groups – particularly from customary chiefs. In many parts of Africa, chiefs are increasingly reinterpreting custom to claim ‘ownership’ over common resources they were traditionally responsible for managing on behalf of their community. These reinterpretations of customary law are strongly contested by local resource users, but customary mechanisms for the accountability of chiefs are not or no longer working in practice (e.g., on Ghana, see Ubink 2007). This situation provides the breeding ground for the co-option of customary chiefs and local elites into strategic alliances with the central state and agribusiness, and makes local resource users vulnerable to dispossession. Recent research from Ghana has documented cases where customary chiefs re-allocated land from local farmers to large biofuel plantations, with no local consultation or formal compensation (Schoneveld et al. 2010).

Legal safeguards for local land rights do exist in many jurisdictions, but their effectiveness tends to be limited. For instance, the laws of Mali and Mozambique require an environmental and social impact assessment (ESIA) to be carried out prior to the land transfer. But the criteria for approving or failing land deal applications on the basis of the ESIA are not always explicit, and the results of these assessments are often not available for public scrutiny (Vermeulen and Cotula 2010). In addition, several studies have documented cases of biofuel projects getting started without the required environmental permits (e.g., on Ghana, see Schoneveld et al. 2010; on Mozambique, see Nhantumbo and Salomão 2010).

Local consultation may also be required through processes other than ESIA. In Mozambique, for example, the Land Act 1997 requires prospecting investors to consult 'local communities' before receiving a land lease from the government. But the implementation of this legislation has fallen short of expectations. What is defined as community consultation may be confined to discussions with village elders and elites. Indirectly affected communities tend not to be included, and villagers usually do not receive full information on the proposed investments and the terms of land deals prior to the consultation. Records of meetings are often incomplete and vague about timeframes, targets and responsibilities, and agreements between the community and the investor are generally not integrated into legally binding contracts (Nhantumbo and Salomão 2010). But in the cases where external organisations supported local people, there were better outcomes and negotiations for community joint ventures in tourism are underway in several places (Tanner & Baleira 2006).

Where land is taken on a compulsory basis, compensation regimes and related procedural safeguards are key to safeguarding local interests. It must also be recognised, however, that to many people no amount of money is adequate compensation. This is particularly the case where cash compensation would not enable affected communities to gain access to alternative land, for instance due to limited development of land markets. It is also the case where land has special cultural and spiritual values. Where land is owned by the state, as is the case in much of rural Africa, compensation is usually paid for loss of improvements (crops, trees, buildings) but not for loss of land rights.¹⁵ Loss of other resources, such as water and forest resources, are rarely compensable. Implementing compensation schemes is riddled with challenge. Levels of compensation are often seen as inadequate by the local population, and lack of formal land markets due to limited transferability of land rights makes it more difficult to properly value land. Conflicts about compensation mechanisms and amounts have been documented for some recent biofuels projects in Tanzania (for example, Sulle & Nelson 2009).

Use of International Courts to Protect Land Rights

Land rights issues are directly related to human rights, and recent years have witnessed growing convergence between land rights and human rights discourses. Diverse groups like indigenous peoples and advocacy organisations have used human rights language to support land claims, and development agencies have pursued rights-based approaches as a means for empowerment. International tribunals have been more prepared to use human rights instruments with regard to resource access disputes, and in several cases they have linked government action undermining resource access for vulnerable groups to human rights violations.

While a 'human right to land' as such has no basis in international law, several human rights are directly relevant to land rights. Even where local land rights are based on customary systems that have no legal recognition, they constitute 'property' protected by the human right to property. This right is internationally recognised, for instance, by the Universal Declaration of Human Rights (Article 17), the American Convention on Human Rights (Article 21) and the African Charter on Human and Peoples' Rights (Article 14). The Inter-American Court of Human Rights and more recently the African Commission on Human and Peoples' Rights have specifically interpreted the right to property as protecting the collective rights customarily held by indigenous and tribal peoples over their ancestral territories – even in the absence of formal titles or legal recognition under national law.¹⁶ Where people depend on land for their food security, local land rights are also protected by the right to adequate food recognised by Article 25 of the Universal Declaration of Human Rights and Article 11 of the International Covenant on Economic, Social and Cultural Rights. And where indigenous and tribal peoples are involved, international law requires governments and investors to seek the free, prior and informed consent of these groups. This principle is enshrined in the 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted by the International Labour Organisation (Convention No. 169). The Convention is legally binding for the states that have ratified it.

A brief discussion of some international cases provides insights into the relevance of human rights law to the protection of local land rights. The most extensive jurisprudence in this regard has been developed by the Inter-American Court of Human Rights. In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court held that the right to property of an indigenous people had been violated because, though Nicaraguan legislation protected the resource rights of indigenous peoples, there were no specific procedures to secure these rights, no land titles had actually been issued and natural resource conces-

sions had been granted to investors without prior local consultation.¹⁷ Similarly, in *Saramaka People v. Suriname*, the Inter-American Court found that the collective right to property of the Saramaka people had been violated because the state had awarded timber and mining rights without prior consultation of the Saramakas, without these obtaining a 'reasonable benefit' from the natural resource investments and without proper environmental and social impact assessment.¹⁸ Besides cases involving interference with local land rights to pave the way to natural resource investments, the Inter-American Court has also dealt with issues concerning land restitution. In *Sawhoyamaxa v. Paraguay*, an indigenous community claimed the restitution of their ancestral lands. The government of Paraguay resisted this claim, partly because the land belonged to a German investor protected under a bilateral investment treaty between Paraguay and Germany. The Court noted that while the investment treaty contained a provision on expropriation, it did not prohibit expropriation altogether – it merely subjected its legality to certain conditions, including public purpose. The Court held that the public purpose requirement would be met where interfering with the investor's property rights is necessary to realise the human rights of third parties, including through land restitution programmes aimed at realising the human right to property of indigenous peoples.¹⁹

In Africa, use of international human rights institutions in relation to land rights issues is more limited but growing. Violations of the right to property linked to a land conflict were alleged in the ACHPR case *Bakweri Land Claims Committee v. Cameroon*, but the complaint was declared inadmissible due to non-exhaustion of domestic remedies.²⁰ The recent decision by the African Commission on Human and Peoples' Rights in *CEMIRIDE and Minority Rights Group International v. Kenya* concerns a pastoralist group – the Endorois – that the Kenyan government dispossessed of its ancestral lands by establishing a game reserve in 1973, issuing a ruby mining concession in 2002 and selling parts of the land to third parties. Compensation for evictions following the establishment of the game reserve were paid only to a limited number of families (170 out of 400), were grossly below market values and were only received 13 years after resettlement.²¹ The African Commission found that several aspects of Kenyan law had not been complied with, including the constitutional requirement of 'prompt payment of full compensation'. Non-compliance with national law constituted a breach of Article 14 of the African Charter, as this requires compliance with the provisions of 'appropriate laws'.²² In addition, the Commission found that, although a public interest may have been at stake, the forced eviction of the Endorois was 'disproportionate to any public need'.²³

International investment law has also been invoked in relation to land disputes between a foreign investor and a host state. This is not a

new phenomenon – as illustrated by the rather old *de Sabla* and *Tradex Hellas* cases, both concerning land expropriation claims. International investment arbitrators have recently re-affirmed the principle that land redistribution programmes carry an international law obligation for the state to compensate foreign investors for losses suffered. This point was made, for example, in the case *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe*, which was brought by a number of Dutch nationals and concerned brutal and uncompensated land occupations in Zimbabwe. The arbitral tribunal concluded that Zimbabwe had breached its obligation to pay compensation under the investment treaty between the Netherlands and Zimbabwe, and awarded damages.²⁴ International human rights law has also been invoked to secure compensation within the context of land reform. In *Mike Campbell (Pvt) Ltd. and Others v. Republic of Zimbabwe*, the Tribunal of the Southern African Development Community found that Zimbabwe's controversial land reform was racially discriminatory and violated fundamental rights like the right to access courts and receive a fair hearing; the Tribunal ordered the government of Zimbabwe to protect land ownership and pay compensation for lands that had already been expropriated.²⁵

Finally, as already mentioned with regard to gender, recent years have witnessed some high-profile cases where national courts have reviewed government measures affecting local land rights in light of human rights recognised by international law or national constitutions. For example, in *Sesana, Setlhobogwa and Others v. Attorney General*, a case decided entirely on the basis of Botswana's national law, the High Court of Botswana issued a landmark judgment on a petition filed by a group of San (also known as Basarwa or Bushmen) that were relocated by the government from the Central Kalahari Game Reserve in 2002. Although the San had lived as hunter-gatherers on that land from time immemorial and enjoyed resource rights under their customary law, the land was legally owned by the state. The government terminated the provision of vital services such as water, food rations and healthcare in the reserve; withdrew the 'special game licenses' that had exempted the San from the legal prohibition to hunt in the reserve; and prevented the San from entering the reserve without a permit. As a result of these measures, the livelihoods of the San came under threat, and many relocated outside the reserve. Compensation for loss of huts and other assets was promised but not quantified nor paid. The High Court found that although the land was owned by the state, the San were lawfully occupying it, and that the San were forcibly deprived of this possession without their consent. The measures withdrawing special game licenses and restricting entry in the reserve were deemed to be unlawful and unconstitutional.

Conclusion

For millions of people in the developing world, land is an asset of enormous importance – not only as a basis for local livelihoods, but also, in many cases, for culture and social identity. Land is also an increasingly sought-after commodity, as the phenomenon of ‘land grabbing’ clearly shows.

Recent trends in national and international law suggest that an increasingly globalised system of property rights regimes is taking shape, where claims based on interlinked national, international or local (‘customary’) rules come into contact and – possibly – into conflict. Global processes can have direct impacts on local land relations – whether through international ‘land grabs’ or international human rights or investment law decisions. National law reforms – to secure local land rights, mainstream gender into land legislation, enable pastoral mobility and/or to attract foreign investment, for example – are taking place in ‘waves’ that are influenced by diverse factors like pressures from social movements, donors and advocacy groups, international discourses, national concerns about promoting economic growth, and the interests of national elites. The growing ratification of investment treaties and use of international arbitration suggest that national legal frameworks are increasingly tied to (and constrained by) international rules – and foreign investors are indeed using international norms to challenge national law. Similarly, local landholders have relied on international human rights law to protect their ‘customary’ land rights before national or international courts, while women have done the same to challenge the legality of gender-discriminatory norms.

In contexts where stakeholders with widely different negotiating power increasingly come into direct contact (such as large investors acquiring land, host states and local land users), the extent to which competing land claims are backed by solid legal protection and by the resources necessary to enforce it can make a difference to the balance of negotiating power, and to negotiating outcomes.

The stakes are high. Systemic changes in the nature and distribution of land rights, for example as part of large-scale land acquisition processes, can have lasting repercussions for the future of world agriculture and food security – and for the roles that agribusiness and family farming will play in the coming decades. Irrespective of the direction taken, secure local rights are a necessary (but, admittedly, not sufficient) precondition to ensure that local groups do not lose out. Securing local land rights is today more urgent than ever, and recent experience with protecting local land rights in ways that are locally appropriate and accessible to farmers provides useful lessons on how to address this challenge.

Notes

- 1 Kasanga and Kotey (2001:13) estimate that 80-90 percent of all undeveloped land in Ghana is held under customary tenure.
- 2 For example, for a study on the continued application of customary land rights after the implementation of Kenya's land registration programme, see Coldham (1978).
- 3 The case involved a legal challenge to expropriation without compensation of customarily held land within the context of Operation Vijiji, which entailed widespread reallocation of land within and between villages. In the case, the Attorney General had argued that customary land rights do not constitute 'property' under Article 24 of the Constitution. In so doing, he relied on colonial-era case law stating that customary rights do not constitute property rights, and on the provisions of Tanzanian legislation vesting land ownership with the President. In addition, the Attorney General had argued that customary rights could not be considered full-fledged property rights because they are typically not exclusive and non-transferrable.
- 4 The implementing regulations necessary to establish the recording procedure for customary rights are the only statutory instrument to the Land Code that has not yet been adopted.
- 5 *Tongoane and Others v. Minister for Agriculture and Land Affairs and Others*. For another South African gender case, see *Hadebe v. Hadebe and Another*, concerning a land restitution claim.
- 6 This section is based on Toulmin et al. (2004) and Cotula et al. (2006).
- 7 Under Niger's Rural Code and its implementing regulations, the *terroir d'attache* is the area where herders spend most of the year (usually a strategic area, such as a *bas-fond* or the land around a water point), and over which they have priority use rights. Outsiders may gain access to these resources on the basis of negotiations with the right holders.
- 8 See, for instance, Niger's Decree 97-006 of 1997.
- 9 Economic Community of West African States.
- 10 Schoneveld et al. 2010 documented cases of agricultural investments that had not been properly registered.
- 11 Tanzania's Land (Amendment) Act 2004 introduced another land access arrangement – the establishment of joint ventures between foreign investors and local groups (under Article 19(2)(c) of the Land Act 1999, as amended).
- 12 www.tic.co.tz, particularly at <http://www.tic.co.tz/TICWebSite.nsf/2e9cfa-c3e472ee5882572850027f544/729d4c075f2b03fc432572d10024bea6?OpenDocument> (last visited on 28 July 2010).
- 13 See for example an interview with the director of Malibya, a company that runs a 100,000 hectares project in Mali's Office du Niger: <http://www.maliweb.net/category.php?NID=37605>.
- 14 See for example the cases *Metalclad v. Mexico*, *Methanex v. US*, or *Bywater v. Tanzania*.
- 15 E.g., in Cameroon, under Article 23 of Decree 76-166 of 1976.
- 16 See for example the following cases decided by the Inter-American Court: *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *Maya Indigenous Communities of the Toledo District v. Belize*, *Sawhoyamaya Indigenous Community v. Paraguay* and *Saramaka People v. Suriname*. See also the recent case *CEMIRIDE v. Kenya*, decided by the African Commission on Human and Peoples' Rights.
- 17 Paras. 140-155.
- 18 Paras. 115, 129 and 158.
- 19 Para. 140.
- 20 Paras. 5 and 55.
- 21 Para. 110-112 of the African Commission's decision.

- 22 Paras. 219-237.
 23 Paras. 213-214 and 218.
 24 Paras. 107 and 148.
 25 Sections V – VIII of the judgment.

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4 From State to People's Law: Assessing Learning-By-Doing as a Basis of New Land Law¹

Liz Alden Wily

Introduction

More than one billion people around the world hold land through customary mechanisms which have insufficient support in national legislation. Most still hold land as permissive occupants on lands classified as government or public land. Efforts to change this are increasing. However the changes being made are not always practical and customary land owners may find their tenure security relatively unchanged. Commentators blame shortfalls on lack of political will and the high institutional and financial costs involved in regularising customary tenure. These are indeed impediments but this chapter explores a third impediment which rests in the manner of legal reform itself. This results in often too complex and inappropriate mechanisms of securing rights to allow uptake *en masse*. It is suggested that a new approach to law-making in land and natural resource law is required; one which is fully participatory with clients and includes opportunities to trial proposed new paradigms in practice.

To argue the case, the chapter looks to an example in Tanzania where the legal transition from state to people-owned forest lands is solidly underway with the help of a new forest law. Unusual for such legislation, the Forest Act 2002 built upon some years of testing with communities as to how this transition could practically evolve. The result is that ordinary citizens are able to fully follow the law rather than be defeated by its requirements. Nonetheless, it will also be shown that legal constraints remain. These derive almost entirely from weaknesses in supporting new land legislation promulgated several years earlier. Although sound in its principles and arising in significant degree from a process of public consultation, the prescriptions of new land law were not developed on the basis of practical learning by doing or even tested in the field. Therefore, this chapter argues, it lacks critical procedures and constructs for the holding of customary property, which even quite limited piloting would have demonstrated as essential.

Of course arriving at new law through more bottom-up and participatory approaches is not so easy for law-makers who see legal drafting as leading rather than being led. Nor is it easy to secure permission to pilot new approaches where these diminish the authority of governments long used to possessing lands or other natural resources of high value. Where localised and community-led approaches to law-making have been attempted, communities are indisputably empowered and may challenge existing tenure and governances far more extensively than administrations were prepared to consider. They also gain knowledge and solidarity. Nevertheless, the need and demand for more devolved and inclusive approaches to law-making grows. Ultimately, the transition sought must be towards the emergence of national legislation which is more expressly people's law than government's law.

Customary Land Tenure

A tenure issue at the heart of much land reform today, concerns the status of customary land tenure in national policy and statutes.² As implied above, this status has been generally poor; customary land interests historically denied status as private property rights (Alden Wily 2007). This has impacted upon whole societies, affecting more or less all of Africa over the last century and other indigenous communities around the world, often for much longer periods.

The conjunction of customary and indigenous land tenure is not surprising. They are one and the same, sharing their origins in pre-state forms of acquiring, holding and transferring land but since sustained for as long as community-framed land use and land relations remain relevant, broadly the case in many modern agrarian economies. They also share the founding template of these systems as community-based. This means their authority derives from and is sustained by the living community, not the state. Landholding norms and rules may change, as do the composition and shape of the community, but their embeddedness in the social construct of local community does not. It is therefore no surprise that customary or indigenous land relations and forms of ownership vibrantly exist into the present.

However, policies, laws and programmes can readily vitiate or alter community-based norms. While capitalist penetration has greatly influenced the shape of locally-determined rights to land, the most directly reconstructive factor has been recurrent programmes seeking to convert (selected) customary interests into imported forms of tenure, and to remove authority over landholding generally from community to state. The latter has in particular been a century-long enterprise in Africa. In practice, community-based customary tenure survives vibrantly.

This is mainly the result of the limited reach of conversionary programmes formally extinguishing customary tenure (see below). Their limited reach is in turn at least partly the consequence of the lack of fit of the offered statutory alternatives with what exists on the ground. This is decreasingly so in regard to family houses or farms which have become more permanent as shifting cultivation declines, and more amenable to European-derived conceptions of absolute, singular and individually-held forms of tenure. Even by custom, homesteads are now often acknowledged as the private property of individuals or their families, and are also more autonomously disposable, as the case with introduced statutory norms. Where collectively-held forests, pastures and swamps remain within the community's domain, local interpretation of these as real property, albeit held collectively, has also strengthened. Even without such assets to bind the interests of a rural community, communal norms seem to persist. In Kenya, for example, customary procedures as to whom parcels are transferred operate even after half a century of their reconstruction as freehold entitlements (Hunt 2005).

In large parts of the world customary tenure remains a major and active form of landholding. At least one billion people hold rural land customarily (CLEP 2008). This includes 500 million people in Sub-Saharan Africa, where conversionary statutory entitlement into introduced tenure forms is limited to around 10 percent of the total land area. Most of this is located in southern Africa and Kenya (Augustinus & Deininger 2006). This leaves a customary domain of potentially 1.6 billion hectares, even after 300 million hectares of wildlife and forest reserves and parks have been excluded. Given the fact that permanently cultivated lands are surprisingly limited in Africa (around 189 million hectares or only 8 percent of the total land area), most of these lands are forest/woodlands, rangelands, marshlands and other landscapes, held by custom and by logic on a collective basis. Similar high proportions of naturally collective resources exist in parts of Latin America and Asia, such as in Bolivia where 58 percent of the population are indigenous, or in Indonesia where more than 100 million Indonesians regulate their land relations through customary norms (Colchester & Fay 2007). While indigenous Sami of Norway, Maori of New Zealand, Aborigines of Australia and Indians of North America are minorities in the developed world, new legal treatment of their land holding is proving disproportionately influential worldwide (Alden Wily 2007).

Above, the term 'holding' is used with purpose. For a fact upon which this paper rests is that much of the global customary estate is not legally recognised as the property of customary holders. Most of this land is *de jure* or *de facto* government land, variously described as state lands, trust lands, tribal lands, reserves and especially public

lands. Even where title is vested in heads of state or governments as trustees for the national community, the real effects are to render customary owners tenants of the state, or worse, 'squatters' on their own (customary) lands.

How this technical landlessness of majority rural populations has come about is a story in itself. Suffice it to say that it has substantial roots in the resource grabbing habit of colonial enterprise of denying that lands they appropriated were already owned. Or where 'aboriginal title' (as it became known) *was* recognised, to cleverly relocate this as a form of sovereignty (as in Americo-Indian 'nations') and to then declare that this could not co-exist with the sovereignty of the new modern state. Thus ownership was diminished to mere possession or occupancy and use on unowned or unownable and thence national lands (Alden Wily 2007, McAuslan 2006).

Over-emphasis upon colonial subordination must be avoided given that the paradigms it established have been more than amply sustained by post-colonial governments. It is, for example, arguably less the original loss of customary property which modern Kenyans resent today than the way in which recent administrations have been able to turn such norms to their own advantage, resulting in startling levels of inequity among landholders and wrongful if legal takings of public lands for officially-endorsed private purposes (Republic of Kenya, 2004). Nor again should it be assumed that subordination of indigenous or customary property rights has been the sole privilege of countries which endured European colonisation; comparable diminishment of community-based rights is as evident in post-feudal Afghanistan and Nepal as in post-colonial Africa and Latin America (Alden Wily, Chapagain & Shiva 2008).

Land Tenure Reform

Since the 1980s the subordination of indigenous or customary property rights has begun to be challenged. Changes have taken root in a gathering number of new constitutional provisions and land laws such as in New Zealand, Australia, Norway, Ecuador, Bolivia, Mexico, India, Papua New Guinea, Uganda, Tanzania, South Africa and Mozambique.³ However, even among best practice cases, limitations of newly-embedded arrangements for customary rights are legion, making it difficult for newly-acknowledged land owners to practically secure their legally admitted interests. Commentators (and governments) rightly point to the inordinate expense of implementing new land legislation or to the absence of political will for doing so (Adams & Palmer eds. 2007).

While the above are genuine impediments, another factor is the inappropriateness of many procedures laid down for acknowledging customary land rights. The greatest limitation is where formal entitlement is required for a customary interest to be upheld, and frequently still involving the extinction of customary incidents in the process. This is a major drawback in new land laws enacted in Namibia (2002), South Africa (2004), Côte D'Ivoire (1998, 1999) and Mali (1996, 2002). In contrast, new land laws in Uganda (1998) and Tanzania (1999) assure customary owners that whether their right is registered or not it legally exists and will be upheld by the courts as a private property interest.

Whether obligatory or voluntary, registration in new land laws continues in many instances to be unwieldy and too remotely controlled. The steps required are often complex and expensive. Frequently the issues of most concern to customary owners are misjudged. New African land legislation tends to reiterate the focus of 1960s-1970s registration laws: they allow farmers to secure formal title to their farms but are silent on the fate of the much more expansive collective land assets in the community, and which are at risk from ever-rapacious logging, mining, agricultural and ranching enterprises. Many new land laws compound limitations by failing to acknowledge that customary land interests in the modern world do amount to property (Alden Wily 2006).

The effect of many enacted changes is disappointing. For example, none of the 14 million residents of the former homelands in South Africa have taken up the opportunities of the Communal Rights Reform Law, 2002, and which law is in any event under constitutional challenge by four communities which regard its provisions relating to traditional authorities to be against democratic principles. No community in Uganda has set about securing its expansive collective assets under Communal Land Association provided for in the 1998 Land Act. And while Mozambique's Land Law of 1997 proclaims the priority right of communities to customary lands, a significant proportion of these lands has been allocated to private enterprise over and above the will of the relevant communities (Norfolk & Tanner 2007). Mainly only wealthy Namibians in rural areas have been able to obtain title deeds for their farms and often take the opportunity to bring into those estates grazing lands which more rightly belong to the whole community (Mendelsohn 2008). Only at great donor cost are a handful of Tanzanian communities beginning to issue farm titles around which so much of the new Village Land Act, 1999 is structured (Odgaard 2006). Nor have more than a minority of the promised award of lands to customary owners eventuated in Latin America and Asia (Colchester & Fay 2007, Ortiga 2004). Papua New Guineans still cannot defend their lands against the issue of industrial concessions any more than

Angolans or Ghanaians (Rusanen 2005, Foley 2007, Ayine 2008). And yet all have been legally assured of their customary tenure.

A missing element is the needed degree of local participation in the making of laws which so profoundly affect communities and rely upon their compliance to be useful and used. Participation means more than consultation, although this can assist when carried out at national scale, as famously the case in Mozambique (Alden Wily & Mbaya 2001). Ideally participation involves experiential learning to get the paradigms right and ownable by those whom they most affect. Such an approach improves the chance for provisions to be relevant, for cheap, accessible and unfettered mechanisms for applying the law to be entrenched, and for communities to be sufficiently empowered to drive political will to see the law applied. Law-making around Tanzania's expansive forest resource is examined to positively illustrate the case.

Towards Community-Led Law Making: The Tanzanian Case

Regaining Customary Ownership of Forests

This example concerns the treatment of customary forestland interests as reflected in the Forest Act 2002. The law is vastly superior in this respect to prior legislation (Forest Ordinance 1959). Moreover, the new law is being actively *used* by ordinary rural communities as a route to secure, protect and conserve their forest land resources. This would not have been so, had the new forest law not been directly shaped by on-the-ground community forestry developments in the eight years preceding its drafting and promulgation.

The forest/woodland resource (hereafter 'forests') is a critical element of customary property in Tanzania. Cultivated lands represent only 10 percent of the land resource. Around 18 million hectares of forest fall within community domains. Sometimes this is woodland and sometimes more dense highland tropical forest.

The forest policy and law in force until 2002, as laid out in the Forests law (Cap 389) and forest policies of 1986 and 1988, made no provision for communities to be recognised as forest managers, let alone owners. By the 1980s some 12 million hectares of the best forest had already been withdrawn from customary ownership and control to create National Reserves. No compensation was paid to customary owners beyond losses incurred through having to dismantle houses or lose standing crops. This was in accordance with the notion that communities were not land owners but merely lawful occupants on public land. Public land itself was legally undescribed but amounted to government land.

Community access and use rights to the forests were restricted to the collection of fuel wood and minor products for subsistence. Government and, through concession or licence, commercial enterprises, collected on the values of timber and other productive use of forests. Forest Management Plans were primarily about policing boundaries of National or Local Authority Reserves *against* their traditional owners, amply evidenced in the regulations and procedures surrounding forest management at the time (collated by Holmes 1995).

In contrast, the new Forest Act 2002 makes the rural community the major force for forest conservation and management. Detailed provision is made for any of Tanzania's 11,000 rural communities to bring local forest under their control as either a declared Village Land Forest Reserve or Community Reserve, the latter structured to cater to a sub-unit of the village community or to cases where several owning communities wish to co-manage the forest (Forest Act s.32-48). Creation of new National or Local Authority Reserves may occur only when it has been demonstrated to the Minister that the forest cannot be as well regulated by the customary landholders themselves (s.24 (3)). Communities may also lease or manage National Forest Reserves or Local Authority Reserves (s.27 & 39). The Minister may alter the status of these properties to become Village Land Forest Reserves or Community Forest Reserves as appropriate (s.29).

Substantial management powers are granted to communities designated as managers (s.14, 16, 37, 39-41, 47, 65, 78, 84 & 97). They may determine if and how the community reserve is used and by whom, and have the authority to exclude all or some outsiders. They may establish, collect and retain fees for commercial use of products in their forests and levy fines upon those who break rules which the community has laid down. They may determine which tree and plant species are protected, as relevant to local conditions and threat. They may enter into contracts for the use of their forest areas or for specific resources. However they may not lease the forestland to non-members of the community without the approval of the Land Commissioner, or of Parliament in regard to larger areas. Pivotal to all this, communities are legally bound to follow the regulations regarding the Community or Village Forest Reserve which they have devised themselves and entrenched in a simple management plan approved by the local District Council, and in an associated approved Village Forest By-Law.

Communities have taken up these opportunities with alacrity. By 2008 there were no fewer than 4.12 million hectares of forests under community ownership and/or management (MNRT 2008). Over 2.34 million hectares fell within some 400 formally declared or gazetted Village Land Forest Reserves and 1.77 million hectares within 246 National and Local Authority Forest Reserves. In these cases the com-

munity is either the designated management authority or co-manager with government foresters under Joint Management Agreements. More than 2,325 (or 22 percent of) villages were involved.

This is aside from a flourishing class of smaller private family forest reserves on customary property, which numbered several thousand in 2006 (Mlenga 2002, MNRT 2006). There is evidence that the condition of forests under community tenure and management is superior to that of forests still under state management (Kajembe et al. 2006, Blomley et al. 2008, Nelson & Blomley Forthcoming).

Of course there are failures.⁴ Broadly however, the legal change in Tanzania as affecting forestland related rights may be declared a success. This is highly advantageous to communities and the security of their rights over collective resources. In most recent years it has also gained conservation pertinence, as the realities of gross destruction of forests which are *not* under community guardianship have come to light, and place Tanzania's forests among those being most rapidly destroyed in the world (Miledge et al. 2007). Meanwhile the Tanzanian tenure-based approach has impacted upon strategies outside Tanzania as more countries acknowledge that recognising community ownership of the resource is the optimal platform for securing sustainable conservation. This challenges both the necessity for important resources to be owned and controlled by governments and the wisdom of taking customary resources away from communities and then expecting them to conserve these lost assets (Alden Wily & Dewees, 2001, Gibbon & Alden Wily 2001, Gilmour et al. 2004).

The Community Forest Reserve Initiative: 1994-2001

How did this 'success' come about? It began in 1994. By then the failures of coerced on-farm tree planting by villagers to keep them out of natural forests were evident, with continuing loss of cover and quality in government's forests reported (MNRT 1986). A new donor-driven action plan had been launched in 1989 to establish buffer zones around Reserves and to bring as much as possible of the remaining resource into new reserves (MNRT 1988). A Swedish-funded *National Forestry Programme* led the way. By 1992 it had identified six potential Reserves in the north of Tanzania and systematically began surveying, mapping and demarcating the boundaries of the first three future reserves: Duru-Haitemba Forest (9,000 hectares), Mgori Forest (45,000 hectares) and Suledo Forest (167,000 hectares). Millions of dollars were expended (Alden Wily & Sjöholm 1995).

As boundaries were cleared, complex Management Plans devised and Forest Guards deployed, local reaction set in. Affected communities were concerned to secure as much area and products as possible

from the forests before these lands were withdrawn from customary ownership and use. Elephant hunting and timber harvesting in Mgori Forest flourished, aided by corrupt local officials (Alden Wily 1995, 1997a). The five Mgori communities also demanded the boundary be redrawn to leave them more forest resources within their respective village areas. A new 22 km cut-line was cleared at the cost of millions more dollars.

In Duru-Haitemba the affected nine villages responded to the threatened loss of their forested lands by clearing the forest as fast as possible, burning charcoal and establishing farms (Alden Wily & Haule 1995). Village leaders stopped regulating the use of the forest by livestock herds from the south. In Suledo, Masai leaders even sold some parts of the forest to outsiders (Sjoholm & Luono 2002). Government-deployed forest guards in all three areas became notoriously corrupt, willing to issue timber extraction licences to those who paid.

By 1994 the Swedish-funded programme was frustrated. This author was brought in to negotiate with the eight local communities of Duru-Haitemba in Babati District and the five Mgori communities in Singida District. The objective was to achieve their cooperation by offering them (limited) use rights in multiple use zones to be demarcated on the edge of the new Reserves. It took little time for it to emerge that the key source of contention was not *access* but *tenure*; anger that gazettelement would extinguish their customary ownership and jurisdiction over the forests (Alden Wily 1997).

To be fair, community customary regulation of the forests had historically been casual and erratic. Its focus was upon limiting expansion of farms into the most valuable parts of the forests and in the case of Mgori Forest, geared to regulate seasonal access by pastoralists moving through the forests to and from the south of the country and frequently setting fires to find animals to hunt and new green shoots for their livestock. Challenged to demonstrate that they could manage the forest better than the government, should gazettelement be halted, affected communities got to work. With facilitation, including by a sympathetic District Forestry Officer, within the space of several weeks, three of eight Duru-Haitemba communities had thoroughly reviewed every inch of their respective forests areas, agreed boundaries among themselves, developed Forest Management Plans, and deployed their own guards (*ibid.*).

The Plan in each case was simple: the forest was zoned into protection and use areas. Banned, permitted under quota, and freely permitted uses of the forest were defined. The procedure for establishing Forest Management Committees was debated within communities and fine rates agreed. Broadly, forest use was limited to members of the community. Guards were to be appointed on a rota basis, excused com-

munal labour for the duration, and rewarded with part of the fines paid by those offenders they apprehended. Every household pledged to annually plant specified numbers and species of fuel wood trees on farms to offset dependence upon the forest. Women, using large amounts of forest wood to brew local beer and men producing bricks from wood-guzzling kilns were directed by community consensus to plant double the number of trees, and warned that they would in future have to pay for wood collected from the forest for these purposes.⁵

Within four months all eight Duru-Haitemba villages had agreed the boundaries of what were referred to tentatively as 'Village Forest Reserves', had appointed and equipped Village Forest Guards (more than 90 operating in December 1994), evicted pit-sawing groups, halted the use of Duru-Haitemba by outsiders, elected Village Forest Committees, each with a Sub-Village Committee responsible for its own most local portion of the Forest. The main Village Forest Committees were expending collected fines on buying gumboots for the patrolling Guards.

While the Regional Forestry Programme nervously supported the initiative and even redeployed its own government forest guards out of the area, the central forest administration was incensed. The Director visited the area and ordered the communities of Duru-Haitemba to stop managing 'government property'. Fired up with their solidarity and success, the communities demurred. They pointed out their achievements, berated the Director for the corruption of his forest guards prior to community management, observed that the Reserve was yet to be gazetted and never would be; the forest, they said, did not belong to the government but to themselves and that they were in the process of securing formal entitlement for their village areas inclusive of forested commons.

The last point was key, for following on from agricultural policies of the 1980s, it was still national policy in 1995 that each elected village government would be issued a 99-year leasehold over its village area, in order to be able to sub-lease house and farm plots to village members.⁶ Under the aegis of another Swedish-funded project, villages in the district were indeed in the process of agreeing the boundaries of their respective areas, having these formally surveyed. Slowly but surely Village Title Deeds were beginning to be issued by the Ministry of Lands.⁷ New land law in 1999 would reconstruct this arrangement as shortly outlined.

Restoring Forest Rights to Communities

The Duru-Haitemba initiative went from strength to strength and was replicated in Mgori and Suledo Forests (1995-1997) (Alden Wily 1995, Sjöholm & Luono 2002). In the process a great deal of learning-by-

doing accrued, on the part of villagers, supporting District Foresters, local government authorities, and the courts, as the Duru-Haitemba and Mgori communities endeavoured to establish their authority and norms. Each lesson would in due course be reflected in the national forestry policy and legislation, the latter accordingly unusually detailed in its prescriptions. Seven of the most critical (and sometimes bitter) learning experiences are listed below.

- 1 *Community jurisdiction over 'village forests' needs to take precedence.* The need for this was first felt in Duru-Haitemba when a District Magistrate ruled in favour of a timber harvesting group evicted by the community. The group held a licence issued by a Regional Forester. Comparable conflicts of interest repeatedly arose in the Mgori Forest as new village managers confronted corrupt forestry officials. The superior authority of recognised *community* forest authorities (committees) would in due course be entered into the law, bound merely to 'give due regard to advice' from government authorities.⁸
- 2 *Village powers need to be as inclusive and forceful as those enjoyed by the government in respect of its own Local Authority and National Reserves.* This included being able to set their own licence fee levels outside of listed royalties for national forests, to set fines within a fixed upper limit and to retain income from fees and fines without submitting these (relatively minor revenues) to the Treasury, sharing them with District Authorities, or delivering captured illegal timber to District Foresters.⁹ Instances of conflicting interests, in which District or Regional authorities demanded 'their cut' of fines and fees triggered the need for such clarifications and entrenchment of new norms (Alden Wily 1995, 1997b, 2002b).
- 3 *Forest is both forestland and the trees that grow on the land.* The need for this clarification arose out of the tendency for foresters to acknowledge that while communities might own the land, the trees were the property of government. This was obliquely the law as laid out in the longstanding Forest Ordinance.¹⁰ This separation of land and natural trees on the land was done away with by new Forest Policy (1998) then the law of 2002. The law would additionally limit the application of listed reserved species to non-village land, allowing communities to determine which species in their own areas needed to be reserved against felling (Section 65 (1)).
- 4 *Community forest rules, traditional or otherwise, need legal status to ensure courts uphold these rules.* The capacity of elected village governments in Tanzania to enact Village By-Laws subject to the approval

of District Councils had existed since 1978 but had rarely been devised by villages themselves.¹¹ The few Village By-Laws promulgated were usually sent down by District Councils or by the Ministry of Local Government for rubber stamping and application by the village governments (Village Councils).

Duru-Haitemba changed this. The need for communities to turn their new Community Forest Rules into formal Village By-Laws arose when concerned Village Councils found their Rules overruled by the District Court. In the first case, one of the Councils had taken two offenders to court in 1995 for failing to pay forest fines. One culprit argued that it was his right to use the forest as he wished. The other argued that as a non-member of that community he could not be fined. The Magistrate demanded to know the authority upon which the community thought it could levy fines. The Village Forest Rules were duly presented, but the magistrate declared them lacking in force.¹²

Following this and another incident involving the right of a large stock owner to use the protected zone as pasture, every community establishing forest rules began to formalise agreed decisions in the form of Village Forest By-Law. They then submitted these for approval to the local District Council for its endorsement, in accordance with local government law. At that point, the District Forester ensured that the District Magistrate received a copy and would decide cases accordingly. Duru-Haitemba villages would thereafter proudly inform visitors that 'even the President must follow our By-Law if he wants to use our forest' (Alden Wily 1997). The use of Village By-Laws entered the Forest Act, 2002 as a major governance instrument (s.34-35 & 37). Of necessity, Village Forest Management Committees also became formally designated Sub-Committees of the elected Village Council in order to be able to legally apply the local By-Law.

- 5 *A simpler process than gazettelement is needed to make a Village Forest Reserve official and to remove the need for costly formal surveys of boundaries.* As more and more villages established Reserves in Babati District where the flagship community forests of Duru-Haitemba were located, the District Council opened a Register in which to record the details, referenced to files containing the approved Forest Management Plan and By-Law. A detailed description of the forest boundary agreed and witnessed by village authorities and boundary committees with affected neighbouring communities was considered sufficient for registration. This entered the law as Village For-

est Reserve Declaration (s.34 & 41). The new law retained formal gazettement as an option but not necessity. Only 64 communities among 395 have found the survey costs of gazettement worthwhile by the time of writing (2008) and nearly all of which are located in donor-assisted project areas (MNRT 2008).

- 6 *The accountability of villagers appointed to regulate the forest, collect and expend fees and fines needs to be water-tight, as does the accountability of the community as a whole to follow the plan and regulations it devises.* This became steadily more important as declarations of Village Forest Reserves multiplied after 1995, with a proportion of failures emerging over fines and fees money management or failure to regulate timber use as pledged. One Village Council was taken to Court in early 1996 by the District Council and ordered to act upon its commitment to clear the forest of illegally constructed houses, one constructed by the Village Chairman himself. The new forest law would provide for District Authorities to take over the management of a community forest on a temporary basis where the community is shown to have failed to improve its performance after due warnings by the District Forestry Officer (s.41). Communities themselves also learnt to make use of their right to fire corrupt village leaders or forest committee members, already long laid out in local government law (Alden Wily 2000).

- 7 *Communities should be given the opportunity to manage not just forests on their own lands but on non-village land.* The need for this arose in Babati District in respect of National Forest Reserves. Already managing its own Village Reserve, Ayasanda Village Council offered to manage the adjoining area of Bereko National Forest Reserve, and would in the event successfully do so. Villagers adjoining the National Forests of Ufiome and Nou followed suit, adjacent communities being designated Managers of respective areas of those National Reserves which abutted their village lands.

During debates around the new forest legislation, the question arose as to whether in fact these forests should be deemed national or community forests. This was particularly relevant in districts like Babati where the boundaries of Village Areas were being mapped as inclusive of National Forest Reserves. Removal of the implication in new forest law in 2002 that a National Reserve is by definition national property was never fully obtained. However national land law is contrary on this matter, rigorously exact that definition of reserves and parks reflect the conservation legislation under which they fall, not their tenure provenance. This opened the way for a

National Reserve to be acknowledged as either national or community property depending upon the circumstances.

In the Forest Act, 2002, areas of National Reserves placed under the guardianship of adjacent communities were referred to as 'Community Forest Management Areas' to distinguish them from Village Land Forest Reserves. As recorded above, 246 National and Local Authority Forest Reserves were under community management by 2008. In the law, the Minister is granted power to re-zette a national forest as a community forest as appropriate (s. 22 (2), 29). No such cases had occurred by 2008.

Making New Policy and New Law on the Basis of Working Experience

Following the pioneering initiatives supported by Swedish aid,¹³ community-based forest management rapidly evolved as a mainstream route for forest conservation and management. Most initiatives have been facilitated by donor-assisted programmes, all of which adopted the Village Forest Reserve approach as a core element. At the same time that Duru-Haitemba Forest was coming under acknowledged village jurisdiction, programmes in central Tanzania were also encouraging farmers to set aside parts of their private farmlands for natural woodland recovery (*ngitiri*) (Alden Wily & Dewees 2001, Mlenge 2002). As these began to multiply in some thousands, this would shape how Private Forests were defined in the new law (s.15 & 19). Later, a German-funded project explored how a large commercial indigenous plantation could be brought under joint state-people regulation (Alden Wily 1998). The trial was not entirely satisfactory, but the idea of a community being able to manage a commercial plantation for the government or a private investor took root in the law (s.16 & 27).

With supporting expertise from the German Government, a new Director of Forestry began the process of drafting a new National Forest Policy in 1997, eventually published in March 1998. This took close notice of developments on the ground from 1994. The creation of Village Forest Reserves was made one of the strategic priorities.

The legal framework for the promotion of private and community based ownership of forests and trees will be established... The communal tenure of village lands which are administered by elected village councils provides a good legal environment for the development of community based forest and woodland management.

(Forest Policy 1998: 4 & 21)

By 1999 there were sufficient numbers of community forest reserves in place and for demand to be escalating for this author and 13 involved Government Foresters to compile guidelines for other foresters, communities and NGOs to follow. This resulted in the first Guidelines for Community Based Forest Management in Tanzania, duly adopted by the government as official Guidelines (MNRT 2001).

The drafting of the new forest law followed. This would give legal force to the above guidelines. A task of the law was to acknowledge existing Village Forest Reserves as duly formalised (s. 32). While these had not been illegal since the first three were declared in September 1994, they had not enjoyed definitive legal support as community owned and managed estates. Such support as they had enjoyed derived from the Local Government (District Authorities) Act, 1982.

The Guidelines of 2001, the outlines of which were embedded in the Forest Act 2002 and its Regulations (2004), have on the whole proved serviceable, and have recently been reissued with minor procedural amendments (MNRT 2008). Creation of Village Forest Reserves has continued apace and is likely to continue until most of the 18 million hectares of unreserved forest is under village tenure and governance. An upcoming concern of facilitating agencies and government is to assist these communities to revisit their initially conservative forest use plans, to allow for more lucrative revenue flow to still poor forest-owning communities (Blomley et al. 2008).

The Supporting Role of the Changing Land Tenure Environment

Although 'leading factors', neither positive political and administrative will, nor practical learning by doing were alone responsible for the success of the new forest law in offering legal paradigms and procedures so precisely tailored to locally perceived needs, and in enabling an unusually seamless transition from law to application and uptake.

There was in the first instance, the useful background of institutionalised community government in the form of Village Councils, launched in the 1970s and embedded legally in local government legislation of 1982. Unlike so many community committees around the continent, Tanzania's Village Councils were formal and elected local governments, empowered to regulate on a range of subjects, broadly inclusive of land and resource matters. By 1994 Village Councils in Tanzania had acquired substantial governance experience, although this had been applied only mildly to resource matters, largely controlled in practice by district and central government authorities. The awakened environmental consciousness of the 1990s and related human rights considerations also have served their purpose, albeit largely

mediated through international advisers into ubiquitous new forest action plans and policies.¹⁴

Most effective of all was the changing *land tenure environment* in the 1990s, apparent in Tanzania and elsewhere on the continent (Alden Wily & Mbaya 2001). A short background in order, for the key incentive for rural communities to declare Village Forest Reserves today is not difficult to identify. This is to enhance their shaky security of tenure over off-farm assets, and to be able to exercise the primary advantage of ownership, to be able to determine how their land resources are used and by whom. This is a concern for rural communities who endured repeated invasion and over-extraction of local forests by outsiders and those licensed to fell timber by the Forestry Department. It would prove to be the changing status of customary land rights that provided the key legal facilitation for communities to take control of their forests.

Threatening Final Demise and Last Minute Rescue of Customary Rights to Land

In Tanzania, 'villagisation' between 1973 and 1978 had placed new stress on customary tenure. It is debated whether these newly recognised villages (most of which were in fact already in existence), occupied lands in accordance with custom or were rather reconstructed on a new tenure basis which set aside customary rights. The colonial legacy begun by the Germans in the 1890s and refined by the British in a 1923 Land Ordinance still established the position of customary land rights in the 1970s. This held that Africans occupied lands by the permission of the State and did not amount in themselves to private property rights (Alden Wily 1988). A landmark case in 1953-57 had ruled as much (*Mtoro Bin Mwamba v. Attorney-General*). Nonetheless, this lawful *possession* was to be respected.

By the 1980s rapacious policies were seeing large areas of land appropriated by the government for mainly Canadian-funded wheat schemes (Lane & Moorehead 1994). Between 1986 and 1989 new Regulations under an old 1973 rural planning law systematically extinguished customary rights in nine affected areas.¹⁵ This was despite such extinctions being ruled unconstitutional in 1985.¹⁶

Just before a high profile Land Commission mandated to develop land policy was to submit its report to the President in 1992, a new law was enacted extinguishing customary rights throughout the country and prohibiting payment of compensation, on the grounds that customary rights did not amount to property.¹⁷ The motive was broadly adjudged to be the land grabbing ambitions of politicians and senior officials combined with donor pressure to free up land for investment (Peter & Kijo-Bisamba 2007). A year later, this new law was ruled null

and void in most of its parts by the High Court (1993).¹⁸ The Attorney-General appealed in 1994 declaring customary rights to amount 'to mere occupancy on Government land.'¹⁹

The ruling of the Court of Appeal on this matter in 1994 was a watershed. This placed customary interests on an unambiguous footing as property. 'Possession and use of land constitute "property"'.²⁰ *Inter alia* it was ruled that customary interests are protected by the Constitution and that deprivation without fair compensation is prohibited. While it was acknowledged that the President holds the radical title to all land, this holding was to be seen as only in trust for the indigenous inhabitants. As trustee, Presidential powers were to be limited. 'We have considered this momentous issue with the judicial care it deserves', Judge Nyalali wrote challenging the appeal by the Attorney-General. He continued by saying that, 'We realize that if the Deputy Attorney General is correct, then most of the inhabitants of Tanzania Mainland are no better than squatters in their own country. This is a serious proposition'.

The ruling was almost certainly greatly influenced by the findings of the abovementioned Presidential Commission of Inquiry into Land Matters. Chaired by Professor Issa Shivji, the Commission had laboured long and hard for a full two years (1991-1992) and arrived at the principles of fair new land policy (MLHUD 1994). A large part of the inquiry had been devoted to visiting communities throughout the country. Communities in the north which had been evicted from their customary lands to make way for the Canadian-funded commercial wheat schemes made a clear impression on the Commission.

Giving Legal Force to Customary Tenure

Not all the recommendations of the Shivji Land Commission were adopted into new National Land Policy in 1995 or eventually into the new land law, comprising The Land Act 1999 and The Village Land Act 1999. The key recommendation not accepted was advice to do away with separation of ownership of the land and ownership of rights to the land, such as Uganda had done by its Constitution of 1995. Therefore all land in Tanzania remains the property of the nation, vested in the President as Trustee.²¹ Land rights are accordingly rights to occupy and use parcels of this nationally-shared property. This explains the terminology of land titles in Tanzania as Rights of Occupancy. In the case of customary rights (unlike those granted by the State) the law confirms that these may be held in perpetuity and regulated by customary norms.²²

Overall the law was at pains to give customary rights the full force of law as private property interests in land. As well as acknowledging that these exist whether they are registered or not,²³ The Village Land Act is clear that a Customary Right of Occupancy is 'in every respect of equal status and effect with a Granted Right of Occupancy' (Granted Rights being those issued directly by the state, not the community, and mainly applicable in urban areas).²⁴ Moreover, rights which elected Village Councils had obtained as owners of village lands on behalf of their communities were extinguished; the new legislation returns the role of Councils to roles of land governance only. Councils are to regulate land relations and may set up Village Land Registers into which customary rights within the area under its jurisdiction ('village land area') may be recorded, along with subsequent transactions affecting those rights.²⁵

Critically, the law is abundantly clear that a customary right may be held (and registered) as belonging to not only individuals, but couples, families, groups or whole communities, or even several communities if the ownership is so shared, such as might be the case with forests or pasturage.²⁶

In general there has been little in law since 2001 (the year the land laws of 1999 came into force) that would suggest to communities that their ownership of forests within their respective village land areas is not assured. Furthermore, the new land laws provide for customary land rights to be acknowledged as existing in areas reserved for conservation or other public purposes. This has two critical implications: first, should a village 'reserve' its forest area (as the new Forest Act would subsequently promote in 2002) this does not remove such lands from customary tenure; communities may be lawful owner-managers. Second, where gazettment of national forest reserves did *not* extinguish customary rights then the potential exists for the customary owners of such nationally important areas to retrieve these as their own collective property, although the area need not lose its status as a protected area of national importance. At the time of writing no community has attempted to retrieve a National Forest Reserve as community property, although no fewer than one thousand communities co-manage these areas, as shown above.

Limitations

There are however more practical constraints to community securement of local forestlands as their rightful property. The first lies in the process of voluntary registration of rights and to which much of the Village Land Act is devoted. While allowing for spousal co-ownership and other timely innovations, the classical focus of titling remains, that is, as geared towards registering the ownership of private homes, farms

and other fixed assets like shops.²⁷ Communal properties like forests and pastures are placed in somewhat uncertain territory. Helpfully, the law implies that before an individual property may be registered, the community is bound to first identify and describe every communal area within the village land area in the Village Public Charges Register.²⁸ Although there is nothing actually preventing the Council issuing the community with a Customary Right of Occupancy for these commons, there is no developed provision in the law to encourage and guide them to do so. Some communities might well wonder if the registration of these properties in the Public Charges Register represents more 'setting-aside' of lands *against* entitlement, than acknowledgement of these as private, collectively-owned community property.

A greater constraint to securing communal property arises from the manner in which the land area of each village is defined. Although the Village Land Act is explicit that this may include land *other* than lands which are farmed (s. 7.1) it takes into account the habit of some district authorities of the past as excluding much of the woodland and pasture of communities from the registered description of 'Village Land Area'. This was a routine occurrence during the 1980s when District Councils and Village Councils were trying to limit the survey costs involved in defining and registering Village Land Areas. As a consequence some communities have found that their traditional forest areas were excluded from the recorded definition of their Village Land Areas.

The new law is also not helpful in offering contradictory definitions of General Land (in effect Government Land). In the Village Land Act, this is described as a residual category as 'public land is land which is not reserved land or village land'. Contrarily, the definition of the sister Land Act adds '... and which includes unoccupied or unused village land' (s. 2). Most communities try *not* to occupy their forest lands and many try to declare key areas out of bounds for use, in order to rehabilitate or protect them. A too literal interpretation of occupation and use could deprive communities of substantial rangeland, wetland and forest lands.

A more concrete threat to collective tenure security derives from the inclusion of 'investments of national interest' as specific grounds on which the President may acquire village land, albeit through elaborated modern compulsory acquisition procedures (s.4). The Investment Promotions Board has been working hard in recent years to find land for foreign investors, who are now permitted to directly own and transfer land for such purposes (by amendment to the Land Act in 2004).²⁹ The Board's *Land Bank Scheme* seeks 'unoccupied and unused' land from villages to provide to investors, backed up by periodic 'instructions' from the government to make such land available. As of 2006, 2.5 million hectares had been acquired from villagers through this

scheme (Odgaard 2006) and there is no reason to think that this will not rise as investor interest grows and government persuasion hardens. This is much easier than compulsorily acquiring (and paying for) customarily-owned village land as communities are simply encouraged to surrender these areas.

Meanwhile World Bank and other donor supported programmes have been actively supporting titling programmes on village lands but which unfortunately once again focus upon house and farm entitlement, and largely for the purposes of collateralisation. As of old, such programmes ignore collective lands within Village Land Areas, despite these being self-evidently most at risk of wrongful appropriation. Private farm titling also tends to encourage a flurry of expansion into village communal lands.³⁰

A further threat to communal properties derives from the wildlife sector. Unlike the forestry sector, the values of wildlife for hunting concessions have been so high over the last two decades that the Wildlife Department has exercised little constraint in allocating swathes of customary property (village land) in northern Tanzania to foreign interests, on the grounds that the state, not communities, owns wildlife. This is a strategy embedded in the Wildlife Policy 1998 and 2002 Regulations. The vast village domains of pastoralists have been primarily affected, adding to existing threat from the National Livestock Policy 2006. This echoes the government's plan to sedentise nomads, bringing their production under ranching schemes (Odgaard 2006), an attempt last tried and failed in the 1960s and 1970s.³¹ Needless to say, many of the pastoral lands are wooded, as are many integrated pasture and woodland areas in other drier parts of the country. Through the allocation of hunting concessions by the Wildlife Division, rural communities in the north of Tanzania have lost literally millions of prime collectively owned property, even though in law it is only control over the wildlife that they have lost.

The Role of Village Forest Reserves in Customary Land Security Today

It is into this pool of vulnerability of collectively owned customary properties that the Forest Act's accessible construct of Village Land and Community Forest Reserves shows its exceptional utility. As law and policy currently stand, and/or are interpreted, this represents the most tangible mechanism through which rural communities may clarify and entrench their customary possession and jurisdiction of common lands.

At a minimum, declaration of Village Reserves removes large areas of community land from potential designation as 'unused or unoccupied', demonstrating these as purposely unoccupied. Creation of Vil-

lage Reserves additionally triggers precise inter-community boundary definition within previously broad wooded boundary areas and which would have run the risk of being declared owned by neither community and made directly vulnerable to Government claims that these lands are unowned or unused. Declaration of Village Land Forest Reserves has for some time enabled many communities to re-align boundaries where incautious earlier mapping of Village Land Areas by district authorities had deliberately or inadvertently removed their collective properties.

Still, the lack of an explicit land law construct through which a community is not only encouraged but bound to register its communal assets as collective private property may be seen as a dangerous legal lacuna for communities. Until such a mechanism is provided rural communities in Tanzania are quite right to look to the village forest reserve construct to help secure these resources.

A Final Word

The case elaborated in this chapter, forest land rights in Tanzania, is not the only occasion whereby fairer and more workable natural resources law has been pursued through an experiential and community-based approach, extending well beyond public consultations.

Benin is another case where a new land law is emerging out of substantial piloting in villages (Lavigne Delville 2004). Cases most familiar to this author include Afghanistan and Sudan (Alden Wily 2008b). In Afghanistan the issue at stake is the ownership of the massive pasture resource, which embraces anywhere from 45 to 65 percent of the national land area and supports millions of rural families. Uncertainty as to its ownership has blighted state-people and inter-tribal relations for the last century and was one of many drivers to civil war in the 1980s. The early post-conflict administration from 2001 remained resistant to amending the status of pasture as government property and which it had chosen to allocate to favoured Pashtun nomadic groups, thereby overlaying rights often anciently held by settled populations. It fell to interested conflict resolution actors working with local communities to trial more workable paradigms, gradually involving key government departments. The result in 2008 is a quite radically altered draft Rangeland Law sponsored by the Ministry of Agriculture. It remains far from clear that sufficient support can be garnered from other government agencies, politicians (and conservative foreign advisers) to see these proposals into law, and from law into active application. Reluctant government support in the piloting exercises which underwrite the new proposals suggests that willingness to genuinely devolve even the regu-

latory powers communities need to be effective, is hard to come by, in an environment which remains determinedly centralised. While gains have been made it is unlikely at this point that community-based pasture management will be underwritten with acknowledgement of communities as pasture owners (Alden Wily 2008c).

In 2004-05, a comparable learning by doing initiative was launched in central Sudan to tackle contested relations between Khartoum and communities over the ownership of invaluable plains lands (Alden Wily 2008b). This proved even less successful in that resulting drafted legislation in the two states of Southern Kordofan and Blue Nile never reached their legislatures and showed no sign of doing in the years since. Nevertheless, the process of working in the field with communities to devise fair and workable new tenure law has had other positive outcomes; many tens of rural communities have used the exploratory experience to clarify inter-tribal and cultivator-nomad disputes over lands and to harden their claims for restitution of millions of hectares of wrongfully appropriated plains lands before and during the civil war. Meanwhile Southern Sudan adopted many aspects of the un-adopted legislation in the north into its own land law provisions, in draft in 2008. Most particularly, these drafts fully acknowledge that customary land rights, including those affecting commons, are property interests and must be fully upheld by courts and administrations alike.

These cases demonstrate that workable legal paradigms can emerge out of practical engagement with those citizens most affected by land and resource legislation and particularly from processes which seek to do more than consult, but to learn by doing. By ensuring that appropriate officials are brought into the process, real progress may be made in breaking down the traditional resistance of officialdom to new paradigms and fostering waning administrative and political will. In this manner, people's law rather than government's law has a better chance to evolve and to be more useful and lasting. Where state-people differences over land rights have shown themselves able to all too easily spill into open conflict, as in Sudan and Afghanistan, the adoption of a people's law-making approach is even more urgently required – although it may surely take much longer to bring results than has been exemplified in the positive historical environment of Tanzania.

Notes

- 1 This paper was drafted in February 2008.
- 2 See Alden Wily, Chapagain & Sharma 2008 for a global review of land reform.

- 3 Some refer to tiny proportions of national populations, such as Norway's Finnmark Law 2005 recognising Sami land rights and India's Forest Rights Act 2008 limiting its scope to India's 10 million forest dwellers.
- 4 Around three in ten villages do a poor job of carrying through on their plans and one fails altogether; Alden Wily 2002. Also see Blomley and Ramadhani 2006.
- 5 A sample Village Forest Management Plans is provided in Alden Wily 1995.
- 6 The Regulation of Land Tenure (Established Villages) Act 1992.
- 7 The Land Management Programme (LAMP).
- 8 Sections 8 (2), 14, 30 (2), 34 (5) (6).
- 9 Sections 14, 34, 65, 78, 79.
- 10 More dramatic use of this separation of trees from the land had occurred in a number of other African states, such as in Liberia (Alden Wily 2007).
- 11 The Villages and Ujamaa Villages (Registration, Designation and Administration) Act No. 21 of 1975, superseded by the Local Government (District Authorities) Act No. 7 of 1982, amended significantly in 1992.
- 12 These cases are reported upon in Alden Wily 1997.
- 13 The Duru-Haitemba and other early community-based forest management projects in Arusha Region were initiated under the Swedish Regional Forestry Programme but sustained and expanded by the Swedish-funded Land Management Programme (LAMP), continuing until the present (2008).
- 14 Among which the non-binding Forest Principles and Agenda 21 under Rio in 1992 must prominently rank as globally highly influential. Refer FAO 2002, Ch. 10 for treatment. ILO's Convention No. 169, adopted in 1989 on Indigenous and Tribal Peoples has also been influential.
- 15 Government Notices 656 of 1986, 88 of 1987, 338 of 1988 and 260 of 1989, made under Rural Lands (Planning and Utilization) Act No. 14 of 1973.
- 16 In a case brought by Barabaig against the State, High Court of Arusha Civil Case 27 of 1985.
- 17 Regulation of Land Tenure (Established Villages) Act No. 22 of 1992.
- 18 Lohay Akonaay and Another v. The Hon. Attorney-General, High Court of Tanzania at Arusha Misc. Civil Case No. 1 of 1993 (unreported). Akonaay and his son had already successfully appealed against their eviction under the 1987 Government Order which cancelled customary rights in 92 villages, and were threatened with eviction again under the new act.
- 19 Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 31 of 1993. Reported in 1995 2 LRC 399. The full opinion of this landmark ruling is reproduced in Peter 1997.
- 20 Judgment by C.L. Nyalali, Civil Appeal No. 31 of 1994, Court of Appeal of Tanzania.
- 21 The Land Act, s. 3 (1) a.
- 22 Village Land Act, s.18.1.
- 23 Village Land Act, s. 2.
- 24 Village Land Act, s.2.18.
- 25 Village Land Act, s.7.6 and 7.7.
- 26 Village Land Act, s. 11, 12 and 13.
- 27 Village Land Act, Part IV Sub Part B.
- 28 Village Land Act, s.12 and 13 and Village Land Act Regulations.
- 29 Amendments to sections 19, 20 and 37 of the Land Act, 1999 by The Land (Amendment) Act No. 2 of 2004 (s. 2-6).
- 30 The two main programmes are a World Bank funded programme known as SPILL and a programme launched under the guidance of Hernando de Soto, MKURAMBI-TA, funded by the Norwegian Government.
- 31 Under the Range Development and Management Act 1964.

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5 Future Cadastres

*Paul Van Der Molen*¹

Introduction

Significant differences are currently exhibited between the cadastres of the world's some 30 to 50 countries which either possess, or will shortly possess cadastres with an appropriate performance, and the other 140-160 that will not have implemented appropriate systems within the near future (van der Molen & Lemmen 2005). Many countries still have a great deal of work to do before they can meet the challenges laid down in 'Cadastre 2014' (Kaufmann & Steudler 1998), although they could adopt its propositions as guiding principles.

An enlightened view of the current situation would be to perceive the cadastral systems (for a definition of a 'cadastre' see FIG² Statement on the Cadastre 1995) of all countries as being in a phase of development; the only difference between them is that they are not all in the same phase. However, an inventory of the *status quo* of cadastres (see second section) reveals significant differences between two categories of countries, i.e. those in which cadastres could develop as an integral element in the continual evolution of their country's institutions, and those countries in which this was either not possible, or did not take place. The first category have implemented cadastres with a national coverage and within an accepted structure of public administration and legal frameworks; the second category is confronted with legal pluralism (Von Benda-Beckmann 1991), and their governments are currently fully occupied with providing for nation building, governance, and the enforcement of their legislation. The different situations confronting the countries in these two categories give rise to the expectation that their perceptions of 'Cadastre 2014' will also be dissimilar.

However, if it can be assumed that the world's community is serious about the requirement of appropriate cadastres for the eradication of poverty (World Bank 2003, UN/Habitat 2004, FAO 2002), sustainable development (Bathurst 1999, FIG 2001) and economic development (De Soto 2000, World Bank 2008), it will be evident that attention should be devoted primarily to the future cadastres of countries in the second category. These countries' cadastres will not necessarily be 'Cadastre 2014' compliant; they will probably be simple systems, designed

to make the appropriate contribution to the basic security of land tenure, basic land markets, and basic government land policy. The degree of simplicity of these cadastres will be determined by the purposes for which they are intended.

This chapter begins with a brief analysis of the potential purposes and continues with an outline description of a potential migration path that would allow for the incremental development of systems in response to society's needs.

Background

At present, there is no systematic worldwide monitoring of cadastres, although Commission 7 of the FIG is attempting to provide for monitoring of this nature (Steudler & Kaufmann 2002) and the standardised country reports.³ For Europe, the Working Party on Land Administration of the UN/ECE publishes a Land Inventory⁴ and the annual World Bank Doing Business Reports comprise a chapter on registration of property rights in some 178 countries (e.g. World Bank 2008). Nevertheless, the findings from Van der Molen & Lemmen (2005) provide a basis for some cautious conclusions.

Cadastres are almost always restricted to land tenure, based on Western common law and civil codes (statutory land tenure); cadastres would appear to have difficulties with catering for other forms of land tenure (Toulmin & Quan 2000, Burns 2007, Payne et al. 2008).

Land tenure arrangements are both complex and locally determined, and they cannot readily be replaced by statutory forms of land tenure. Many examples are known of populations which continue to exhibit their traditional conduct even after their government has introduced new statutory forms of land tenure and registration (Von Benda-Beckmann 1991, Bruce & Migot-Adholla 1993). In other words, these new forms of land tenure are alien to the population, probably because they are not compatible with the country's traditional societal structure. Consequently the reform of land tenure needs to take more account of the prevailing standards and values in the country's society.

The allocation of duties, responsibilities and competences in public administration (inclusive of cadastres) is not always commensurate with the public's understanding of the structure of their society, as a result of which they do not always have affinity with the organisation of their government. Consequently cadastral agencies need to take more account of the population's perception of their governance structure (World Bank 2003).

Political Aspects of Cadastres

A cadastre is not an end in itself. It is a tool to serve society. What the society requires is a matter of political choices about 'the legal and social prescription that dictate how the land and the benefits of the land are to be allocated' (UN/ECE 1996). Manji (2006) demonstrates that this is not common thinking and that some countries 'were faced with a new land law before any true political discussion'. The political nature of the land issue relates to different approaches, in the whole spectrum from a communist to liberal ideology. Neo-liberal approaches appear to be promoted by De Soto (2000) and the World Bank (2003), while many experts challenge this approach, amongst them Manji (2006) and Benda-Beckmann (2003).

Meanwhile, the relationship between land policy and cadastral systems has not been explored much, at least not during two meetings organised by the ITC/Kadaster School for Land Administration Studies (UNU Windhoek 2005, UNU Tokyo 2006), where decision-makers on 'land' in Africa and Asia reflected on the issue, concluding that the relation was a difficult one. This relationship by consequence is a field for research (Van der Molen 2006), because the way a government wants to deal with access to land and land related benefits will have impact on the choice of the cadastral concept, design and content of the information system, processes, and legal meaning of the data (Van der Molen 2002). Development of laws governing cadastres therefore require adequate political consideration and consent, embedded in an acceptance of societal groups ensuring that the new law is fair. The basics of cadastres are simple: the registrar writes in the land book the name of an owner, and the land surveyor surveys a boundary and draws it on the map. However, if it is the wrong name, and the wrong line, then citizen's trust is lost and the system will be obsolete. This is proven to be extra manifest in post-conflict countries (FIG/UN 2003).

Development of the Cadastre

The implementation of cadastral concepts imported from other countries has often proven to be unsuccessful. Many problems are encountered due to the incompatibility of these concepts with forms of land tenure based on the country's history and cultural development, an incompatibility which results in a cadastral system that is often totally inadequate for the community's needs. This sometimes leads to the assumption that it would be preferable for governments to begin with the 'introduction of land information systems that do not include a cadastre' (Fourie 2001). Although 'Cadastre 2014' offers these countries

significant guidelines, they are still far from the achievement of the vision as phrased in this document.

Basic Concepts of Traditional Land Administration

Cadastral systems are based on the immovable nature of land, where 'land' should be understood as the surface inclusive of all the space above the surface, all the layers below the surface, all groundwater, and all fixtures. The concept of land ownership employed by the various groups of Western legislation is based on this broad interpretation of what 'land' is.

The key is the conventional concept of ownership; for example, the Netherlands' Civil Code (Articles 5:20 and 5:21) defines ownership of land as ownership of the 'ground' including 'ownership of all space above surface, all earth layers below, all groundwater, and all fixtures'. Similar definitions are employed in Germany, in the Bürgerliches Gesetzbuch (§ 905), in the UK, in France, and in Belgium (RAVI 2000).

Consequently ownership constitutes the most comprehensive right a person can possess with respect to an object, being comprised of the following characteristics (UN/ECE/Trade 1995):

- The owner is free to use the object, whilst observing the rights of other persons and the restrictions pursuant to the law or the rules of unwritten law;
- Ownership is an exclusive right, i.e. no other person may exercise any right over the object unless pursuant to legal or contractual grounds;
- In principle the owner is entitled to all his property.

However ownership may be subject to the following restrictions:

- The rights of other persons with respect to the object, both in terms of real rights and personal rights;
- Restrictions pursuant to the applicable legislation;
- Restrictions pursuant to unwritten law.

This concept of ownership largely determines the nature of the cadastre: the right of ownership is exercised by an individual person. The broad concept of ownership is often understood as a bundle of rights that can be sub-divided into separate rights: other persons can possess parts of the bundle of rights, if these rights can be separated from the strict 'ownership' of land. Examples of these subdivided rights are rights of superficies, accession, mineral rights, rights of apartment, and rights of condominium. Modern approaches speak about 'RRR', which stands for rights + restrictions + responsibilities on land (Bennet et al. 2006).

Consequently the first basic concept of conventional cadastres pertains to the unambiguous identification of persons who exercise real rights.

Since the objective of cadastral systems is to register real rights within the statutory system of real rights (the Roman-law family actually incorporates a *numerus clausus* of real rights) the registration will be limited to those rights, as will the mapping of boundaries on the cadastral map. It should be realised that the cadastre endeavours to record or register rights to and interests in land because the law recognises these rights and interests as a legitimate relationship between a rightful claimant and a specific parcel of land. Consequently this relationship has a legal significance, i.e. a legal definition has been drawn up of the relationship that is legally binding to other persons (third parties). This is due to the fact that although land rights refer to the relationship between man and land, society perceives this as a man-man relationship with respect to land. As a result other people will need to have access to information about the legal status of land so as to determine their approach to the purchase of land, creation of derived rights, etc. In the absence of a legal definition of property rights and legally-defined mechanisms for their acquisition, transfer, protection, restriction or creation the recording or registration of these rights and interests would be legally meaningless.

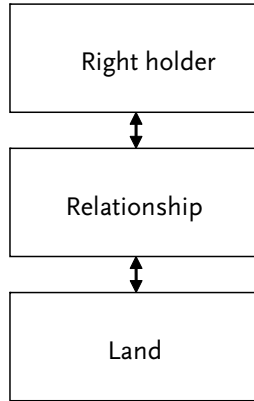
Consequently the second basic concept of the conventional cadastre pertains to the unambiguous definition of the rights to land, either pursuant to statutory law (in the French and German-law families) or pursuant to common law (in the English-law family).

Western jurisdictions employ a legal concept whereby the object on which rights are exercised, the land, is a known spatial unit. So as to render this spatial unit unambiguous to both the owner and third parties it is required to possess an explicit definition, and to be specified by geometric determination based on measurements of the boundaries determined by either approximate ('general boundaries') or accurate ('fixed boundaries') means. This is also applicable to elements of the bundle of rights that are segregated and assigned to other title-holders, if the specific object on which these title-holders exercise their rights are also established by geometric means.

Consequently the third basic concept of a conventional cadastre pertains to the object on which rights are exercised being provided with an explicit definition and being capable of determination by geometric means, segregation from other objects, and mapping.

Henssen (Henssen 1996) summarised these basic concepts, as elaborated by Kaufmann & Steudler (Kaufmann & Steudler 1998), in the diagram shown in Figure 1.

Figure 1 *Conventional cadastral concept*



This diagram can be further elaborated on the basis of the discussion of the substance of right holder, relation, and land. So as to render the content more specific, ‘right holder’ – as the exerciser of rights – is defined as either an individual or a group of specific members comprised of a legally-recognised number of individual members, because they assign legal representation of the collective. Interestingly, ultimate legal certainty about this relationship collective-individual member is normally provided by chambers of commerce-type of registers (‘trade-registers’). ‘Relationship’ is defined as a real right (right *in rem*) that is provided with a strict legal definition. ‘Land’ is perceived as a defined parcel of land, i.e. a parcel of land which possesses demarcated boundaries established either by an approximate or accurate determination, but always with specified boundaries. The modified diagram is shown in Figure 2.

With the growing awareness that collective right holders (apart from private law bodies like companies and foundations) more and more include public organisations, another development is evolving, namely that rights to immovables exercised by public bodies often regard other land objects than cadastral parcels (such as zoning areas, soil protection areas), so that the cadastral parcel box should be enlarged with other legal objects. This is also envisaged by ‘Cadastre 2014’. This is, however, beyond the scope of this paper (Figure 3).

Figure 2 *Elaborated conventional (Western) cadastral concept*

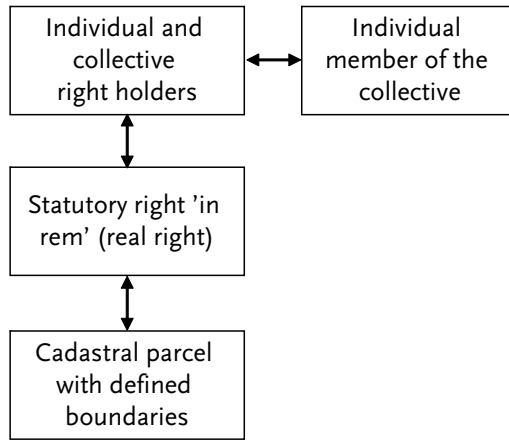
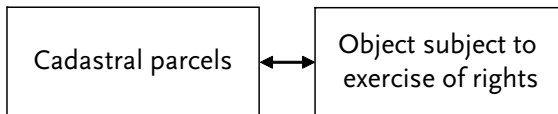


Figure 3 *Extension of the concept of cadastral parcel toward legal cadastral object*



New Insights into the Man-Land Relationship

Although the rigidity of the ‘Western’ approach is often challenged (e.g. Bruce & Migot-Adholla 1993) the four World Bank seminars on Land Policy in 2003 held in Budapest (3-6 April), Kampala (April 29-May 2), Pachuca (19-22 May) and Phnom Penh (4-6 June) exhibit a major breakthrough with respect to the recognition of what has been referred to as indigenous systems of land tenure, i.e. customary tenure and other forms of non-formal tenure (e.g. informal ‘rights’). The World Bank states that ‘it now is widely recognised that the universal provision of secure land rights within a country does not require uniformity of the legal arrangements, and that there is some form of consensus on the desirability of having legal recognition of customary forms of tenure and land right for the indigenous people. The Bank devotes greater attention to the sustainable management and evolution of customary tenure systems. Communities should be allowed to choose between different types of tenure’ (World Bank 2003).

Research reveals that some countries develop land legislation which endeavours to integrate customary tenure within the formal system (Van der Molen & Silayo 2008). For example, Bosworth (2002) reports on Uganda, where the Land Act (enacted in 1998) provides for meth-

ods to adjudicate customary landrights and comprises the issuing of (a) certificates of customary ownership; and (b) occupation-certificates for tenants on mailo land⁵, as well as the establishment of a Land Fund to assist in the market-based transfer of rights between tenants and landowners. These certificates will be mortgageable. Consequently, the Act recognises group rights to land by means of the registration of communal land associations with elected management committees. Quadros (2002) reports on Mozambique, where the Land Act 1998, recognises customary rights in the form of co-titling and the need to consult with the local communities as part of the authorisation process for new investments. In Namibia, a new Land Law is pending that will address the broad issues of communal land reform by means of the creation of regional land boards (Pohamba 2002). Van den Berg (2000) states that under a new Act in South Africa communal titles can be granted to Communal Property Associations. In Bolivia the INRA Act (1996) (*Ley Instituto Nacional Reforma Agraria*) provides for the recognition of *Tierras Comunitarias de Origen* (TCOs), i.e. land belonging to indigenous groups (Zoomers 2000, Assink 2008).

The recognition of customary rights also devotes attention to rights of sheep and cattle farmers. In many countries (such as Kenya, Tanzania, Rwanda), there are serious conflicts between traditional nomadic sheep or cattle farmers and arable farmers about grazing and farming lands. Tanzania's new village Land Act provides for the sharing of pastoral and agricultural land by sheep and cattle farmers and arable farmers on the basis of adjudication and mutual agreements (Mutakyamilwa 2002). In analogy with pastoral rights, the problem of overlapping rights has yet to be resolved in many countries. For Kenya, a solution is proposed by Lengoiboni (2011).

This brings us to the issue of the nature of the spatial unit which forms the basis for registration. Objects on which customary rights are exercised are not always accurately defined (Neate 1999). Within this context, Österberg (2002) advocates a flexible and non-traditional approach to the spatial component. Fourie (2002a, 2002b) notes that non-cadastral information should be integrated in spatial information systems, since 'the high accuracies and expensive professional expertise associated with the cadastre has meant that there is too little cadastral coverage in Africa'.

The conclusion to be drawn is that the conventional basic concept is affected in three ways:

- The subject: group ownership with defined and non-defined membership;
- The rights: types of customary and non-formal rights ('informal rights');

- The object: other objects than accurate and established units of cadastral parcels.

The Impact on the Basic Concept of a Cadastre

Do governments bear the sole responsibility for the definition of the subjects, objects and rights that are to be recorded? The answer is obviously 'no', since the government is not the only party involved in the definition of the relationship between man and land. In addition to land rights based on statutory and common law, these relationships can also be based on the country's customary traditions or its informal use. As such a cadastre possesses a direct relationship with the prevailing standards and values in the country's society or community.

In the absence of an in-depth understanding of land tenure arrangements it will prove difficult, if not impossible, to identify the processes involved in the determination, recording and dissemination of information about tenure arrangements. When viewed from a land-tenure perspective cadastral systems entail the registration of the existing land tenure in a manner which imparts a given added value – i.e. the certainty offered to the persons possessing registered rights that those rights will remain in force until such time as they might be revoked in a legal and comprehensible manner. In our opinion the meaning of the term legal within this context should be understood as any system of standards and values that offers transparency, reliability and predictability to the relevant community. This in turn implies that customary rights or indigenous standards should be regarded as fully eligible for land registration and cadastral purposes. In fact this also needs to extend to what are referred to as informal settlements (irrespective of their precise nature); these should also be eligible for the purposes of registration of titles to land, subject to the provision that the land relationships are generally accepted and perceived as being legitimate within society – i.e. provided that the relevant society regards the rights to land as being legitimate, and provided that the population is familiar with the rules pertaining to the allocation, acquisition and transfer of land. This once again demonstrates that in essence it is possible to register or maintain records of relationships between man and land irrespective of the nature of the country's jurisdiction; this ability offers opportunities for the integration of statutory, customary and informal arrangements within cadastral systems. In fact, the opposite is actually true: the registration and recording of relationships between man and land will be meaningless, if those relationships are not accepted and the standards and values pertaining to those arrangements lack transparency, reliability and predictability. Governments are, irrespective of the situation in the relevant country, exhibiting an increasing tendency

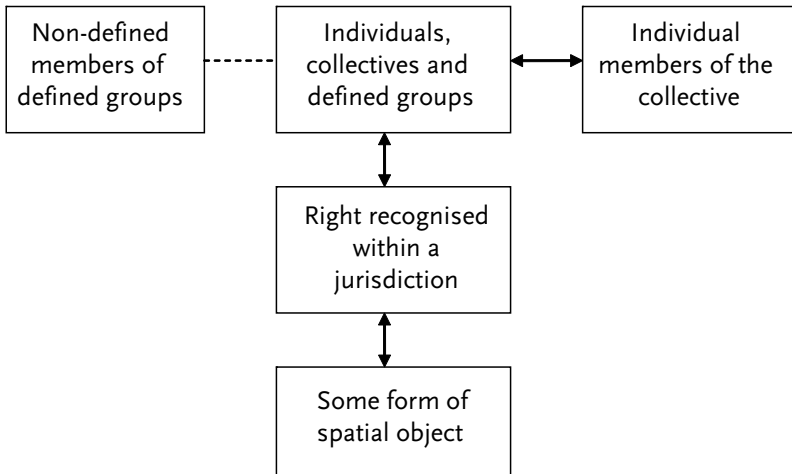
to incorporate some form of recognition of customary land tenure in their land legislation (Van der Molen & Silayo 2008).

These measures provide for the registration of these rights to land in the existing cadastre or in separate 'official' registers (such as native title registers) (Neate 1999). This would appear to be preferable to the imposition of a foreign land tenure system on a society with its own land standards and values, as is also apparent from Bruce & Migot-Adholla's discussion of the 'replacement paradigm' or 'adaptation paradigm' (1993). However in some situations it may well be necessary to replace these rights, i.e. in the event of the collapse of customary structures as a result of:

- Population pressures resulting in the implementation of individual forms of land tenure;
- The scarcity of land, thereby rendering the traditional allocation of land impossible;
- The need for formal credit for smallholders;
- The growth in land-market initiatives;
- The increasing migration of the population;
- The development of conflicts between the customary groups at the periphery of their jurisdiction;
- The need for the deployment of land management tools (planning & development, lands taxation);
- The need for government-led land and water-resource management.

In such situations preference is given to an inter-disciplinary approach to the formulation of land administration policy in which land surveyors, for example, cooperate closely with sociologists, anthropologists and lawyers (Fourie 2002a). These new insights can now be incorporated in a further modification of the diagram of the three basic concepts of the cadastral systems. The modified diagram is shown in Figure 4.

The entity exercising the land rights is now extended to communities, i.e. a specified group of persons (e.g. tribe, family, village). However, in this situation the individual members of that group may not be specified (i.e. in terms of their membership of a tribe, a family, stool, skin etc.), although in some cases this is an issue, for example in the US, where certain members belong to Indian tribes in order to enjoy the benefits given to the tribes by the government (NRC 2007). The members' rights pertain to a relationship with the land that is in accordance with the standards and values of the relevant community, although these rights will need to be defined if it is to be possible to provide third parties with legally meaningful information. In these situations the parcel of land, i.e. the object on which the rights are exercised, may be defined in a manner other than accurate land surveys and geometrical measurements. Österberg (2002) shows pro's

Figure 4 *Extended cadastral concept*

and con's of various perspectives in effect, coverage, costs, technology and implementation time. For Ghana, Arko-Adjei (2011) provides a practical solution.

Intermediate Conclusion

Recent developments call for redefining the traditional 'Western' basic concepts of a cadastre. An expansion of these concepts to encompass customary and non-formal (informal) rights will offer opportunities to land-policy analysts, land registrars and land surveyors to improve the incorporation of the world's large tracts of land in those countries in which the implementation of a cadastre is proceeding at an excessively slow pace. The current situation whereby so many countries are unable to profit from the benefits from a cadastre in the same manner as 'Western' countries (UN/ECE/WPLA 2005) cannot be allowed to continue, and consequently the mobilisation of all possible resources is required.

The achievement of this objective will require the development of institutions and operations that are able to provide for:

- The maintenance of records or registration of social groups with non-individualised membership;
- The maintenance of records or registration of the various forms of customary and non-formal (informal) rights;
- The maintenance of records or registration of parcels of land which are not defined using geometrics, and which possess flexible boundaries.

Particular attention will need to be devoted to the relationship between customary, non-formal (informal) rights and the formal system, since these systems should not be designed in isolation from each other (Fourie 2002a, 2002b).

Purposes of a Cadastre

Investments in the cadastre are related to a justification on the basis of the intended purpose(s) of the cadastre (the common business-case approach). The functionality of the system should meet the requirements of its users. In the absence of a thorough analysis of the intended roles to be played by a cadastre, it will be difficult to furnish an adequate justification for the allocation of the necessary funds. Although cadastre might have multi-purposes, I mention three main goals, namely land tenure, land markets and land use.

Improving the Security of Land Rights

Cadastrals differ from other geo-information systems in the sense that they specify more than solely the physical attributes of spatial objects; they also lay down the relationship between man and land in the form of the rights, restrictions and responsibilities for the right holders. These relationships can be based on statutory or common law, customary traditions, or informal use.

The tools employed in the implementation of a cadastral system are adjudication and mapping. These tools are focused on the creation of records of existing land tenure arrangements, i.e. the *status quo*. Consequently both adjudication and mapping are of an intrinsically static nature. It should be realised that adjudication entails the definitive and authoritative specification of the existing rights to a given parcel of land (Lawrance 1985). Land adjudication does not create rights; it merely establishes the existing rights (Simpson 1976).

Mapping, in the sense of the determination of a geo-reference for the object on which the land rights are exercised, also intrinsically reflects the status quo. The mapping element of a cadastre needs to provide a sufficiently-detailed specification of the location of the object. It would be incorrect to assume that this specification can be obtained solely by drawing up a definition of the cadastral parcel and carrying out an accurate survey of the boundaries. In fact, any form of geo-reference that is recognised by the community will be adequate for the purposes of the specification of the object. Conversely, it would also be incorrect to presume that a specification of an object that does not make any re-

ference to the surface of the earth would provide sufficient evidence of the location of an object (e.g. address without co-ordinate).

In many countries the provision of secure access to land has been assigned a high priority in line with the recommendations enclosed in the global plans of action drawn up by Agenda-21 (1992), Habitat (1996) and Johannesburg Summit (2002), as well as the former UNCHS Global Campaign for Secure Tenure and recent Habitat Global Land Tool Network GLTN. The main goal is the eradication of poverty, as stated in the Millennium Development Goals. Consequently measures implemented to encourage the security of tenure focus largely on the urban and rural poor, and on vulnerable groups (the indigenous population and women). The use of conventional forms of tenure to provide security of tenure (freehold, leasehold, etc.) has proven to be a cumbersome approach that ultimately results in lengthy procedures which offer totally inadequate access to the poor (World Bank 2003, 2008; De Soto 2000). Consequently governments have to adopt an innovative approach with new forms of land tenure and simplified land rights that can be assigned with relative ease. Examples of these new forms are certificates of right, occupancy licenses, permission to occupy, land sharing constructions, corporate land banks, community land trusts, and anti-eviction orders. All these forms of land tenure share, to a greater or lesser extent, a common characteristic; they all provide basic *de facto* security rather than sophisticated *de jure* security.

Better Regulation of Land Markets

The transfer of land rights in the market environment is based on the concept that land is a commodity which can be bought and sold and, from a legal perspective, the land rights can be transferred from one person to another. The extent to which cadastres are maintained in an up-to-date condition depends largely on the nature of the procedures involved in the transfer of land. The aforementioned global plans of action severely criticise the manner in which cadastral personnel design and organise their procedures. For example, in a paper given to the 1994 Congress of the International Federation of Surveyors, Barnes (1994) states that the issue of land titles in Ecuador could take as long as between nine months and five years, whilst the procedure in Bolivia involved 23 steps stretching over many years, and in Peru the issue involved a procedure comprised of more than 200 steps that required about 43 months to complete (De Soto 2000). Fourie (1999) is of the opinion that cadastral and land information systems constitute one of the most significant impediments to the transfer of land. The systems are centralised to an excessive degree, are too expensive, are not tailored to the urban poor – the majority of the population – since they

cannot afford them, are too frequently based on a colonial approach, are excessively complex, and lack transparency. Van der Molen & Österberg (1999) discuss technical imperfections. The land administration system will – irrespective of the nature and causes of any changes – need to be able to accommodate all changes in the relationship between man and land.

The World Bank (2003) states that access to land and access to credit, especially for the poor, should be promoted by the implementation of simple, rapid and explicit clear procedures, cheap and accessible information about land, and explicit definitions of land tenure and property rights. In view of the unequal distribution of income around the world it is a moot point as to whether the tools possessed by governments can regulate the markets in a manner that is not beneficial solely to the rich. Some East European countries are beginning to give consideration to the imposition of restrictions in the new open land market to avoid a situation in which a few privatisation-oligarchs would rapidly possess the majority of the country's land. It should be realised that a true free open market can have disastrous effects. There is no doubt that the abolition of moratoria on land transactions, the elimination of restrictions on the size of ownership, the elimination of price restrictions, the elimination of land use restrictions and the minimisation of preferential rights for the government will be to the benefit of the rich. Governments should endeavour to implement a balanced set of regulations capable of managing the land market in a manner such that the poor can gain access to land and credit (Dale & Baldwin 2000) – an opinion based on the belief that land should be regarded as not just a commodity, but also a scarce communal resource in need of careful management.

The point is that as soon as these restrictions have power against third parties (e.g. buyers) they must be knowable through registration. On the other hand, the government cannot monitor – without inclusion in the cadastre – its application.

Better Development of the Use of Urban and Rural Land

The planning of the use of urban and rural land involves the stipulation of a specific use for land. This can result in voluntary or compulsory changes in land rights as a result of either voluntary action by the owners and users (adapting the land use), or compulsory action by the government (expropriation).

The FAO Guidelines for Land Use Planning (1983) recognise legal and traditional ownership and usage rights to land, trees, and grazing areas as one of the important basic elements for the development of land-use plans. In its study of the role of legislation in land-use plan-

ning of 1985 the FAO emphasised that questions like ‘who is the legal owner of the land’ and ‘who actually controls the land’, as well as to the manner in which ‘customary rights are incorporated in statutory law’ are substantial input to the planning process.

Although the attention of international organisations is increasingly being drawn to urbanisation, they should not neglect the rural areas, since the complex of food, water and land is important for the resolution of food shortage (FIG 1999, World Bank 2003, FIG 2004, HLPE 2011).

However, in mentioning urbanisation it cannot be denied that the growth of urban and peri-urban regions also constitutes a major problem. Experience reveals that governments are often unable to cope with the migration of the rural population to the cities, in turn resulting in an increasing number of informal settlements. It is estimated that as much as 80% of the growth in the urban regions may be informal settlements. This causes rapid exacerbation of problems in the urban fabric, and results in a lack of services, the absence of an infrastructure, poor housing and, above all, insecurity of land tenure. The HABITAT Global Plan of Action 1996 regards security of tenure as one of the most essential elements of a successful shelter strategy; consequently it is hardly surprising that the former Global Campaign for Secure Tenure has assigned top priority to its opposition to forced eviction – especially since forced eviction is always associated with the worst housing conditions, always has the greatest impact on the poor, is often violent in nature, and ultimately results in victims who are worse off than they were before. More and more governments are introducing anti-eviction legislation, which when viewed from a cadastral perspective introduces an innovative form of land rights – i.e. the right not to be kicked off the land one actually lives on. Consequently this constitutes a new form of right that needs to be incorporated in the cadastre! A major duty of cadastral systems is to provide governments with information about the identity of those with specific land rights, the location of the land, and the size of the relevant parcel. This duty is of even greater significance to governments intending to implement land-use plans; the implementation of these plans will be virtually impossible in the absence of information about the land rights that will be affected by them.

Better Taxation of Land

Cadastral systems have traditionally served for land taxation purposes (Youngman & Malme 1994, Bird & Slack 2004, UN/ECE 2001b). All countries employ information obtained from the cadastre. Land tax is usually a local tax imposed by local authorities to obtain their revenue.

In an inventory carried out by the UN/ECE it transpired that of the 40 ECE member countries 95% were operating a land-valuation system for the purposes of the assessment of land values for taxation (UN/ECE 2001). Countries in transition also introduce land taxation, a move which constitutes a combined challenge to their efforts in achieving privatisation, the decentralisation of state power, and market development. For example, in the Republic of Estonia revenues from local land tax account for 3% of the local budget; in the Czech Republic the figure is also 3%, whilst in Slovakia the figure is 11%, and in Poland no less than 13%. The Lincoln Institute of Land Policy states that a political debate is currently in progress in Colombia, and in analogy with many other countries in Latin America, is highlighting the problems encountered in the assessment of the land tax base using the present obsolete cadastral information. El Salvador, which is recovering from a civil war, is reviewing the introduction of a municipal land tax for the city of San Salvador initially based on a simple tax rate and later evolving into a more sophisticated system. Subsequent to signing the Dayton Peace Treaty the Federation of Bosnia Herzegovina, for example, is now endeavouring to develop a local land tax on the basis of the existing cadastral records in combination with local public-housing records and information from the public utility companies.

An up-to-date cadastral system is an essential source of information for land taxation. The country's taxation authorities will be virtually unable to enforce a system of land taxation in the absence of information about the persons liable to pay tax, the taxable objects, and the market values.

The Migration Path For Cadastres

Land Tenure (What Should Be Registered)

Since land tenure is understood as a bundle of rights, it is necessary to decide which elements of that bundle should at least be registered for the purposes to be fulfilled by cadastral system, for example:

- If the system is intended for the purposes of land taxation and the tax legislation stipulates that tax shall be levied solely on ownership, then it will serve no purpose to maintain records of leases, derived rights and actual land use;
- If the purpose is to facilitate credit mechanisms and the legislation defines mortgages as a personal right rather than a right *in rem*, then the registration of mortgages might be irrelevant;
- Should the purpose be to promote the land market, and the parties involved (sellers, buyers, conveyors, etc.) are not interested in en-

- cumbrances and servitudes, then there will be no need for records of this information;
- Should the purpose be land use development, information about right holders of ownership, group ownership, communal ownership, village ownership and the name of the chief, the village headman, might be sufficient;
 - If the government imposes restrictions on land use and the legislation stipulates that these restrictions are imposed on the owner rather than the parcel of land, there will be no need for cadastral recording, while conversely records of the restrictions could be beneficial, if specific restrictions are imposed on parcels of land (thereby imparting them with a legal force on third parties such as buyers).

When assumed that a country is at least of the intention to improve its land management capability (planning, development, maintenance of land use, and resource management), it needs access to the names of persons to contact for the negotiation of planned developments and, where relevant, for the acquisition of the land. In such a situation a simple land administration system will be sufficient, which need not contain more than elementary records of the combination of the names of the persons in authority (village heads, chiefs, family heads, residents, and company names) together with some form of definition of the units based on the location of the land (such as the address, or the map coordinates). Consequently, no large investments are needed for a system of this nature. Since much land development is carried out in the form of projects (such as housing, transport and energy infrastructures, and nature conservation) the government can, where relevant, give consideration to the implementation of a project-oriented cadastral system (for example, when problems are encountered for the public acquisition of land).

A government intending to levy land tax will require a more sophisticated cadastral system which at least contains information on the parameters used for the assessment of the land tax (Dale 1999, Nieminen 2004). The collection of data can be restricted to the information the tax legislation stipulates as the base for taxation; this is usually comprised of ownership and/or use, and not of secondary rights and interests. Should the tax legislation regard group ownership as being subject to taxation and the surface area of the land as a taxable object, the register could include the names of owners (individuals, companies and groups) together with an identifier and an indication of the surface area of the land. Substantial investments are not needed for either very precise land tenure registration or for very accurate boundary surveys.

In principle a cadastre with the above content is, subject to certain conditions, suited to the improvement of the land market. Additional regulations will be required to protect parties in the market (particularly the buyers) since such fiscal cadastre contains little information about the legal status of land. These regulations should remedy the imperfections in the system and could, for example, stipulate that sellers are under the statutory obligation to furnish complete and truthful information about the legal status (the rights, derived rights, restrictions, public encumbrances and boundaries) of their land, such subject to pain of claims in court in the event of the wilful provision of incorrect information.

However, if the presence of these rights and interests exert a great influence on the market prices and values, the operation of the market will be impeded in the event that the public is not provided with ready access to reliable and complete information. One measure of the extent of this problem could be the volume of litigation. Consequently the cadastral system will need to collect and provide information about the legal status of land that is as comprehensive as possible, a need which will give cause to substantial investments in the system. However it will be possible to pass on the costs of these investments to the market transactions, since the market will probably possess a strength and wealth sufficient to bear the additional transaction costs. Detailed information about the land will offer sufficient value to the relevant parties as compared with the benefit the parties gain from the wealth of information available to them.

A government which incorporates a specific legal recognition of titles in its records of rights and interests (for example, in the form of guarantees for the information, or the acceptance liability with respect to its correctness) will provide for the legal security of land tenure.

From the above it will be apparent that, depending on the purposes for which they are intended, cadastres collect, process, and disseminate information about land tenure in systems ranging from extremely simple (solely the land use *status quo*) to comprehensive (all rights and interests) registers.

Cadastral Authorities (Who Keeps the Records)

Many countries perceive a cadastre to be a public duty to be performed within the mandate of the state. This is also applicable to the allocation of land to citizens (by e.g. Ministry of Land, Commissioner of Land). Consequently both duties are performed by organisations at a state level. These organisations often adopt a decentralised approach to the performance of their duties; for example, the registration is effected by the courts, whilst the cadastral duties are performed by the local or

regional branches of another Ministry (such as Housing, Environment, Home Affairs, etc.). In some countries (such as France) the municipalities are responsible for the cadastre.

However, it is also necessary to view the division of duties, responsibilities and competences between the various layers of government from a perspective of the efficiency and effectiveness. Although it might be extremely efficient to concentrate the time-consuming maintenance of registers and maps in one location, thereby employing a minimum number of staff, this would nevertheless not be very effective; this is because land policy tools (land markets, land use planning, management of resources, etc.) are primarily measures of a marked local and regional importance, which consequently should be implemented in the proximity of and in interaction with the public (Fourie & Nino-Fluck 2001, Alden Wiley 2006).

This dilemma might be resolved by means of ICT. Financial calculations reveal that central databases are more economic than decentralised databases, since this obviates the need for ICT staff at all the local offices (for systems management and maintenance, helpdesks, etc.). However the implementation of data communications simultaneously provides for the adoption of local responsibility for information management. This combination provides for the delegation of duties that need to be linked closely to persons at the appropriate local or regional level, whilst at the same time keeping the costs as low as possible by means of the centralised processing and storage of the data.

Consequently, ICT developments have rendered local operations feasible. In view of this there is no objection to the introduction of a cadastre at a local level – and especially in an analogue environment – since at some point in the future the local registers and maps can be made available to all the relevant levels of government, and can serve as the input for a subsequent central database.

As a result a migration path might begin at a local level, and gradually evolve into a system of centrally-stored data and remote information management with the commensurate responsibilities.

Registration (How the Records are Created)

Governments that intend to provide titles to land guaranteed by the state are aware that this is a costly operation. The concomitant precise adjudication processes, in-depth investigations of the legality of land transfers, and accurate boundary surveys are all capital-intensive operations. The simplest cadastre is comprised of a shoebox containing simple transfer documents approved by the seller and buyer and endorsed by witnesses, together with a reference to a description of the object. It will be self-evident that a simple system of this nature will exhibit a

large number of imperfections with respect to its comprehensiveness, validity, accessibility, etc. Nevertheless it fulfils basic needs of transparency, albeit in a very rudimentary way – and the system could work.

An improvement to the above system would be the assignment of a certain legal status to the documents by having them drawn up by a licensed conveyer, lawyer or civil-law notary. The costs incurred in maintaining the records can remain low, since the duties of the keeper of the shoebox (the box will evolve in the direction of a register) are restricted to filing the documents and keeping them available for consultation. The keeper does not investigate the legal impact of the documents; in essence this is a simple form of deed registration (registration of documents without guaranteeing the validity of the transactions).

However, once the keeper of this simple register also investigates the validity and the legal impact of transfer documents, and has the power to approve or to endorse them, then he becomes a kind of registrar; his approval imparts an added value to the records, i.e. the transfer of right deemed to be valid and is recognised. In essence this is a simple form of title registration (guarantee of valid transaction). However the costs incurred in the registration of the documents will increase in view of the keeper's additional duties. The additional need for some form of identification of the relevant object on a map in the registration process, in effect constitutes the beginning of a simple cadastre.

Consequently the migration path for a cadastre can begin with a simple and rudimentary form of recording of documents ('deeds'), evolving over the years into a system incorporating approval for land transfers ('titles'); at the same time the 'keeper' evolves into a 'registrar'.

Implementation (When Records Should Be Created)

On the introduction of the system it will immediately be necessary to devote attention to updating the records. The best method to guarantee up-to-date cadastre is to stipulate that in the absence of records land transfers will not be valid, i.e. the buyer will not become the owner or acquire rights to the land. However this is a fairly stern approach; in practice the updating requirements will depend on the intended purpose(s) of the system. A system employed for taxation purposes could require less frequent updating than a system employed in connection with the land market; for fiscal purposes the submission of transfer documents by no later than a specific fiscal reference date would appear to be adequate, whilst for land-market purposes the daily updating of the records would be more appropriate.

Consequently a suitable migration path could begin with less-frequent updating and evolve to frequent day-to-day updating.

The Identification of Subjects in the Cadastral Process

Persons with access to the cadastre must be certain of the identity of the right holders listed in the records. The ultimate form of identification is comprised of records of ID cards and the relevant ID numbers as verified by the registrar or civil-law notary. Modern options are biometric identification. A simple form entails the identification of right-holders by witnesses so as to impart the names in the records with a certain degree of validity. An intermediate form is comprised of a declaration from, for example, a conveyer verifying that the persons cited in the transfer document are indeed the persons they say they are.

The Identification of Objects

The accuracy with which the boundaries of the parcels of land are surveyed depends on the purpose(s) of the cadastre. Since boundary surveys and boundary mapping are expensive operations, which involve a given amount of time it could be preferable to opt for an alternative.

If the cadastre is intended to provide for land management then the government could consider information restricted to the outer boundaries of the customary areas and the name of the chief or the village boundary with the name of the village headman to be adequate for its purposes. In this instance it will not be necessary to record accurate information about individual parcel boundaries. If individualised forms of land tenure are an issue, addresses or single midpoint coordinates could be appropriate (GPS or map coordinates). In situations in which information about the approximate boundaries is required the general boundary rule could be employed, resulting in the visualisation of the boundaries on a topographic map, orthophoto, or satellite image.

If the cadastre is intended for land taxation purposes and the tax is not assessed on the basis of the surface area of ownership (in m^2), it will serve no purpose to make accurate surveys of the boundaries, and once again an address (if available) and/or midpoint coordinates may be sufficient for the needs. In such situations it is not necessary to draw up cadastral parcels.

Nor will accurate surveys of the boundaries be required, if the system is intended for credit purposes, and the banks require solely the value of the building in reaching their decision as to issue a mortgage.

Consequently, from a surveying perspective a suitable migration path could begin with a simple indication of the location of the land and then evolve via records of general boundaries towards accurate surveys of the boundaries.

Conclusions and Recommendations for Migration

In view of the challenge confronting many countries in increasing the speed of the registration of information about ownership, etc., it would appear to be preferable to implement simple systems that can evolve into more complex systems over the course of the years. Governments could adopt the following incremental approach to the implementation of their cadastres:

- Develop a long-term scenario specifying the land-policy tools ultimately to be supported by the cadastre;
- Assign priorities: in which sequence should tools be provided with support;
- Decide on the minimum contents of the registers and maps;
- Design simple processes, and accept imperfections;
- Design systems which are scalable;
- Develop a migration path for the evolution towards the intended long-term use of the system;
- Anticipate ICT resources that can be introduced in the course of the years;
- Avoid accurate surveys of boundaries whenever possible during the initial phase;
- Avoid intensive investigations for the guarantee of titles, and accept the imperfections inherent in the recording of transfer documents (deeds).

Since countries exhibit differences – as do their attitudes, histories and societal cultures – it is not possible to draw up a general specification of the best migration path. However, the adoption of the incremental approach as discussed above could provide a suitable framework for the successful implementation and development of a cadastre. The adoption of an evolutionary approach to the implementation and development of cadastres should guarantee the viability of these systems in developing societies.

Notes

- 1 The author would like to thank Dr Janine Ubink for her critical comments on the paper.
- 2 Fédération Internationale des Géomètres (FIG) or International Federation of Surveyors.
- 3 See www.cadastraltemplate.org.
- 4 See www.unece.org/hlm/wpla/welcome.html.
- 5 Mailo land is a form of tenure that was created by the 1900 Buganda Agreement between Her Majesty's government of Great Britain and the Kingdom of Buganda.

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6 If Not Private Property, Then What?¹ Legalising Extra-Legal Rural Land Tenure via a Third Road

André Hoekema

Introduction

What kind of land law would best promote economic development and social welfare in the developing world, particularly in the countryside? Moreover: what kind of development is that? Is it betting on the large foreign investor or on the small semi-subsistence farmer and pastoralist?² If the answer to the delicate tenure position of many rural smallholders all over the world is not 'private property' any more, then what is it? Doing nothing is not an option either under the mounting pressure on rural land from large-scale investors, urban expansion and problems with food security. As we saw in the introductory chapter some intermediate, third way of legalising extra-legal land tenure is in the making in many places. Governments, donors, NGOs now tend to shun from the old recipe of trying to completely replace local law but do not uncritically accept local tenure arrangements either. Instead recent rural land law reforms follow a mixed course, paying heed to recommendations such as the one from Lavigne Delville (2000: 116): 'Rather than suppressing legal pluralism by absorbing one system into another, the aim is to retain the most dynamic aspects of each.' And this mixing or hybridisation of elements nowadays is done in many places where governments in designing new land law take local law into account, but also test and reform it against standards of human rights, gender issues, accountability of authority and so on.

This plurality of new *adaptive* policies, in their concrete features depending heavily on local and national specific conditions, leads to a wide variety of designs of legalisation of rural land tenure for development. But their common feature resides in the fact that they somehow try to bridge the gap between local, customary and state, formal rules, that is, to build formal state land law on extra-legal ground, if not on still functioning local law, then at least on local needs, interests and sensibilities. This ties in with the present day stress in almost any development project on participation of local stakeholders lest the project fails.

I can call these hybrid rural land law designs *a bundle of third – or intermediate – roads* towards land tenure legalisation. In countries like Uganda, Mozambique, Tanzania, Niger, Namibia, to name just a few, there is ‘a new wave of land tenure reforms . . . [in which] many recent laws protect customary land rights and provide or allow for their registration’ (Cotula et al. 2004: 5). In Latin American countries like Bolivia, Colombia, and Ecuador, land and water tenure laws as well as forest management schemes are in the process of being built on local indigenous tenure institutions. Indonesia also tries to follow this road. However, finding a passage between the two extremes of top-down imposition of private property and leaving things at the bottom as they are, is challenging. In view of enormous differences in national and local contexts, goals and means of this operation often are not clear, concepts of development strongly contested, and the risks of derailment serious and manifold.

One conclusion of this introductory paragraph merits some emphasis: also the novel hybrid and locally adapted approach needs strong state policies and state commitment. But the role of the state is not like in the earlier days of issuing a complete new package of land laws and regulations of land management. In the adaptive approach, the state facilitates the coming into formal being of local, customary land rights and authorities. In close cooperation with local stakeholders and generally with civil society actors, state authorities clear up the existing local land rights, introduce some corrections on the relevant practices, provide for simple and accessible registration devices, if necessary adapt or sometimes reconstruct local decision making practices, promote legal empowerment of the smallholders – among many other items that we will encounter in the description and analysis of the cases I am going to present below. In this new paradigm in land tenure regulation it is a matter of reconciling state perspectives of a programmatic, national and legal nature with people’s perspectives on local land law, on law and land use. Sometimes however the state tries to reconstruct local patterns so drastically that it seems that the old top-down centralist land law policies are making a come back. We will see these trends in the next paragraphs.

I venture to say that at least in rural areas in developing countries, the third paradigm has won.³ The need to plead for this paradigm is over now. Rather it is time to analyse and evaluate in detail different legal designs aimed at reconciliation between state and people’s perspectives on land use and land law and how this works out on the ground. This is the main thrust of this chapter, and will be explored in the third section. However, before we study some of these bridging efforts, a more general overview of the main types of third road designs will be given (second section).

A Variety of Third Roads

The variety of intermediate approaches can be broken down into two types of legalisation: either providing smallholders with *individual* (or family based) long-term use rights coupled with a decentralised land management institution; or recognising and partly remedying existing local communal tenure arrangements, the *communal* type.

The first, individual way is followed e.g. in Ethiopia where farmers had been completely at the mercy of politicised village and district authorities for a long time. Rahmato (2009) describes how communal tenure practices had practically died out after 17 years of the military regime of Mengistu (1974-1991) with its huge resettlement programmes and harsh centralising policies. Farmers experienced almost fatal insecurity of tenure. In some states of the Ethiopian Federation state law recently (2004) ordered to officially title and register long-term use rights to plots of land in the name of the head of a household, to do this in simple ways and leave general management competences in the hands of village and districts authorities. While this is not a grant of individual private property it is a grant of *individual title* documented in writing in accordance with national law. Where communal tenure arrangements have crumbled, this individual road of legalisation of long-term use rights is practically the only one viable.

The second, communal way, leads to the introduction of a form of *communal title* in the hands of a community as such, recognising thereby the communal character of existing arrangements and often at the same time amending these. In Mozambique local communities are granted rather strong ownership rights to their lands, even to the point that investors have to negotiate with the local leaders for permission to use part of these lands for, say, tourist facilities. Communities are allowed to continue managing their lands in their own way, regulating access, use and transactions. In this case state interference in the internal affairs is minimal (see section, 'Mozambique, a radical community-based approach'). In various countries, like in Bolivia, indigenous peoples have obtained collective ownership title to their lands (Pacheco 2009, Assies 2009), while in Tanzania, the Village Land Act accords to Village Councils the competence and task to recognise, title and register customary land rights, assign and withdraw these use rights and generally to manage the village land in its totality. State interference with the local arrangements is much more intense in this case (see below). This is roughly what Senegal did already back in the 1960s (Heseling 2009). In these communal examples, the local tenure arrangements and the local institutions of authority are recognised as parts of official law and official public administration.

The current section will sketch some general features of the communal, or community-based way. I have a preference, perhaps a bias, for the grant of community-based title in situations in which local tenure arrangements are still resilient, while I am convinced that this normally cannot be done without introducing some corrections and at least regulate officially the relation of this new jurisdiction with the national legal order.⁴ My preference stems from the fact that in the vast majority of community-based arrangements social security principles are embodied: a morality of mutual care as well as care for nature and future generations, briefly to be called an ethos of *reciprocity*. In my view before setting off for rural land law reform one has to study carefully if these local arrangements are still present and, if so, how they function on the ground, including this moral element. Such empirical studies have a supplementary benefit. In modern times in which depletion of nature and rampant individualism are problems of the first order, it is important to try to learn some lessons from these community-based arrangements even if one knows that the specific communities involved perhaps are dying out or at least cannot be taken for granted, even less so in Western countries. To get a feeling for what this moral element could mean, how it may function, and why it is significant for sustainable land management all over the world, I need first to presume familiarity with the main features of communal land tenure arrangements (see box 1 for some basics), explain the important phenomenon of *secondary rights* and then elaborate on the *moral element*.

Box 1. Communal or Community-Based Tenure

The communal title approach purports to build on socially existing extra-legal tenure arrangements, sometimes called: *customary tenure*. This however is a misnomer, as it suggests a rather static and only slowly and organically developing phenomenon. Often such 'customary tenure' is a rather recent and sometimes a wilfully designed product of encounters between on the one hand state and on the other hand local community leaders. *Communal* land tenure, a terminology often used in legal anthropology has other terminological flaws. Communal is often equated with 'collective' which term carries the false suggestion that the land is held by a collective subject only, a group of people as such, without specific individual, family and (sub) clan land rights. I prefer 'community-based land tenure' (after Lynch and Talbot 1995), which leaves the question open who is holding the various rights in land while it rightly points towards the social corporation, the community, which lends legitimacy and effectiveness to the regime. It comprises both common pool

resources shared and held by the collective, as well as land on which, next to community rights to manage and control the land, individual and family use rights exist. Often these rights are long-term use rights. Typical for these systems is the role of kinship, territory or generally possessing the 'identity' of the community (status) as a condition for being entitled to land. Let me define this institution of community-based ownership of land as a 'complex of values, practices and procedures developed and enforced within a specific non-state community or people, regulating legitimate control & management rights as well as use, transaction and inheritance rights over a variety of forms of land like arable land, grazing areas, trees, forests, reserve lands, waters etc., thereby combining rights in the hands of individuals, families, clans and the community itself or its authorities, often in the form of rights that with regard to a specific piece of land overlap in time or in place.'⁵ This overlap manifests itself in the existence of a wide variety of so-called secondary rights (see immediately below).

Secondary Rights

Community-based tenure arrangements allow for considerable overlap of rights in terms of time and space. Important categories of rights people may hold are grouped together as secondary rights. Regarding women under customary systems for instance 'land usually belongs to and is managed by a patrilineal group, so that women are always secondary users (...). Their rights of access are highly dependent on the social ties which link them to those with primary rights over land. Hence, for example, on divorce or widowhood, a woman may be forced to leave the land behind and move away' (Toulmin and Quan 2000: 24; see about gender also Cotula, this volume: 65). Furthermore, secondary rights holders – also called derived rights to land⁶ – are characterised as those people whose access to land is based on arrangements like sharecropping, borrowing of land, pledging, renting, leasing, and 'mortgaging' the land, or the right of people to let their cow graze on land cultivated by another, after the harvest. Sometimes pastoralists' rights to graze their herd on common grazing land and walk the herd over agricultural land after the harvest (in exchange for dropping manure on the land) are called secondary rights too. Within pastoralist zones rights to graze are even further distinguished e.g. in primary users, secondary users etc. (Cousins 2000: 158; about the rights of pastoral groups see also Cotula, this volume: 68). A next category of secondary right holders consists of people who have forms of rights to use trees while not being the owner of the tree. Dubois (1997: 5-7) is one

of the few who provides an analysis of the various often most complicated forms in which the multiple use rights of trees are organised. Finally, a right to gather fruit on land owned by another⁷, or collect firewood over there, is yet another example of secondary rights.

In legalisation designs usually secondary right holders are neglected (see Platteau 1996: 40 ff) The same goes for rights to use resources to be found in the commons (also called common property resources like woodlands, ponds, steep hilly slopes, water for fishing, wetlands, grazing land etc.) where different use rights for various categories of users have to be distinguished (Cousins 2000: 157). Van der Molen (this volume) discusses the need of and possibility of expanding the traditional Western notion of registration (cadastre) to find ways to adapt registration procedures to non-Western concepts such as community-based title, secondary rights, etc.

Community-Based Land Tenure Arrangements and Moral Economy

In community-based rural tenure arrangements usually a local corporate entity is expected to act as a kind of trustee for the commoners, the villagers, the indigenous members. Be it a chief, another traditional authority, a 'government' (*cabildo*⁸), it is this entity that has socio-political power over the land and is supposed to determine the general uses the land is put to, to solve conflicts, to control transactions among the insiders, to permit or refuse outsiders to acquire a piece of land, to represent the people before the outside world. These management rights are justified by the need to keep the landmass intact, to preserve the land for the local people, to prevent absentee ownership of the land ('all the land to the tiller') and to care for ex-villagers or members who return from the urban areas or from war. Within the community occasional redistribution takes place in case a family sees its subsistence threatened because their children are running out of land. In this arrangement long-term use rights are assigned to individuals and/or families.

Often the use right holders also have the right to bequeath the plot to children (although strictly speaking under control of the local authority) and sometimes to rent or lease out for a short period. Sales and other long-term transactions of alienation of land to outsiders usually are forbidden. While in these regimes notions of growth of production and individual market orientation are not absent, first of all these systems aim at social security of a group. This is captured well in the title of an IIED (2004) brochure: *Land in Africa, market asset or secure livelihood?* (Quan, Tan & Toulmin 2004). The need to survive, to help each other out, render each other crucial services in harvesting and preparing fields, and the important element of having the certainty

in case of landlessness to obtain some piece of land somewhere, these are features of livelihood security. General development notions as well as dynamic investment behaviour are still far away from these minds.

In these rural smallholder communities it is not just the hardship to survive or the need to resist a common enemy that explains the orientation on livelihood security. Community-based land tenure often rests on a very specific perception of man, nature and society, a set of beliefs and values about spiritual relations between man and nature – in Latin America often called a *cosmovisión*.⁹ Many non-Western people nurture a meaning of what it is to be human which contrasts drastically with Western individualism. Studying ways in which for instance indigenous peoples solve their problems of keeping order and restoring harmony between man, nature and the spirits, one encounters the notion of reciprocity in almost every relation between humans, animals and the supernatural world of spirits. Reading the account by Rupert Ross (2006) about aboriginal thinking in Canada (*Dancing with a Ghost*), one immediately grasps the wide gulf between the West and the aboriginal world with regard to the often implicit feeling and knowledge about how to live decently in a community and how to relate to others and how to relate to nature. The aboriginal emphasis on caring for others as well as for nature does not mean, however, that any notion of a personal self and of individual agency, desire and emotion is rejected. Rather it is another way of perceiving the right balance between individual and general interests in caring for an integrated and just social life. Obviously these notions permeate also in the nature of the land rights and the obligations they carry with them.

But with or without such a specific *cosmovisión*, attached to every right in the community-based arrangement we find obligations that can be called a ‘social mortgage’ on your right. Others call it a ‘moral economy’ (Robbins 2004: 151). Authorities and ordinary people alike who possess the status of belonging to the community or to the people, carry the moral obligation of stewardship for the benefit of present and future members of the community and the community at large. Okoth-Ogondo (2001: 2) points to the fact that land access rights are transgenerational, hence ‘carry an obligation of stewardship for the benefit of present and future members of the community’. These obligations are internal obligations which are assumed on the basis of reciprocity by and to each member of the community.¹⁰ These obligations cannot be exhausted in a set of precise rules; they are *unspecified* and oblige people in a general way to care for the community and the fellow insiders. Everyone is supposed to have the tact to know what this duty entails in some concrete setting and to respond to peer pressure to live up to it.

In (legal) anthropology this set of obligations is analysed as the embodiment of a principle of reciprocity. The principle of reciprocity implies an obligation of any right holder in times of distress to restrain somewhat the pursuance of his individual interests, redefine these and take care for the greater benefit of the community, out of 'free will'. But neither is this behaviour free in the sense of having a choice, it is enforced by the community, nor is it free in the sense that it is just a completely altruistic gift to others. On the basis of this contribution one helps to maintain the social integrity of the community and may reasonably expect to be cared for in case it is his/her turn to get stranded in adverse conditions. One is socially bonded, and this bondage embodies a specific solidarity.

Particularly the new institutional economists have taken up the anthropological insights into the important impact of 'moral economy' on people's behaviour (North 1990). People all over the world are definitely not 'organising their lives in remarkably similar ways'¹¹, let alone only along individualistic economic profit-making ways.

Not in all cases of community-based tenure arrangements a moral economy is still alive, but in many it is. This morale explains fierce resistance against the introduction of full private property (Platteau 1996: 55-56) and it makes us understand why and how local smallholders often feel secure under present extra-legal arrangements. They feel themselves more or less secure in their livelihood and prioritise this over investments and individual market orientation. The presence of this moral economy in social life means a rather strong element that promotes the survival of the community as such. People perceive land, water and other resources as part of their very existence and identity and also as a guarantee for the continuity of social relations. In modern times the term 'social capital' has appeared to describe this cohesive potential (Putnam 2000). This existence and importance of a moral economy is not often mentioned in studies about land tenure, legalisation and development.¹² While there is every reason to be wary of the ideological – perhaps romantic – distortions in one's perception of the nature of communal land tenure arrangements, unmistakably these arrangements are usually glued together to some degree by obligations based on the principle of reciprocity between people of the same status. Because of this element these institutions not only have strong self-regulatory potential, but also foster strong resistance to some private property oriented development projects. Particularly in legal designs in which local institutions of authority are brushed aside and competences are vested in new state-imposed committees, councils, associations or land boards, there is a risk of losing out on moral economic values and corresponding behaviour. Such loss of 'social capital' may 'lead to violation of traditional constraints on resource use, and de-

creasing accountability in natural system regulation' (Robbins 2004: 151).¹³ This risk is rarely taken into account in the design and implementation of designs for land tenure legalisation.¹⁴ A moral economy, however, has another face too. It may paralyse people, force them to stay within low level subsistence economies, block initiatives and produce a closed community.

New Community-Based Tenure Arrangements?

My sketch of the ins and outs of communal land tenure arrangements is very sketchy indeed. Moreover, it is well known that in many such communities tendencies are at work towards individualisation of land tenure,¹⁵ while in others traditional authority has degraded into a non-accountable despotic kind (see Ubink 2009, about Ghana). Notwithstanding these deficiencies taking communal land tenure arrangements seriously is a promising approach. For one, the moral bonds of reciprocity are an important brake on unfettered individual exploitation of nature and on mounting inequalities within the communities. Secondly, an ethos of reciprocity has regained relevance in new constructions of community-based management institutions not only in developing countries, but also outside. Alden Wily (this volume) describes such a newcomer in Tanzania. She illustrates vividly the failure of centralised top-down state policies of forest management. She then shows how empowering the local communities and creating institutions that foster a partnership between the local stakeholders and public authorities lead to far more successful management. Secure tenure and resource rights for local users are crucial to guarantee their position and motivate them to overcome partially deep distrust of state power. Such cooperation is not forthcoming unless people are motivated by a sense of reciprocity, the need to give in on one aspect of their direct interests and partly orient themselves on the well-being of the community at large. In this case one could build on still existing village communities and the reciprocity people are familiar with. But the new construction has a far wider scope. This Tanzanian experiment is not restricted to this specific situation. It is in tune with now widely applied development policies stressing participation of local stakeholders and civil society actors in designing and executing public policies. These new platforms are supposed to promote cooperation between former antagonistic groups and corporations and thereby bring more successful management of natural resources.¹⁶

Reciprocity is making its comeback also in the Western world. Complicated problems – 'intractable problems' as these are called (Schön & Rein 1994) – such as how to regulate fishing effectively and save fish stocks from total depletion, get tackled now by new coordinating insti-

tutions designed to foster partnership between all stakeholders.¹⁷ Recently the concept of *governance* has become popular to indicate such 'horizontal', 'negotiated', 'cooperative', 'participatory', or 'interactive' ways of defining and trying to solve these public problems. Governance is defined as 'a new mode of governing that is distinct from the hierarchic control model, a more cooperative mode where state and non-state actors participate in mixed public-private networks' (Mayntz 1998: 7; more about these networks in Hoekema 2001). Under favourable conditions¹⁸ this new mode of governing may lead to a kind of 'new community'. Antagonistic public-private may slowly turn into more cooperative relations and these in turn may foster mutual trust and in the end a renewed sense of reciprocity.

Reciprocity which is only another word for a spirit of connectedness between people, possibly has the key for the future of public problem solving in the Western countries too. The rugged individualism in this part of the world is powerless against the serious and complicated problems that face our societies and the world. There is need for the learning anew the kind of behaviour that Schön & Rein (1994: 179) so nicely captured as 'to be prepared to act as though your counterparts will behave cooperatively in spite of the risk that they may not do so and in advance of evidence that reveals how they will behave'.

While 'old communities' and their ethos of reciprocity are tied to very specific conditions, that cannot be reproduced in highly developed countries, there is something to learn over there. Providing communal title to these communities may not only be a way to empower these and provide tenure security to smallholders against inside and outside threats, but also a way to bring the ethos of reciprocity to bear on present day problems of sustainable management of resources. Getting to know this ethos better as it binds indigenous and other closely knit communities together, helps to understand better the potential of new forms of common property resource governance as this is introduced to overcome the inexorable depletion of the natural resources in the Western world. Clearly this line of thinking falls outside the scope of this article, but the case of land tenure (in)security in Lampung (Sumatra) which I discuss briefly below illustrates the potential of the *new* community-based institutions of governance of natural resources.

Designs of a Third Road to Land Tenure Legalisation

Coming to the heart of the matter I will now discuss third road designs in Mozambique, Tanzania, and Ethiopia while also briefly passing a quite different tenure situation in Indonesia (Sumatra).¹⁹ My main

yardstick for my evaluative remarks is threefold: Has real tenure security for all categories of smallholders improved? Are there adequate institutions for legal empowerment to the smallholders? And finally, are authorities in charge of land management accountable and are these positions of authority legitimate in the views of the rank and file?

Mozambique, a Radical Community-Based Approach

The Socio-Political Context

The complete chaos, in which Mozambique found itself in 1992 and the fact that traditional structures turned out to be still well and alive, at least in big portions of the rural countryside, made it almost necessary to build new (land) law on this basis and to accept the validity and legitimacy of the local institutions of community-based land tenure. A plea to resort to private property c.q. freehold and to introduce therefore the costly and extremely slow procedures of demarcating, titling and registering of individual land got no serious foothold in the debates. Land grabbing in the fertile river basins, beginning tourism in the coastal areas, returning plantation owners, all these actors encroached already on the rural land mass. 'An uncontrolled land grab would result in a rural exodus and a huge increase in peri-urban poverty in a country just emerging from war and already with serious unemployment problems' (Tanner 2002: 13). The only way forward was to build formal land law on customary land tenure systems. It may come as a surprise that such a broad view took hold instead of only the views of an urban elite group preparing the way for freehold titles, absentee ownership and huge profits. Probably the amazingly broad processes of prior consultation prevented such one-sided elite approach.

The New Regime

The 1997 Land Law of Mozambique (and its Constitution) grants a *group tenure right* to rural communities. A 'title for the use and improvement of land' (*DUAT* in the Portuguese acronym) is granted by law to communities for all the land they are using and have traditionally occupied. Even without an official piece of paper, the legal title to the land is perfect, legally speaking. It concerns a kind of lease right, as the state retains full ownership of the land. The lease has no time limit. In a way all the land now granted to the communities remains trust land in the hands of the state, but the state cannot easily take that land back.

The community as such has full competence to regulate land use rights within its territory and thereby apply the communal land tenure regime. The legal definition of a community is vague and intriguing and may also cover groups of families or even a group of neighbours,

apart from the usual category of traditional communities with traditional leaders (called: *régulos*).²⁰

Communities can ask for delimitation and for a certificate (or, after a more elaborate procedure, for formal title). The delimitation as well as the formal demarcation procedure is expensive and seldom executed.

After delimitation the state cannot grant an investor/outsider land rights in that territory without full consent of the community. For the large majority of communities with unregistered rights the law only prescribes consultation. This condition can be circumvented easily unless the state officials are willing to empower the community and see to it that the consultation is not just a sham. About this provision an important debate is going on. Some authors think that also in these unregistered cases the community holds a veto right. Should it declare the lands an investor wants to use, 'occupied' or 'in use' by the community ('in use' thereby to be understood very broadly, commentators tell me), the investor has to leave. Others, however, remark that in such a controversy the district administrator, a state official, can and often does allow the investor to go ahead. (Hanlon 2002: 22, Tanner & Baleira 2006: 11) Investors can only get *DUAT* and not private property in community land, while any transfer of a part of the communities' use rights on the land to the investor is only provisional for two (foreigners) or five (nationals) years. After this period a 50-year title may be issued by the state agencies. This system means that once the community gives up part or all of its right, it has no means whatsoever to get it back.

Internally, within the community all kinds of transactions take place between the 'members' of the community, following local practices of the communal tenure regime prevailing there. Individuals can ask for personal title to their plot of land, but it is not clear how to do this nor what kind of right this would be. It is doubted if individual community members can transfer their individualised use right to outsiders, or mortgage it. Non-members that have been using land of the community in good faith for ten years or more automatically get *DUAT*. This may undermine the integrity of the land base of the community.

Experiences

Mozambique has gone through an intense debate about whether or not this more collective system provides enough tenure security for the communities and its members while at the same time being sufficiently attractive for outsiders and investors. It seems that investors although not getting full private property can always 'sell' the land notwithstanding the general prohibition on selling (and mortgaging) land, because they can sell the improvements, buildings, etc. Selling these improvements seems to imply an automatic transfer of the land itself as well. This even opens up possibilities for using this land *cum im-*

provements as collateral for a mortgage. At the country level, the government has to approve such transfers, but the criteria with which the government should decide on these matters are vague. At the time of writing of this analysis, it was not yet clear how this 'selling of improvements' will work out in practice.

Generally speaking, experiences with the system as a whole are still rare. The few experiences available suggest that the consultation procedure between the community and a potential investor derails often. The regulations ask for a thorough and broad representation of community people to be present in the negotiations (and to sign the final document), but often just one or two traditional leaders do the job or even some kind of outsider usurps the representation, by bending some technical rule in collusion with state personnel which sometimes threaten the community 'that they want no trouble'. These state officials seem to get away with this interpretation of the land law system. Moreover, investors sometimes bribe community people into agreement. Like Cotula (2009: 4) writes on the basis of reports on the way the system functions in practice: 'In Mozambique, there is a rather vague legal requirement that investors "consult" local people before obtaining natural resource rights. This is often fulfilled through a brief meeting between investors and local elites where community lands are exchanged for one-off compensation and vague (and therefore unenforceable) promises of jobs and facilities'.

This abuse of the new land law system is supported by the widespread lack of awareness of rights among the rank and file community members, or even the leaders. Moreover, enforcing these rights against investors not living up to their promises, or against state officials short-cutting the procedure, is hardly possible as an independent court system does not have a serious presence in the countryside.

Sectoral Laws are not Coordinated with the New Regime

Finally, it is reported that the Forest Act at some crucial points deviates considerably from the Land Law. The Forest Act limits the community's rights to timber exploitation to subsistence purposes, excluding commercial exploitation by the communities themselves. In commercial foresting communities are accorded a place on a kind of forest management board only. So, 'even after communities have registered their land, their control over valuable resources like timber remains limited' (Cotula 2007: 67.) Here we meet the familiar problem of the presence of sectoral laws that undermine the promises of the new official land rights.

I am not aware of other sectoral laws like water law, mining law, environmental law, but chances are that in those areas the same problems abound.

Internal Deficiencies

As the community is the bearer of important land rights and regulation of tenure and decision making one meets two crucial questions in any state recognition of community-based land tenure.

- 1 What is 'the community': criteria for being considered a community, membership, territorial limits, among others.
- 2 Who is the legitimate authority: how to find out, how to legitimise a candidate within the community, what role do state agents play in recognising someone as the representative of the community, among others.

On both scores the experiment in Mozambique shows major weaknesses. In the land law we do not find criteria what entities count as a community. Neither are these to be found in the Decree 15/2000 providing community leaders with competences to regulate local matters and nominating them as part of the state's public administration. Buur & Keyed (2006) describe how 'state recognition of traditional authority in Mozambique' recently went about. Not only the concept of a community is not specified, but the way to nominate and recognise these leaders is left completely open. As they describe vividly this decree suggests that 'traditional leadership' has survived the civil war, is still in place, is legitimate in the eyes of the villagers, not contested and therefore easy to recognise. This, however, is a myth. Traditional leadership hardly ever is uncontested, changes in power structure and often fierce competition for power are a regular event, everywhere. The more so in communities that have suffered years of civil war, got squeezed between two powerful fighting parties, and often have disintegrated to some extent. Therefore any recognition of someone claiming to be the *régulo* is a thoroughly political or at least contested event, and often traditional leadership is a creation of state officials. Those leaders possibly serve state interest more than community interests as the villagers perceive it. Therefore this generous grant of autonomy poses another problem: what if local tenure arrangements are treating women badly, or riddled with rather authoritarian *régulos*?

Summarising the Case of Mozambique

The case is a radical version of recognition of community-based tenure. In itself it is a highly interesting and challenging way of legalising rural land tenure, unique in the world. The legal fact that the communities do possess ownership titles even if not officially registered is an important provision. And so is the generous recognition of local authority without imposing a whole set of requirements. The matter of secondary rights holders is not touched upon in the design as it

accords practically all management competences to the communities without imposing (new) rules. Neither do we find requirements to remedy specific deficiencies in the internal functioning of the various communities and their authorities.

Although the new design has still to prove itself, weaknesses are already clear to see.

'Real Tenure Security'

- There is unclarity about the important question whether or not the communities have a right to veto investors' plans.
- There are loopholes in the protection of community land, as it is possible for investors having obtained DUAT to 'sell' (and mortgage) the land and thereby take it out of the grip of the community.
- Sectoral laws are truncating seriously the (semi) autonomy of the communities, at least on the level of formal law. How it will work out in practice remains to be seen but experiences in other countries do not warrant any optimism here.

Accountability and Legitimacy of Authority

- Unclear definition of what constitutes a community and unclear provision how to recognise (or assign) traditional leaders.
- State officials possess non-transparent discretion to manipulate the rules for instance in cases of consultations about investors' plans.
- Much is left to local authorities, as this design is an example of the 'minimalist' way of recognising community land ownership. Therefore there may be quite different situations oscillating between leadership which is accountable along the customary lines, and leadership that functions rather dictatorially.

Legal Empowerment

- There is no independent and viable court presence to enforce the new land rights.
- In general legal awareness is still low, NGOs providing legal support for communities or members thereof are not present. The difference in power between the rank and file and public officials as well as investors is serious and tends to derail the new regime.

Forest User Groups in Sumatra, Indonesia²¹

Villagers from Langkawana village (Lampung Province, South-East Sumatra), mostly Javanese and Sundanese immigrants, used to exploit plots of land in a forest, but then the forest was declared officially a conservation forest. Formally no individual (use) rights can be granted within such conservation forests. Nevertheless the villagers continued

their practice. After a while evictions followed but the villagers returned and resumed their work on their forest garden plots. Finally some active anthropologists, NGO workers and academics helped in organising the villagers into a Forest User Group (FUG) and in pushing the Forest Service to grant a community forest license (in 1999). This license officially permits local people to manage and use the forest resources. In the course of time the villagers developed some local rules how to use the forest in a sustainable way. The FUG also settles conflicts between the users, and sets up cooperation among the users to conserve the forest resources. Apart from these new rules, local norms and practices of land tenure and land transactions still hold sway, in (and also outside) the forested area. These 'traditional' practices regulate matters of bequeathing land, ways of acquiring rights to land, arrangements of sharecropping, renting in and out and similar transactions. Sales are a regular phenomenon, at least between the villagers. But there is a customary ban on sales to outsiders. Transactions are not registered, they remain in the form of verbal agreements only. From the case study it is not quite clear how the tenure arrangements are enforced and changed but quite probably this is done by the FUG bodies, leaning perhaps on some informal leaders among the immigrant groups.

After five years of practice the license expired, the province had ruled out licensing in conservation forest and the villagers continued again as illegal squatters. This situation however was condoned by the authorities against collection of a levy and some bribe money. Certainly for the villagers themselves there was nothing 'illegal' in this situation.

Analysis

Granting a community forestry license for the agro-forest gardens means indirectly recognising the existence of local use rights, some transaction rights as well as management rights. It boils down to a kind of *de facto* recognition of a community-based land tenure arrangement. In a roundabout way a collective title is granted to a specific community represented by a new corporate body, the Forest User Group. This latter element should draw our attention. It may make a lot of difference if the corporate body getting the collective title is a traditional body or a newcomer. Of course, in real life the difference may fade away as local authorities possibly take over the new organisation. Also it may make a difference whether or not the villagers united in the FUG do form a distinct, 'traditional' community living there for a long time already, or, as in Lampung, a more heterogeneous grouping of various people having migrated into that area rather recently. Moreover we have to bear in mind that it is still the government through the Forest Department that holds an overarching right to the forest

(although the nature of this right seems to be unclear, legally speaking). One could expect this Department to put and enforce conditions on the way the villagers and/or its representatives use the agro-forest gardens but they did not.

Although officially the collective title has been repealed, in practice local use and management goes on as before.

Evaluation

Evidence after five years of official license and some more years of informally condoning this situation, shows that people feel more secure (Safitri 2010). They have diversified their production, they now cultivate crops that yield more and thereby raise their income significantly. Transactions with these plots, however, instead of rising in numbers, are diminishing. So, the better tenure security does not produce more market behaviour. The author of this case study explains this by pointing to the high yields of the plots which make people cling to their land, as well as to the local practices banning sale to outsiders. The gardens provide by far the best part of their income and therefore the villagers are not eager to engage in transactions with their plots.

It is important to note that the villagers, as explained in the evaluation, still feel secure in their tenure even after the license was withdrawn. For them the strictly formal situation of 'illegality' does not count. Although local transactions are not confirmed and neither backed up by official legal rules which define and protect the position of, say, a buyer, or a 'heir', villagers do not care. Security of their right depends on the resilience of the local practices and authorities. What strikes me as well is the general attitude of the Forest Service which does not interfere with the local forest use and management neither during nor after the formal license period. Also one may ask how FUG obtained the legitimacy within the communities involved to issue rules and settle conflicts. Quite likely the situation forged new relations between the villagers, creating a kind of neo-community of users with sufficient social capital to be able to successfully rule the use of the forest. Therefore I mentioned this case earlier as an example of the 'new' community-based tenure arrangements where 'community' does not exist already but is created through the practice of cooperating together and thereby solving pressing general problems.

From this case, finally, we see how different each situation of a mixture of local tenure arrangements and state legal and factual policies is. Official legalisation of community-based forest tenure did not take place but on the ground the situation pretty much resembles such a recognition. At least tenure security as perceived by the villagers has improved considerably. And it seems that the Forest garden area is still alive and kicking.

Summarising the Sumatra Case

This case illustrates a *de facto* 'recognition' of a new form of community-based tenure. Although local tenure practices take place in a grey zone between on the one hand official law and authority and communal practices on the other, it may well be that the introduction of a Forest User Group has nurtured new relations between the forest users and created a new community of stakeholders sufficiently cohesive to manage the forest successfully. On the other hand, the vagaries of the official policies put the new system at the constant risk of suddenly being repressed or overruled by the formally competent state authorities, a threat that bears the risk to wreck the basis of trust that might have grown between users, other civil society actors, and public actors.²²

Tanzania, Between Community and the State

The Tanzanian recent land law reform will now be scrutinised at some length, because it is a good example of legal recognition of existing extra-legal customary use and lease rights, while at the same introducing a great number of new rules, new corporate bodies and very detailed procedures for local land management and conflict resolution.²³

What went before? A long political process of debate about reform of a chaotic land tenure situation eventually led to a drastic revision of the legal position of (rural) communal land tenure, confirmed in 1999 by the introduction of two acts: the Land Act, and the Village Land Act.²⁴ Before, customary tenure was outlawed and all not-officially titled and registered land declared state land (more details in Alden Wily, this volume: 100ff.). But in 1999 the reverse position took hold. In the new legal design 'customary land rights are recognised by the present land acts whether such rights are registered or not' (Odgaard 2006: 18).²⁵ The plot holder has only to show 'long and uninterrupted possession of the land' to have title.²⁶ Existing *de facto* legal pluralism is turned into legalised, or formal, legal pluralism.²⁷ There is still some doubt whether or not the Village Land Act recognises communal land tenure only in the form of individual and family holdings. This would negate and frustrate the typical community elements of any communal tenure arrangement. But according to Alden Wily, there is nothing in the Village Land Act which prevents a Village Council from issuing a specific title for collective ownership by the community as such²⁸ of parts of the village lands, like the commons, rangelands and forests. However, the question is not settled what body owns (or manages) all the lands which are outside specific individual and family plots (the 'reserve lands'). The law does not say: it is community land. Perhaps, as Alden

Wily suggests, the new concept of Village Forest Reserve may partly fill this gap (see below).

The Main Features of the New Legal Design (see Alden Wily 2003)

Although all the land in Tanzania is still being declared public state land, in village areas in the countryside, management²⁹ of land is decentralised firmly to the already existing village authorities, notably a Council which is an executive body – its members are elected – and an Assembly to which all the adult villagers belong. The councils are supposed to respect the customary practices as the basis for their titling and regulation (provided they do away with discrimination of women, and impose some other conditions). Generally speaking the Council has by far the greatest weight in matters of defining, granting, withdrawing, administering, controlling land rights, land use and land transactions. This in itself immediately raises the question how transparent and fair decision making is or will be.

Although not the owner, the village's managerial competences are vast. The Council has competence to administer the existing customary rights and to grant 'Certificates of Customary Occupancy'. This procedure provides the holder with a certificate of a 'Customary Right of Occupancy'. This right may be held for an indefinite period.³⁰ Not only villagers but also non-villagers can apply for such certificate. In all cases of issuing such a certificate it is the Village Council, that decides. There is no provision requiring the Council to put the case before the Village assembly. These lands are basically for cultivation (or grazing). But the Council can also set apart land for public use as well as reserve land thereby excluding it from being occupied by farmers and from being officially titled in their name. In so doing conflicts may flare up, e.g. between pastoralists for whom perhaps large swaths of pasture is reserved, and farmers who already had a keen eye on these lands to expand their farm. Or the other way round, taking grazing land and define it as reserve land etc. Moreover, according to customary law villagers have the right to make use of resources to be found in the commons, the forests etc. The moment the Council sets these areas apart, this may cause conflicts with the customary access rights. Some villagers possibly will start a row, pitting communal practices against the new Council regulations.

Through the certificate of 'Customary Right to Occupancy' holders of land get a stronger position. Certificate holders seem to be eligible for mortgages and also may lease out or even sell their plot, in the form of so-called *derivative rights*.³¹ The (certificated) right of occupancy as such cannot be alienated. In cases of such transactions a detailed procedure has to be followed wherein the Village Council is the body which has to check and approve the transaction. In case of bigger

swaths of land, from 5 hectares upwards, the Village Assembly has to approve too. As we will see below, this set up is complicated and possibly will not be implemented rapidly.

In passing I note the important new procedure introduced in the Act for solving doubts and conflicts about the existent patterns and boundary of the traditional land holdings. Should one ask for a certificate, but without 'the boundaries in land fully accepted and agreed to', these new procedures have to be followed. These 'village adjudication processes' are quite explicitly regulated and use techniques to secure the participation and impact of all the villagers. This is an interesting procedure to solve amicably the internal conflicts as to the existing rights and boundaries.³²

Apart from this adjudication process a new body is set up to mediate in conflicts 'on any matters concerning village land'. This so-called Village Land Council has no decision making competence, only a mediating role. A party who is not satisfied may go to a Court. Although the set up of such an 'elders council' is another interesting move, its lack of any judicial status almost certainly will hinder its development into a local legitimate and efficient problem solver. Other 'nearby' courts foreseen in the new Land Acts are severely underfunded or have ceased to function (Odgaard 2006: 36). Unsatisfied smallholders will have to go to distant and expensive courts.

Some Observations Regarding the New Design

On the one hand, then, the new legal design suggests that Village authorities just respect the existing community-based tenure arrangements as they are. The Council is supposed to administer the land in accordance with customary law (s. 20 of the Village Land Act), that means, as Alden Wily (2003: 23) says: 'any rule that is established by usage and accepted as having the force of law by the community'. All village land is by definition and automatically under customary tenure (customary right of occupancy). This is a drastic move towards large-scale legal recognition of local 'customary' (community-based) land tenure arrangements. The non-state character of local practices is fully confirmed.

On the other hand, however, the new design also *reconstructs* local practices. Firstly, Village Council and Assembly are not the same as traditional authorities in charge of managing communal land tenure arrangements. These novel bodies by the way are not brand new, and already functioned quite some years before. I have no grounded knowledge to judge whether or not the rank and file already perceives the Village Council and the Assembly as fully legitimate authorities of their own. Secondly, when assigning certificates or permitting transactions on the land, the Council by law has to regard various officially

laid down rules and obligations related to the use of the land or the way it is transferred. Prohibition of gender discrimination is one of these new rules³³, 'good use' of the land is another one.³⁴ These and other conditions also come into play in case the Council wants to withdraw a certificate from a holder misusing the land. So, there are new rules imposed on customary ways of management of land.

Although local arrangements are supposed to be the cornerstone for the new deal, a potentially intense reconstruction of local relations is mandated too. In itself this reconstruction may remedy weak points in the existing communal tenure arrangements. But in so doing chances that the new provisions will be followed by the villagers might diminish considerably. Another frequent problem is to be found in the very real possibility that local authorities do not have the capacity to develop and apply standards as to what amounts to sound development of a plot (Sundet 2005: 15, 16). So, there are reasons to be a bit sceptical about the success of such top-down reform requirements imposed on the communities (Fitzpatrick 2005: 462).

Secondary Right Holders

Another tricky topic concerns the position of some categories of secondary right holders. In community-based tenure arrangements often poorer people can eke out a living by having some (restricted) access to commons, by having the right to glean on his neighbour's land after harvest, or to graze his animal. Also women while not possessing title of their own might have the right to work on and take advantage of their husband's lands or lands of their clan. Pastoralists often have the right to graze their animals on communal or even family land. All these rights are called secondary rights. One may wonder if and how such rights, for instance, the right to use the harvested fields for grazing can be and are recognised as title and if people would wish so, certified as such. The evaluation studies do not answer this concern. In fact these secondary right holders will not bother and will continue their practices perhaps until some plot holder opts for a certificate and uses this to exclude everyone. If the Village Council does not care for secondary rights, the certification of the right of the plot holder might lead to the exclusion of the 'grazing after the harvest right holder'.

In its own manner pastoralists' rights to graze the commons and to travel over the land of others are to be qualified as secondary rights too. Often, like in Tanzania, these rights are neglected or deemed inefficient and are not well protected in the new land laws.

Village Land

A quite important aspect of at least the situation on paper is the way the perimeter, the extension of Village lands is determined and demar-

cated. The villagers usually perceive not only farming land but vast tracts of land around the villages, including forests, as 'their land', land under their collective customary ownership. The demarcation process therefore is crucial for the question whether or not it can be said that managing powers really go to the villages. Here the situation, although improved compared with earlier days, is rather delicate. The official demarcation procedure knows a high quality procedure to solve conflicts, either a conflict between villages over their outlying 'commons', forest, grazing areas, swamps etc., or between the village and government officials. This includes an inquiry of a quasi judicial kind. Its conclusions have to be accepted by the government (the minister) unless there is a (non-specified) 'overriding reason of public interest'. This latter possibility could frustrate the village wish to secure not only their tenure of the lands they traditionally worked, but also to secure tenure of the lands and forests they kept as reserve area.

But looming even larger are various other risks for mutilation of what villages see as their lands. Firstly, between the two Acts there is serious incoherence in the definition of the category of state land outside the villages – so-called general land. The Land Act includes unused and unoccupied village land, the Village Land Act does not. So this certainly will induce governmental executive agencies to take land which villages would see as village land and give it to investors. Often in these presumably unused areas pastoralists make their living and they may suffer most.³⁵ Particularly in villages that do not possess their official demarcation of their village land, this kind of taking land for investors is relatively easy in view of the unclear definitions (Sulle & Nelson 2009: 46).

Secondly, historically when some villages were granted official land deeds under the then valid legislation and policies, often forests, pastures etc were not included, and it seems that this historic restrictive boundaries sometimes are just copied in the new 'Certificate of Village Land'.

Thirdly, and even more importantly, the president of the country can 'transfer any area of village land to general or reserved lands' (meaning: exclusively state land) in case of public interest e.g. to promote investments. Village authorities cannot block the transfer but at least there is a rather strict requirement of compensation payment.

Possibilities, then, to take land for state's purposes are abundant. It is reported that already millions of hectares in some way or another have been taken/acquired by the state for investors (Odgaard 2006: 22).³⁶

A preliminary inventory of the way international biofuel companies acquire vast tracts of land for growing palm oil, sugarcane, jatropha or other basic crops reveals serious loopholes in the procedure to acquire land from villages (Sulle & Nelson 2009: 48-54).³⁷ Lack of sufficient

legal knowledge and of experience in negotiating cause villagers to accept conversion of chunks of their village lands into state land without exactly knowing the consequences (permanent loss of their customary rights) and/or for extremely poor compensation and/or against idle promises to receive employment, social services, etc. Moreover, the legal requirement of prior compensation is often not met.³⁸

Box 2. The Fourth Loophole

In a field report from 2005³⁹ we encounter yet another, fourth loophole through which the Village land mass is amputated. Someone desperately wanting to buy a village-registered property has to confront the absence of a functioning system of village processing of official land tenure data. In fact he cannot get the desired title. The only way out might be a roundabout procedure: he and the original plot holder could try to convert his community-based right of occupancy into a right issued by the state, a long-term lease right, called ‘Granted Right of Occupancy’. The plot becomes state land. After that operation the new title can be transferred to the would-be buyer. It seems that such individual conversions of community land to state land is condoned by the national land authorities, although the Village Land Act prescribes an elaborate procedure to do it properly and legally. The land then is escaping the managerial grip of the Village. However, to produce – after conversion – the desired official ‘Granted Right of Occupancy’, and then have it transferred to him, the buyer has to follow an awesome series of bureaucratic steps which takes more than a year full time work and a lot of money. This loophole number 4, then, after all, is more of a theoretical loophole, but it warrants attention because in many schemes of empowering local communities and recognising their communal tenure such loopholes are present.

Alden Wily (this volume: 104) points to yet another danger of undermining the village’s hold on land. Sectoral laws like the Wildlife legislation allow governmental authorities to issue permits to hunt on some territory, even if these lands fall under Village Land, particularly Village Land Forest Reserves under the new Forest Law, to be discussed now.

How is forested land, which is presumably part of the community’s land mass, dealt with legally? Alden Wily’s account shows that Villages have had quite some success in conquering the right to manage ‘their’ forests and do better than the poor management and conservation efforts by official state forest agencies. She describes how on the basis of appallingly bad results from state management and conservation

practices, and in view of rising tension with and sabotage from the villagers, a fully participatory approach was put in place. These experiments later on resulted in the new Forest Act of 2002. Villages can have 'their' forests gazetted as e.g. Village Land Forest Reserves and then obtain almost a full package of relevant management rights, like the right to regulate the use of the forest, to exclude outsiders, to reap the fruits of the forests etc. They may even apply for management rights in adjacent state forests, or at least co-management rights, and some villages have done so already. Conditions to be fulfilled to get the managerial rights are the making of a management plan, the appointment of many committees, the drafting of formal regulations of all kinds, in the form of village by-laws, and to respect their own rules. Although there remain many weak spots and obstructing authorities, it seems that here sectoral law at least is helping to sustain the main set-up of the new village land law design, particularly the unresolved problem who owns the commons, including woodland.

Experiences

I now want to try to come to grips with the way the system works, with the situation on the ground. Experiences with the new design are not many yet.⁴⁰ It is true that already many certificates of Village Land have been issued but people applying for a 'Certificate of Customary Right of Occupancy' are still rare. This does not come as a surprise. Sundet (2005: 9ff) describes in a detailed manner how complicated the village procedure for issuing a certificate of customary occupancy is. At the moment there is still no capacity for village officials to do so, and they just bring the request to higher level district boards (the district land department), as was reported in a 2005 inspection field visit to various locations. The certificates are presumed to be bundled in a kind of file, a register, but if this file is not present in the village, updating does not take place. The 2005 field visit had to conclude that very few villagers ever asked for a certificate and that in case they had the certificate, transactions were not filed. This takes Sundet (2005: 9) to the conclusion that it is a very risky operation just to allow for certification without making it compulsory for everyone. Certainly this latter option would strain local and district capacities and funds even more, but it might prevent the rise of a very small class of wealthy villagers that have acquired the certificate (or used the loophole described above) versus a broad mass of poor smallholders. Chances are now that the richer villagers as well as shrewd people from outside manage to get certificates even at the expense of their poorer neighbours, leaving the smallholders in an insecure tenure position.

The official provisions on getting a mortgage on land on the basis of 'Certificates of Customary Occupancy' have turned out to be an illusion

(Odgaard 2006: 21). Banks have no interest in this kind of small loans, nor have the capacity to administer these. Or they fear non-payment while evictions are not feasible. The 2005 field report contains a scary story about a certificate holder who tried to get a loan for a tractor. In fact, it is almost impossible to get one.

In view of the very slow advances in certification and in getting the Village land management system in place, it stands to reason that the ordinary ways of dealing with customary non-certified tenure are still going on. Someone wanting to officially sell or lease out his land either cannot do so in the legal way or has to resort to informal, extra-legal dealings. Many villagers are not going for certification in the first place, because they fear the costs, they foresee capricious decision making and for other motives. This means that the 'traditional ways' continue to be followed by the vast majority of villagers. In the field report of 2005 it is noted that in a village where certificates of titles have been issued, 'people continue making transactions privately. Sale between friends or relatives, subdivisions between parents and children, are mentioned as transactions which take place anyway without intervention from the Council. Verbal agreements or intervention of a traditional leader are the make up of these many extra-legal contracts'.

Continuance of traditional tenure practices might also jeopardise or at least not improve the position of women particularly regarding their right to inherit land from their fathers in their home village. Odgaard (2006: 28ff) describes a case in which at least part of the home community claims that women cannot get nor inherit land in their home village as their own. At best they are allowed to borrow a piece of land in case they return as a widow or as a divorced women. This loan is not like property, a right of their own that could be bequeathed to her children, etc. Particularly male relatives (like brothers) take this restrictive view. They stand to lose part of their inheritance should their sisters inherit too. Others however deny that this is standing practice.⁴¹ At least there is ambiguity or outright manipulation of so-called customary rules. Although these practices are attacked also from inside and are changing, still the position of daughters remains weaker than that of sons. In the frequent cases in which implementation of the new Village Land Act practically is not far advanced the very explicit prohibition of this kind of discrimination bears no fruit.

In view of the above, a more general observation is in order. It is not the first time that a new legal framework for local tenure arrangements produces a situation of an untidy mixture of more or less official regulation plus management by legally designated officials on the one hand, and unofficial, communal practices executed by traditional authorities on the other. One cannot help but be sceptical about the le-

vel of tenure security the new design will bring to the villagers. Sundet (2005:14) goes even further and predicts that the system will not be implemented, and if implemented will provoke many land conflicts and might not raise small-holders' tenure security at all.

Finally, mentioning the position of pastoralists and their secondary rights, one has to conclude that their position has hardly improved legally. Often their usual grazing grounds fall under the category general land which bring these outside the orbit of possible protection from the local village management.⁴² I choose the word 'possible', because also *within* the village perimeters, the conflict between farmers and pastoralists may lead to Council decisions to restrict pastoralist use of some areas of lands, particularly – but not only – in areas that the Village sets aside as village forest reserves. Although such decisions have to be authorised by the Village Assembly of which all people are member, pastoralists seem to be underrepresented and their voice not heard (Odgaard 2006: 26-27).

Summarising the Case

This case of a daring and surprisingly exhaustive legalisation design provides us with many lessons while it also provokes many challenges, as is to be expected. An important element is the legal fact that customary rights are recognised wholesale, even without a form of registration (which is only 'declaratory' and does not legally speaking create the rights).

Furthermore, this full scale recognition of the community-based land use rights is an important step, and so is the recognition of the management role of the village. In the design care is taken to allow landholders to enter into transactions with the outside world. Mortgages can be obtained, formally speaking. Also, at least legally, outsiders can obtain title within the village. So, a land market and a credit market are opened up while village authorities have competences to control and regulate transactions in order to prevent a whole sale selling out or losing village land. A sectoral law like the new Forest Law provides for communal management of nearby forests and tends to remedy somewhat the blunt contradiction between two land laws about the question what counts as Village Land. To adjudicate boundary conflicts between plot holders and solve further land related problems two new bodies and carefully balanced procedures are offered. Discrimination of women is firmly ruled out.

That such an elaborated system also presents major weaknesses does not come as a surprise. Let me summarise some.

Real Tenure Security

- Leaving certification of land tenure an option instead of a prescription introduces the risk of local land grabbing by the better posi-

tioned villagers and in the longer run breach of internal trust, thus destruction of social capital. It is the well-known topic of the (de) merits of sporadic versus systematic registration (Bruce, this volume: 40).

- Although things may change in due course, many of these new rules and provisions remain a black letter such as the certification procedure itself, the register, the procedure for conversion of village land into state land, the conflict resolution procedures, among others.
- Land and credit markets are not doing well. Although the possibility is opened up to do transactions with banks and with outsiders who want to exploit land in the Village area, in practice this does not work yet. It remains to be seen how the Village authorities will control and regulate these transactions so as to prevent a selling out of village land.
- The reform has almost left out some regulation of the commons. Moreover between the two Laws there is a serious contradiction in the way ‘Village Land’ is defined. Both elements carry the risk to truncate traditional village land.
- Although elaborate procedures and prior compensation are stipulated in cases of the taking of land for investors by national authorities, these procedures are hardly respected, while village authorities cannot formally block this taking of land for investments nor enforce the paying of the required compensation.
- Sectoral laws sometimes support the new system (Forest Act) but others wreck it (wildlife law).
- The position of women, although legally drastically improved may still remain weak, this goes also for other secondary rights including those of pastoralists.
- Customary practices among which secondary rights of the kind of leasing, renting, mortgaging, sharecropping and further transactions are not yet satisfactorily regulated and continue in a complex mixture with ‘official’ practices under the new regime. It is likely that under demographic and economic pressure this situation favours the wealthy and better positioned.

Accountability and Legitimacy of Authority

- Wide areas of discretion characterise the competences of the village corporate bodies. In some respects important provisions are in place such as the one to solve internal land holding conflicts, but it remains to be seen how these adjudication platforms will function.
- The rather heavy-handed reconstruction of local land use rules and of management institutions is overburdening the capacity of local officials. Apart from the risk of non-implementation of the design,

this highly conditioned recognition regime may damage legitimacy of local authorities in the eyes of the villagers.

Legal Empowerment

- There are, as usual, huge power differences between village, political and economic forces. Lack of sufficient legal awareness, knowledge and legal aid cause villagers to accept conversion of big chunks of their village lands into state land without exactly knowing the consequences (permanent loss of their customary rights) and/or for extremely poor (prior) compensation and/or against idle promises to receive employment, social services, etc.
- Moreover, legal protection by courts and other means, provided for on paper, often is not (yet) forthcoming or functions deficiently.
- Legal aid offices and similar NGOs have started their work but certainly not everywhere.

*Ethiopia, the Individual Road*⁴³

In this country up until recently smallholders suffered from blatant tenure insecurity.

Land governance by the Mengistu government (1975-1990) was strongly top-down and smallholders did not have any official right to their plot. Resettlements were rampant. The new government of 1990 did not change this situation very much, apart from a token constitutional improvement.⁴⁴ Smallholders still had no piece of paper to prove their right,⁴⁵ state authorities were still managing the land top-down. Farmers were exposed to drastic measures such as periodic redistribution of land to cater for the landless and the youth (as in Amhara State in 1997) and the taking of land for investment purposes and public works without much ado and without compensation. Political patronage was and still is an overwhelming phenomenon leading to capricious assigning or taking away of land. Local institutions of communal tenure might have provided some alternative form of security to the smallholders but these institutions had practically died out after the long years of systematic repression of customary norms and leadership, at least in the highland areas.⁴⁶ Under these circumstances, already before any change in federal land tenure policies, in several regional states from about 2000 onwards a new land-holding policy was introduced, calling for titling and a form of registration while introducing some (minor) amendments to existing official land tenure rules. The federal government did not move its position but retreated in view of upcoming elections that for the first time ever promised a real challenge, land law being a very hot topic. A new federal land law was passed in the Ethiopian federal parliament in June 2005 in the

middle of huge political turmoil over the elections of one month earlier (May 2005).⁴⁷ While being a highly politicised undertaking – the federal law reaffirmed state ownership of land – it foresaw a titling and registration procedure leading to ‘holding certificates’ containing plot boundaries, quality and size of the plots as well as the names of the holder(s). The regional states had to adapt their land laws to the federal law. In Amhara state, the land law of 2006 is almost a copy of the federal one.

In this approach improved tenure security was not sought through the introduction of private ownership of land but through clarification and documentation of the existing land use and management rules, or rather practices. The rules/practices as such did not change much: all the land was still declared property of the state, land management stayed in the hands of (recently decentralised) local bodies like the council plus executives of the lowest public administration levels (the *kebelle*) and the district (*woreda*). Farmers would keep the kind of use rights they already informally possessed and would now be provided with a land use certificate.

This then is an example of legalising land rights in the form of *individual* (and family or household) rights as opposed to *communal* or group rights. There may be some examples of a right granted to a group of villagers to use and manage common good resources, the commons, like grazing land, steep hilly slopes, some patches of forested land. On the whole however, commons are not included in the land law reforms, formally they are state property and are continually subject to encroachment by outsiders.⁴⁸

The Legal Framework

According to the new Amhara Land Law (2006) farmers possess use rights hedged in with many conditions. Residence in the rural areas is one; using the land properly and sustainably is another. Letting land lay idle for more than three consecutive years can be motive for taking the land and distributing it to others. Bequeathing the use rights to heirs is now allowed freely.

The new formal position of some kinds of secondary rights holders in the sense of sharecroppers, renters etc. is mixed. It is not allowed to sell, exchange or mortgage the land but the holder may let or lease the plot, for a short period of time. For longer periods the lowest governmental entity, the *kebelle*,⁴⁹ has to give approval. In some new regional state legislation – but not so in Amhara – renting out for a longer period is allowed only in case the lessee uses ‘modern technology’, an undefined category, in practice meaning ‘using a tractor’.

It is the *kebelle* with its elected council and a variety of standing committees nominated by the council, including some villagers, that it is

legally confirmed in its competence to take the decisions about assigning, withdrawing of land, permitting renting out, and applying conditions such as being a resident in the area.

The Registration Process

The *kebele* administration is the body in charge of issuing the certificates after inspecting the plots, measuring these, determining rightful plot holders and solving the many disputes, particularly in terms of boundaries. After the large-scale redistribution of land in Amhara state in 1997, much confusion about plot boundaries and/or plot holding ensued, so in the new registration operation many conflicts flared up. This conflict-ridden situation is compounded by the crude ways of measuring the plots.

Each certificate contains the names and addresses of the household head, his/her spouse, and siblings or other relations in the household (as well as details of the land and its geographical position). A typical example of locally grown rules without basis in official law is the 'rule' that persons not mentioned on the certificate will not have the right to inherit the land.

From the case study done by Rahmato (2009b) one gets a good idea of how the registration procedure was completed. A local village committee within the standing committee structure of the *kebele*, composed of local people – some with a reputation of wisdom – and local bureaucrats do the work. Women are notoriously absent, with few exceptions.

As happens often, the register is not kept up-to-date, so one may expect the *de facto* situation on the ground to deviate considerably from what is written down.

The Practice of Implementing the New Land Law

We now rehearse some experiences with the new system and inspect perceptions and anxieties of smallholders interviewed by Rahmato and his team.

State-Imposed Redistribution

Although in Federal Law collective redistribution of land is now hedged in with conditions, it is not ruled out. The Amhara Land Law follows this. Almost half of the (120) interviewed inhabitants of two *kebelles* in the Dessie Zuria district (*woreda*) said that redistribution is likely, which shows widespread distrust in the state's intentions.

'Informal' Local Redistribution

Kebele authorities during the registration operation decided to take land from families with over a certain (small) amount of land and

redistribute it to others. This is an unlawful practice but there is no effective remedy against it. Also after registration such practices ensue. Once from a widowed woman part of her (small amount of) land was expropriated to compensate a prestigious high-ranking person in the *kebele* for loss of land because of the building of *kebele* offices. At the local level she found no interest in her case, let alone a remedy and thereupon went to the far away *woreda* court at great costs. She went without lawyers or para-legal support and lost the case. The court said that the *kebele* authorities had assigned the land to that person and therefore he is the rightful holder now. She did not pursue the case further as the cost of doing so before the high court of Amhara state (one day travel away) was prohibitive (Rahmato 2009b: 91-92, and personal communication).⁵⁰

Another example of extra-legal local redistribution is the implementation of the 'three years absence rule'. After three years of absence legally the plot of land can be redistributed, but there are reports that this sometimes happens already after two years (USAID 2004: 16).

Discretionary Powers

The conclusion is warranted that the question what competences legally rest in the hands of the lowest level executive authorities is not easy to answer. At least not from written official texts. Not only do the written conditions for the holding of land – under sanction of withdrawal – grant wide discretion to the authorities, but practices of extra-legal decisions about land management are frequent.⁵¹

Taking the Land and the Matter of Compensation

The same unchecked power is at work in the important matter of taking the land for public works, private investments, and other purposes of a general nature. That land can be taken for public purposes is a normal feature of any land law. But the way procedure and compensation for land taking are regulated in Amhara state, as well as the implementation, show many unclear areas.

First of all, a new Federal Law of 2005 allows the *woreda* authorities to dispossess farmers and take land for private or public investment purposes or any other destination which is more useful. Compensation is mandatory indeed but as yet no regional state proclamations have been passed regarding the way compensations have to be determined, so 'local officials on the ground simply make *ad hoc* improvisations' (Rahmato 2009b: 78), often far below market prices.

Other experiences are even less promising for smallholders. Land used for grazing was taken for road building without any compensation because it was asserted that common lands are state property. Land from farmers with certificates was taken too and compensation

was paid, but only for houses and buildings not for the land itself, because even cultivated land was deemed to be state property.

Taking of land for development purposes (in local language: *limat*) like road works, dams, irrigation projects, natural parks, foreign investment, forest exploitation, is still easy and cannot be blocked by the farmers, but now some forms of compensation are provided for. But if e.g. land is taken nowadays for water works, often compensation is not in money but in kind, meaning that a piece of land of poor quality is offered. Cash payments once again are only for improvements, not for the land itself.⁵²

Conflict Solving Institutions

People resent these discretionary and sometimes capricious practices of applying the rules. Conflict solving institutions are not much of a countervailing power. In case of persistent conflicts the local land administration committee usually hears the case and tries to settle it. Only then parties are allowed to adduce the so-called social court, a typical lowest level body within the state system. It is not an independent body. After this the *woreda* (district) court can be appealed to, and finally the state high court.

People generally do not feel they stand a chance against the decisions by *kebele* councils and committees like LAC, *kebele* and *woreda* public functionaries, social courts and district courts. These bodies are packed with members of the ruling parties who have no incentive to go against the government(s).⁵³

It is reported that people still resort to customary authorities to get a solution for conflicts that might arise with other villagers. These 'elders' have no official status and their decisions have no formal legal validity but apparently in some places they are still at work, as a left-over from the times of resilient communal land tenure arrangements.

Position of Women

While generally women are often discriminated against, reports about the fairness of the registration operation and its implementation are mixed. In the registration committees hardly any woman is to be found, and generally local officials are prejudiced, reasoning e.g. that female households heads cannot work all the plots they have because they are not supposed to do rough physical labour, so part of their land may be taken (Rahmato 2009b: 92). But as to the certificates, they do not particularly discriminate against women. As a report on Amhara registration observed: 30 percent is registered under female title.⁵⁴

De Facto Legal Pluralism?

It is reported that customary inheritance practices like dividing up the land and giving it to siblings during lifetime of the holders, are still around in some places. As this is reducing land sizes below the subsistence level, it is more than likely that local authorities informally or formally fight these practices, e.g. by not giving permission to transfer the use right title. I already mentioned the matter of commons and a possible community-based practice of management as well the role of traditional elders in settling conflicts between community members. In a field study about registration in Tigray (Mitiku et al. 2005: 22) mention was made of a wide spread practice of 'mortgaging' plots of land although it is formally forbidden. It is not the usual mortgage however (where the land stays in the hands of the borrower until possible default). The land is given to the one who lends the money until the loan is repaid, the profit from the land is considered to be the rent for the loan. This is another example out of the wide category of secondary rights. This transaction is called *antichresis*, and is even informally registered. It seems that social courts at times do enforce these non-official practices.⁵⁵ As usual some *de facto* plurality of practices may be observed.

Concluding

Expectations of the new registration were high. And 'compared to the situation in the recent past (...) there has been considerable improvement in peasant attitudes with respect to tenure security in their holdings than in the past' (Rahmato 2009b: 60-61). A majority of the respondents interviewed said that for instance they now felt more confident in leasing and renting out land. But at the end of the day prevailing land administration practices have not changed much and fears of peasants of redistribution, taking of land without compensation, lacking a defence mechanism against state arbitrariness have not been allayed. The respondents still perceive their rights to be easily taken away from them. Rahmato (2009b: 82) concludes that robust tenure security assumed to come from registration, only has a chance to come forward when registration is an integral part of the effective granting of other basic political and democratic citizens' rights. These rights moreover should be organised in such a way that the people can also mobilise these rights effectively. Empowerment of the smallholders and accountability of public authority are essential circumstances to take into account while drafting legal designs with the aim to effectively provide for real, effective land tenure security.

This situation is exacerbated by the very fact that in a country like Ethiopia with its high spread of illiteracy, people hardly have any notion of the law. Their awareness of their official legal rights is very low,

they have no idea where to look for the law and for their rights. The low level authorities do not have such knowledge either. Copies of the land laws are not around, there is a blatant lack of NGOs and other rights-advocacy organisations serving to empower local people and giving free legal aid, if needed.

Summarising the Ethiopian Case

Smallholders now for the first time ever get a registration document, while the registration procedure is simple. Compared to the situation in the recent past peasant attitudes with respect to tenure security have improved. People feel for instance more secure about leasing and letting land. Some rights such as the right to bequeath a plot to one's own children, are now officially confirmed. However, some weaknesses remain.

Security of Tenure

- Taking of land for development purposes, public works etc. is not regulated adequately and takes place without much ado and without adequate compensation.
- The commons are not involved in the new land laws and remain therefore free for grabs.
- Non-recognised practices live on, like the *antichresis* way of 'mortgaging' land.
- Formally, redistribution policies are not ruled out and moreover continue sometimes in informal practice on the local level.
- The position of women in matters of land rights although improved slightly, remains weak.

Legitimacy and Accountability of Authority

- In the new land law(s) a wide discretion in land management is accorded to the lower level of the public administration (sound use of the land, the three years absence clause etc.), without much opportunity to call them to account for their decisions. Capricious and politicised decisions partly wreck the newly won tenure security.

Legal Empowerment

- Legal awareness is weak both among smallholders and the lower level officials, legal empowerment and active legal aid NGO activity is absent, while an independent and accessible court system is not available yet.

If not Private Property, Then What?

There is a lot to be learned from the cases of land tenure legalisation we discussed. As I prioritise the communal road I want to summarise some lessons learned about granting communal title as a means to legalise land tenure for development.

Tenure Security

Demarcation procedures for community or village land bear the risk of not including all the traditional land, particularly the ‘commons’.

Better protection of the community-based arrangements are provided by designs that recognise land rights – both the communal title and individual use rights – as rights already legally valid without any further registration or similar procedure.

Registration usually is a condition to be able to enter into transactions on markets. It would be best to make this procedure obligatory for all (Bruce, this volume). If not, land grabbing through political and economic manipulation risks to frustrate the rights of the smallholder.

In the design it is necessary to cover all relevant tenure transactions, like inheritance (under the living, under the dead), sharecropping, ‘mortgaging’, renting out & in. Rights of various user categories have to be taken care of, such as the rights of pastoralists and women, secondary rights, as well as rights to use the commons.

Investment regulations and practices as well as regulations for taking the land for development projects and public works should contain careful procedures for at least serious community consultations and compensation payment, if not veto rights.

Sectoral laws should respect the competences formalised in the new land tenure design.

The Land Management Authority, Composition, Capacity, Legitimacy and Accountability

The legal design should define the land management authority in such a way that it is or can easily develop into a locally legitimate community-based authority. It should be a community-based approach with ample popular engagement, based on a locally embedded learning-by-doing approach (Alden Wily, this volume). Heavily reconstructing this corporate entity bears the risk of recognising the community as the owner of all the land but at the same time changing it into something else.⁵⁶ Okoth-Ogondo (2001: 3) discusses the drafting of third road legalisation designs while being aware of the need to remedy e.g. discriminatory practices, and stresses the need for this legal design to be

responsive to these community values and processes. In this context he is chastising the Tanzanian Village Land Act in that it vests the power of management of village land in new local committees without setting out 'the principles upon which these committees will manage village land'. 'Nor are the community values to which administration must conform prescribed'. Indeed, the question is warranted what happens with village authorities and their local legitimacy, when these authorities 'become agents of the state' (Van Cott 2003: 25). Social capital gets lost. The capacity of the community to defend itself against encroachments may be weakened.

Criteria how to use the land management competences would have to be specified but as this will always leave a large area for discretion some simple procedures have to be mandated for the regular issuing of guidelines as to how the authorities will fill in their wide discretion and through what procedures they take land management decisions.

Without generous support to local authorities, capacity problems will thwart the neat set up of any design.

Legal Empowerment and Adjudication

Measures should be in place to empower smallholders, make them aware of their rights, provide for free legal aid, and strengthen community organisation to be able to have access to the new tenure rights and defend these against outside-investors and against state officials (see Mitchell 2009 about Land Rights Legal Aid and Cotula 2007 on Legal Empowerment). Local conflict solving procedures have to be simple to prevent overburdening of local functionaries. Official low level courts have to be established, should be functioning and should be reachable at a low cost.

Final Reflection

It is to be expected that in real life any new design walking a third road will exhibit a *de facto* (empirical) legal pluralism of practices and authorities. Transmission of the individual (or: family-) plots to heirs or transactions like sharecropping or 'mortgaging' are often done in practice although formally ruled out, just to give one example. Because of this grey zone, smallholders may be kept at the mercy of state officials, particularly in case land is getting scarce and/or awakes interest of investors. This leads to a hypothesis: the more the (state) law defines norms, procedures, authorities and/or forces local authorities to reconstruct and codify these, and the less one is building on the local institutions, the more a kind of unruly, haphazard mixture will turn up, a

mixture of local practices and decision makers on the one hand and official norms and formal authorities on the other. It is likely that under demographic and economic pressure this situation favours the wealthy and better positioned villagers and undermines the power of resistance that the community can muster against encroachment on their lands through investment and other large-scale development projects.

Notes

- 1 A variation on a paragraph title in Sundet (2005: 15).
- 2 From 2001 onwards the Ethiopian government chose the first category, see the note 'Rural Development Policy and Strategies' by the Ministry of Finance and Economic Development (MOFED), Addis Ababa, April 2003. With thanks to Dessalegn Rahmato, who drew my attention to this document. Compare Hanlon's (2002) well-framed question, in the subtitle of his article, about the future of rural development in Mozambique: 'will foreign investors, the urban elite, advanced peasants or family farmers drive rural development?' Clearly 'development' is a contested concept that requires socio-political choices.
- 3 As we will see this is partly due to a general tendency in development projects to go for 'participation', to engage 'stakeholders', to reframe central state policy making into public-private networks of governance.
- 4 It strikes me therefore that Hatcher, Palombi and Mathieu (2009) in a recent interesting brochure practically only deal with providing for *individual* land rights and legally empowering the local smallholders to make them aware and capable of making use of their improved legal position. In the brochure we find only two short remarks about the provision of collective rights for women in Burkina Faso and collective forest management rights for the San in Namibia.
- 5 See variations on this definition and further details in my essay 'Communal land tenure: the concept and its historical defeat against capitalism', in Hoekema (2008: 57-87). See also Van de Sandt (2007: 24). A useful characterisation of 'customary tenure' or community-based (land) tenure to be found in Fitzpatrick (2005: 454). Also Prosterman, Mitchell & Hanstad (2009: 26).
- 6 This terminology is also used by Van der Molen who uses the term overlapping rights. A thorough analysis of derived rights to be found in Lavigne Delville et al. (2002).
- 7 Mitchell 2009: 358.
- 8 A name given in Latin American countries to local indigenous leadership.
- 9 Fitzpatrick (2005: 454), while analysing 'customary tenure' (as he calls community-based tenure) stresses the 'overarching ritual and cosmological relations with traditional lands'.
- 10 In the unabridged version of his keynote address to the African Public Interest Law and Community-based Property Rights Workshop (Arusha, Tanzania, August 2000), Okoth-Ogendo stresses reciprocity as the foundation for these obligations.
- 11 As suggested by USA former president Bush Senior applauding De Soto (Otto 2009: 178).
- 12 In this volume nobody mentions this explicitly.
- 13 See a clear example of this decreasing accountability in Fisiy (1992).
- 14 Many neo-institutionalists are pleading for rural land legalisation designs in which formal land rights are being built on extra-legal arrangements. But usually this is not

out of concern for the moral economy and the livelihood security implied therein. There is a definite risk that their plea for a middle way between imposing private property and doing nothing eventually promotes a form of legalisation in which the moral economy gets lost. The institutional turn is part of a top-down, state-led reconstruction of institutions for development through facilitating markets (see Newton 2004: 7, footnote 10). The goals of this new policy are often the same as before: liberating land rights from communal bonds and fetters. The land has to become a commodity, rural land markets as well as credit markets have to be promoted, but to get there it is better to take a step-by-step approach and not to force the situation. This approach also dominates the recent turn of the World Bank towards more respect for extra-legal local tenure institutions in programmes of legalisation of land tenure for development. While acknowledging that non-state customary tenure regimes can provide sufficient tenure security, Deininger (2003) suggests a rather strong reconstruction of the local situation. He pleads for a remake of local practices, to change them into clear-cut rules. He wants to renovate local authority structures into a more accountable and transparent way of decision-making. Rule of law and good governance do have to be brought to the local communities as well, but preferably in a step-by-step approach and not all at once. This way of official upgrading of community-based tenure arrangements has a double face. On the one hand, it means recognition and acceptance of local ways of dealing with land and the legal introduction of a plurality of property institutions, the local and the national ones. On the other hand, quite a few of the central features of such arrangements are rejected and replaced by models of governance that are carbon copies of the dominant regime.

- 15 Individualisation is an important tendency in quite a few of these communities. For the indigenous self-governing territory of Jambaló in Colombia, territory of the Nasa people (Paeces), Van de Sandt (2007) describes precisely the stark tensions among the inhabitants of this territory between, on the one hand, a community orientation in the organisation of (agricultural) labour and in the way the people perceive their land rights, and on the other hand, a more individualised tenure of the plots and the decision making on how to market surpluses and find new ways to earn some money (his chapter V: 'Nasa (Paez) governance and the indigenous communitarian economy').
- 16 An example is a UNDP project in Mongolia about sustainable management of grossly depleted grasslands. A project document says: 'The goal of this project is to increase the welfare of herding families through the sustainable management of Mongolian grasslands. The main mechanism to achieve the project goal is to strengthen and formalise existing herding community institutions and to strengthen the linkages between them and formal governance structure and the private sector'. The project was mainly financed by the Dutch government (UNDP Project MON/02/301, under 'Background', website accessed June 2006).
- 17 The spirit of this less command-and-control and more cooperative 'horizontal' community-based forest management is clearly analysed in Gregersen and Contreras (2010).
- 18 Important conditions are the presence of an urgent public problem, a state (department) that steps back from the command-and-control policy making approach, a guaranteed (semi-) autonomous firm position of the non-state partners, a minimum of belief in the possibility of positive relations between public authority and private communities and last but not least a minimum of stability in that particular society. These conditions for successful new forms of community-based management of forests, fishery, and other natural resources including land, are extensively studied by the many participants in the International Association for the Study of the Commons

(IASC), often reported in *The Commons Digest*, and further discussed in studies like Ostrom (1990).

- 19 I haven chosen these for two reasons: Mozambique, Tanzania and Ethiopia are well documented and moreover show an interesting continuum: both Tanzania and Mozambique are examples of recognition of tenure rights on the level of a group, as community rights, while Mozambique is 'minimalist' (Fitzpatrick 2005: 458) and Tanzania rather reconstruction-oriented and demanding. Ethiopia follows the individual track. The (brief) example from Sumatra serves to show a typical situation of two parallel systems of tenure existing in a kind of legal limbo. This again is fairly typical in many third road designs (and not only in these, also – and even more so – in full private property designs). But even more important, it shows the potential of new community-based governance of natural resources.
- 20 Usually the *régulo* is partly a traditional authority, partly a kind of governmental officer, a figure once adapted to the needs of the former colonial power. Until the present time they occupy quite an ambiguous position. In former days they have been the object of bitter contests and ideological quibbling between the anti-colonial Frelimo party and the oppositional Renamo movement (Pimentel 2010).
- 21 For this case see Safitri 2009.
- 22 According to Dubois (1997: 15) in forest co-management schemes such informal situations are common. He attributes to this 'loose situation' the 'prevalence of covert arrangements between stakeholders at the local level, e.g. replacement of official fines by bribes, or clientelism'. These deals 'serve both parties: on the one hand, they complement the forest agent's insufficient salary; on the other hand, the briber can use the resource at a lower expense by paying less than the official fees or fines'. This resembles the situation in the Lampung forest users case.
- 23 Normally these designs are not so detailed.
- 24 These laws came into legal force in 2001.
- 25 This reminds me of the way in which in Mozambique communal land tenure is legally recognised even without any official certification. The important difference however is that in Mozambique rights are recognised on the level of communities, not individuals/family.
- 26 This is almost the same notion as we find in the 1964 Land Law of Senegal.
- 27 For the granting, conditioning, withdrawing etc. of rights to land located outside the rural village land areas, the top-down and centralised governmental management system is kept alive. This matter will not be pursued here, as I only dedicate my attention to village land and the interplay of the traditional ways of land management with the new legal regulation.
- 28 Titling might also be done in the name of a specific group. So, common lands ('the commons') including rangeland and forests could be titled in the name of the community itself or perhaps some group within it.
- 29 Formally speaking the village is not declared the *owner* of the village lands but its manager.
- 30 Rights on state land, so-called 'Granted Rights of Occupancy', have 99 years as their maximum duration.
- 31 Sometimes called derived rights (see box 1).
- 32 In cases of prolonged conflict the district authorities can take over the adjudication process, which according to Sundet (2005: 11) undermines the legitimacy of the elaborate and meticulous village process.
- 33 The Village Land Act clause forbidding discrimination has become famous for its length and thoroughness. In section 20 (2) of the law it says: 'Any rule of customary law or any such decision in respect of land held under customary tenure, whether in respect of land held individually or communally, shall have regard to the customs,

traditions and practices of the community concerned (...)’ and adds ‘(any) rule of customary law or any such decision in respect of land held under customary tenure shall be void and inoperative and shall not be given effect to by any village council or village assembly or any person or body of persons exercising any authority over village land or in respect of any court or other body, to the extent to which it denies women, children or persons with disability lawful access to ownership, occupancy or use of any such land.’

- 34 In French speaking Africa this latter one is the condition of *mise en valeur*.
- 35 Their grazing grounds are almost invariably deemed ‘not in use’ or badly used. This view still prevails in the 2005 ‘Strategic Plan for the Implementation of the Land Acts’ (SPILL) (See Odgaard 2006: 22 ff). Compare a 2008 official governmental view on the role of smallholders as well as as pastoralists in the kind of development the government wants. These categories of land users are seen as not using the land in economically efficient and productive ways (Sulle and Nelson 2009: 35-36).
- 36 It is (to me) not entirely clear if the taking of the land follows the loophole of declaring unused and unoccupied village land as needed for state purposes, or by using the power of the president to convert already established village land to state land. Disturbing reports have been issued as to the impact of large foreign investments in gold mines in and after 1996, bringing testimony of massive evictions of villagers from their lands and houses without serious compensation. See an unauthorised report of a meeting ‘Raw materials versus Poverty’, Friends of the Earth, Netherlands, a conference on the role of the World Bank in financing fossil fuel and mining projects, 12 September 2001. This report can be retrieved via: www.milieudefensie.nl/globalisering/publicaties/publicaties-olie, accessed October 2010.
- 37 The other acquisition road is through a governmental investment agency (TIC: Tanzanian Investment Centre) dealing in state land (‘general land’).
- 38 Other loopholes in the compensation matter abound (Sulle and Nelson 2009: 54 and 52 respectively). Sometimes compensation is negotiated between a private investor and the village authorities while the law prescribes negotiations and fixing of the compensation between village and central government. The private investor often gets away with the promise to pay after he has secured a bank loan to get the operations started. If this loan is not forthcoming the villages get nothing while their lands are officially out of their hands for good. Or, the other way round, district governments claim a large portion of the compensation payment because they need it for provision of services in the district at large. But districts do not officially manage village land and cannot legally claim any ‘compensation’.
- 39 I found this report ‘Titling and Registration System in Tanzania Villages, visit to Dar Es Salaam and Mbeya regions from august 4 – august 11, 2005’, in a bundle of reports and reflections *The costs of complying with the law over a fifty year period of productive life*, on the website www.tanzania.go.tz/mkurabita/PDF/annexes%20volume%20III.pdf, accessed September 2010.
- 40 Sundet (2005: 1) writes ‘(the Acts) to a large extent still aren’t being implemented’.
- 41 The insecurity of women’s rights is a common feature of community-based tenure arrangement. Vel and Makambombu (2009: 18) depicting customary land tenure on the island of Sumba in Indonesia, conclude: ‘Several of the above cases have shown that access to land for women is very limited in Sumba. Traditionally a widow is only entitled to take care of her husband’s or her son’s land. Relatively wealthy women can purchase land, but their tenure may never be entirely secure. In general women cannot own *adat* land, and daughters cannot inherit land.’ The authors refer to one exception: giving land to a daughter as part of her dowry.
- 42 This risk is palpable because the general policy in Tanzania keeps seeing the pastoralist way of life as not sustainable and wants to sedentarise these people(s).

- 43 I mainly draw on two articles by Dessalegn Rahmato (2009a and b).
- 44 Article 40 (4) of the 1994 Constitution of the federal Democratic Republic of Ethiopia, in an unofficial English translation, says: 'Any Ethiopian who wants to earn a living by farming has a right, which shall not be alienated, to obtain, without payment, the use of land'.
- 45 Supposing that in those (recent) days they had any officially recognised right to their plot at all.
- 46 In the lowlands, particularly in pastoralist areas, communal land tenure institutions are still well alive and kicking (Afar area, Somali territories, various areas in the Southern State etc.).
- 47 The draft law was presented to the parliament in its pre-elections composition, where the government parties had a comfortable majority.
- 48 Because the system at least in the states of Tigray and Amhara only provides certificates in the name of individuals (or families) the matter of rights and governance over common pool resources is not settled. Forests are in the hands of state authorities.
- 49 A group of villages.
- 50 A USAID report (2004: 15) quoted *kebele* officials saying that also with certificates, redistribution was possible.
- 51 Sometimes by these invented rules local authorities are able to dampen unfair results of official rules. Take the rule that restricts the right to access to land on being a resident. When a woman after marriage moves to her husband's village and would normally lose her access rights, it is reported that sometimes the authorities respect her original rights, so that upon returning, say as widow or divorced woman, a plot of land is still available in her original village.
- 52 I am not knowledgeable about the way sectoral laws, like environmental law, forest law, investment law etc. are coordinated with the new land law, but one may expect important failures of coordination which compound the insecurity for smallholders even after registration.
- 53 In the committee as well as in a social court a locally respected elder person may be sitting alongside functionaries who are loyal to the ruling parties.
- 54 See Teklu (2005: 10). For male-only title: 32 percent, and joined title: 39 percent (end of 2004).
- 55 In an official mortgage the borrower in case of default loses the land, that is transferred to the bank and/or to more successful farmers. This is promoting market-based development. In the *antichresis* the land stays in the hands of the lender. Upon paying the loan back the borrower can retake the land. But should the lender not give the land back, the borrower runs into serious problems because his claim to get his land back is not supported officially.
- 56 Fingleton (1998) puts the question in a succinct form: 'how to recognize a group without converting it into something else' (see the foreword to this paper by Lawrence C. Christy).

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