



# Land Rights Reform and Governance in Africa

## How to make it work in the 21<sup>st</sup> Century?

**Discussion Paper**

**Liz Alden Wily, March 2006**

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## **Abstract**

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 Lands and resources owned in common have been most affected, the more valuable having been withdrawn from local custodianship or reallocated to outsiders and investors.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

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

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

Constraints upon the delivery of real security abound. The paper points to the need for a more action-based and community driven evolutionary process. This, it is argued, will better resolve conceptual confusions that still surround customary tenure and which frustrate sound policy development. It will also better trigger the local level empowerment and institution-building needed to more appropriately shape, drive and sustain political will towards real removal of the chronic tenure insecurity of the poor. It will also help limit the impacts of reform that is broadly market-driven and in the African context, often seeks more to bring as much customary land into the market place for investor acquisition than to secure customary rights and benefits. Approaches which work from the community level and which focus upon the security of least secure properties will also bring threatened commons to the centre of reform, facilitating the evolution of stronger constructs for the ordering and protection of collective rights. Securing those rights in clear and inclusive ways will lay a foundation from which their generally poor shareholders of these properties may begin to reap the benefits.

## Resumo

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

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

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

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

## Resumen

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

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

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

Existen muchas trabas a la realización de una seguridad efectiva. El documento expone la necesidad de un proceso basado en mayor medida en la acción e impulsado por la comunidad. Se argumenta que ello, resolverá más adecuadamente las confusiones conceptuales que todavía existen respecto de la tenencia consuetudinaria y que frustran el desarrollo de políticas idóneas. La resolución de esta confusión conceptual redundará en el empoderamiento y la creación de instituciones necesarias para generar un sentido de propiedad pública de la reforma. Asimismo, ayudará a fomentar la voluntad política (a menudo ausente) para una remoción real de la inseguridad crónica a la tenencia por parte de los pobres de las zonas rurales. Ayudará también a limitar los efectos de la reforma que, en general depende del mercado y que, en el contexto africano, tiene por objeto primordialmente colocar en el mercado la mayor extensión posible de terrenos consuetudinarios no ocupados para su adquisición por inversores. Los enfoques que se basen en el nivel comunitario ayudarán a que la reforma se centre en esos precarios derechos, facilitando la evolución de estructuras más idóneas para la ordenación y protección de los derechos colectivos. La seguridad de esos derechos de forma clara e integral sentará una base a partir de la cual sus interesados, generalmente pobres, puedan comenzar a recoger los beneficios.

## Résumé

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

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

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

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

# Summary

## The Context

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

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

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

## Looking to Root Causes

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

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

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

The drivers to these conditions have varied. In Sub Saharan Africa there is plenty of evidence to suggest that misdirected paternalism and incomprehension of complex customary land ownership and land access norms have been factors, and misunderstandings persist. Political and administrative convenience has just as clearly played a role.

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

## **Wrongful attrition has especially affected common properties and the poor**

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

One effect of this dispossession has been to undermine and often disable such community based mechanisms for their use regulation as existed and which should have seen flourishing development to meet the demands of new conditions. Absence of support helped generate the self-fulfilling 'tragedy of the commons'. Another effect has been to enable governments and aligned private sector interests to capture the benefits of commercial use of these community properties through logging, rental and other fees and benefits.

## **The commons as the capital of the rural poor**

The most serious effect has been to legally enable practical realisation of this dispossession through outright appropriation of these lands and their reallocation under statutory tenure regimes to government's own agencies or interested entrepreneurs of its choice. Some of this has been in genuine pursuit of assumed greater public purpose, such as in the creation of national forest and wildlife parks and reserves. Much of it, however, has been wilful expropriation for private purpose, justified as supporting the national economy. While eviction from houses and farmlands has generally induced payment of compensation for at least the loss of standing crops or buildings, the 20<sup>th</sup> century entrenchment of community owned lands as un-owned has enabled governments to avoid paying any compensation to the traditional owners at all.

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

## **20<sup>th</sup> Century Remedy**

There have been exceptions on all continents and attempts at remedy, mainly through widespread redistributive land reforms targeted at tenants and workers. In Africa 20<sup>th</sup> century reforms were mainly in the form of titling initiatives, designed to convert existing customary occupancy into European-derived forms of land holding and to register these on the basis of formal survey. This has been most systematically pursued in Kenya, primarily intended to provide a basis upon which 'progressive' farmers could obtain loans and buy out less progressive farmers. Fifty years on, and with still under half the rural domain titled, it is apparent that conversion has not done away with customary norms in those areas, that titling has not prompted significant mortgaging, and that the security of tenure that widely exists in the farm sector does not derive from the often corrupted registration or the holding of title deeds. Nor has the promised reduction in land conflict occurred, with a new generation of conflict

clogging the courts, often due to contrary customary and statutory norms. Like many countries in Africa, Kenya is constitutionally reviewing the status of rights derived through customary norms, beginning to overturn the unjust and failed approaches of the past 100 years.

## **The Promise of Real Reform**

### **Liberation of customary tenure from a century of suppression**

Dramatic improvement in the legal status of unregistered customary land interests is globally on the horizon. This is most evident in Latin America where the traditional land rights of indigenous peoples in at least twelve states have seen improved legal status. Change is also underway in parts of Asia and in the developed world, where the customary land rights of indigenous minorities in Canada, Australia and New Zealand are seeing fairer legal interpretation through new supreme court rulings and just as important, slow but gathering delivery on the ground.

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

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

### **Recognising customary land interests as private property rights**

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

Other elements of land reform are contributing to majority rural land security. Uganda, for example, has taken the bold step of doing away with the notion of the state or government as ultimate owner of all land and others have clarified that ownership as no more than trusteeship on behalf of the national community. Government powers over local property decision-making are broadly being reined in. New attention to the land rights of women has been widespread, with important new constructs entering law, variously presuming spousal co-ownership of primary properties (e.g. Tanzania), requiring adult family member consent for transactions (e.g. Tanzania, Uganda) and quite widespread new provision for family title. Current efforts seek to protect the rights of orphans, who number many millions in the AIDS-stricken continent

## **The helping hand of governance and natural resource management reforms**

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

## **Constraints**

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

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

On the ground, insecurity of tenure is little changed. The security of common properties is particularly threatened as investment interest in these unfarmed lands grows with economic liberalism and in the absence of new constructs which indisputably acknowledge these vast areas as the private and registrable property on groups and communities. The idea of unoccupied land as un-owned public land is in fact seeing resurgence. These lands possess enormous current and future production and rental real estate values which could help the poor clamber out of poverty; a fact not lost upon governments and investors, who continue to be their beneficiaries for as long as the commons are not defined and entrenched as community property.

Many constraints upon progress exist but these fundamental inhibitors need focused attention:

- i. Unresolved policy contradictions arising from the dominance of land market promotion objectives over and above mass securitisation of tenure
- ii. Revived justification of rights certification for the purpose of collateralisation, narrowing the target to individually-held properties, shaping process and persistent requirements for formal survey of properties; driven by what lenders need (or think they need) rather than what are necessary or viable for majority interests to be secured
- iii. Still incomplete understanding of customary rights and their embedded systems, producing confused strategies and limiting legal provision for needed constructs to embed distinctions reflecting collective and family tenure
- iv. The time-old problem of poor process, in both the formulation of policy and delivery; largely through the absence of a sufficiently community-based approach to deliver relevant and

realistic proposals and procedures, and to engage the popular ownership of changes required to drive and sustain political will.

Main effects are:

- i. Continued and even increasing vulnerability of unfarmed customary lands – the commons – to wrongful attrition and formal appropriation
- ii. Over-attention to classical registration and the search for innovative technical tools within this limited framework at the cost of building upon locally tried-and-tested and socially legitimate mechanisms for ownership certification
- iii. Growing divides among what policy promises, law entrenches and what occurs on the ground; flagging political will and rising popular disenchantment - ultimately leading to renewed dissatisfaction and sometimes open conflict.

## **Enabling Reform**

### **Adopting developmentally-sound and poverty-focused change**

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

### **Focusing upon the commons due to the losses they face and their value for the majority poor**

Both strategies will have the effect of bringing the security of common properties over and above less-threatened individually held estates (houses and farms) to the centre of reform.

This will necessarily be concretised through a facilitated process of *first*, inter-community agreement as to the limits of their respective domains of jurisdiction (and resulting in more exactly defined ‘community domains’) and *second*, to intra-community agreement as to the limits and proper future of the community-owned properties that exist within those domains (as distinct from properties owned by individuals and families).

Such exercises lead logically to establishment (or reformation) of community based institutions for the regulation of land relations within these domains, and in whom ultimate or symbolical community title may be vested. These steps alone can sharply raise the protection of commonage against wrongful designation as un-owned and therefore Government or public land. On-the-ground demarcation of specific common estates within the domain should follow, each entrenched along with agreed upon access rules as the private group owned property of all members of the community, including the poor.

### **Clarifying collective private rights**

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

### **Helping the poor make use of their capital**

Once secured as community-owned private properties and in ways which explicitly include the very poor in the community as equal shareholders, community decision-making may begin to examine how they may make safe use of these assets, beyond current low levels of return or use. Various viable opportunities suggest themselves, including mortgaging some areas of expansive commons to raise loans for community-based enterprises such as commercial maize milling machines, borehole and piped water developments and secondary school construction, user fees largely paid by the better off members of the community as the higher users, to more complex enterprises involving eco-tourism lodges and game ranching. Grounds for seeking the rerouting of main benefits from existing streams of revenue from commonage such as accruing to Governments as pasturing, logging, mineral and other licence and concession fees, will also be much stronger, once community tenure is secured.

### **Shaping land reform in the right directions and with public will**

Reform overall will be better instructed through community-based and incrementally expanding change. Proposals will be more realistic and tested. Through local ownership of tenure developments, the majority rural poor will be better able to protect their interests. Popular will better engage, shape and sustain political will and at the same time prompt the essential shift from top-down political will as the (unstable) determinant of reform to more reliable public will, and without which policies of social change are so often derailed or dwindle in potency.

## **An explanation of tenure terminology used in this paper**

Tenure system, tenure regime	the way in which ownership of the land or rights to the land are organized; the system may be determined by statute, agreed precedent or by customary practice
Customary tenure	a regime which is dictated by community adherence to particular practices; often but not necessarily, these have a basis in long-standing customs and rules; the essential element is community adherence
Indigenous tenure	as above; indigenous and customary tenure may be used interchangeably given that customary regimes have their origins in pre-State and pre-European-influenced societies
Communal tenure	a key characteristic of customary or indigenous tenure reflecting the fact that the community is the reference point for decisions about land ownership or decisions, not the State (i.e. communal as in 'sharing')
Communal property, common property, commons	Areas of land which are directly owned in undivided shares by all members of a community are a common characteristic of customary/indigenous tenure systems. Today some communities have subdivided such areas so that no common land exists.
Communal domain	This refers to the territory or area where the community has customary jurisdiction. This usually comprises a mix of property types: those that are owned by individuals or families and those that are owned by groups or the whole community (commons or common property)
Root title	This refers to the ownership of the soil (the land itself). It may be owned in a symbolical manner or in real property terms. In many African countries root title has been centralized from communities to the nation, with the Head of State holding ownership in trust for all members of the nation. This does not prevent individuals, families or communities from owning the rights to use and occupy the land.
Land ownership	Depending upon the law of the country this may mean ownership of the land itself and all rights associated with it, or just ownership of those private rights to the land
Rights in land or interests in land	These cover different levels and types of rights; they may be full rights to own the land or limited to rights to occupy and use the land, or just the right to use the land under certain conditions or
Derivative rights	Seasonal access rights to land, or other rights which imply someone else owns the resource or the primary right to the land
Statutory law or national law	Laws which are passed by a state-making body or legislature (e.g. parliament) and which apply nationally

Commonhold	A new term in use to express the holding of land by a whole community
Freehold	The most complete form of land ownership under English law, generally without any conditions and able to be held in perpetuity
Leasehold	Ownership that can be for any period as specified and usually with conditions
Statutory law, or national law	Law made by a national legislature like a parliament
Common law	Nationally applicable rules and principles that have evolved through court decisions over time, not as a result of parliamentary enactments
Customary law	The conventions and rules which a particular community observes, usually developed over time, often not written down
Registration	A recordation procedure describing a parcel of land and identifying its current owner and the form of ownership s/he or they hold
Cadastral registration	A modern form of rights registration which accurately described the land parcel in identifiable map coordinates, thus requiring formal survey of the parcel
Title deed	A certificate issued on the basis of details in a register, describing the parcel and the owner
Public land	Land which is owned by the nation or State, rights to which (freehold, leasehold, commonhold or other forms available in that country) are issued by the government. Because the land belongs to everyone and no one in particular it is often treated by users as 'un-owned land'

## **I Introduction: Tenure Insecurity, Poverty and Power Relations<sup>1</sup>**

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

### **Insecurity and poverty**

While assurance of stable access to land is clearly not a sufficient route out of poverty on its own, insufficient land to live on and insecure access or rights over land are well-recognised factors in sustaining poverty.<sup>2</sup> The main thrust of 20<sup>th</sup> century reforms was towards socially equitable distribution, implemented in more than thirty agrarian states.<sup>3</sup> Current reforms – and this paper – focus less on distribution than on security of ownership and access to land which rural people have traditionally held. This entrenches reforms yet further in the sphere of social justice. Security of land tenure is arguably the most important human right of those who need that land to survive, having no other means of production.

### **Looking beyond the farm**

Urbanization and de-agrarianization is currently occurring at unprecedented rates in Africa but is expected to plateau, leaving behind a still-poor rural majority.<sup>4</sup> While there is growing evidence that off-farm incomes in rural areas may begin to rival farming as the foundation of livelihood, security of occupancy and having land to use remain pivotal in the survival of the rural poor.<sup>5</sup> This includes secure rights over pasture and forest lands, of uniform importance in Sub-Saharan Africa and Central and South Asia where most of those defined as ‘poor’ live.<sup>6</sup> Insecure tenure or access probably afflicts half of these one billion people - and for reasons that are largely avoidable. As this paper intends to make clear, tenure insecurity is first and foremost a socio-political condition that grows from chronic to severe and may eventuate into outright dispossession in the face of changing policies.

### **Insecurity and conflict**

The linkages with conflict cannot be ignored – although (curiously so, given the long history of land grievances in virtually every modern revolution from the French Revolution onwards) peace-making often still fails to grasp the centrality of conflict over land in civil war, or at least to ensure that routes to remedy are explicitly laid down in peace agreements.<sup>7</sup> This visibly hampers post-conflict resolution and reconciliation, currently the case in Sudan. Unsurprisingly, conflicts simmer and may help restart war at the slightest provocation – currently the case in Afghanistan, Zimbabwe, Burundi and the Democratic Republic of Congo - and threatening to be the case in Sudan.<sup>8</sup>

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<sup>1</sup> The author is extremely grateful to DDC and OGC for commissioning this independent concept paper and to Eric Patrick of DDC for consistently helpful comments.

<sup>2</sup> FAO 2003 passim.

<sup>3</sup> These took the form of either recognising longstanding tenant farmers as owners (e.g. Japan, Korea, Taiwan), liberating farmers in serf-like arrangements through similar recognition of ownership (e.g. Egypt, Bolivia), or breaking up large estates for subdivision into family farms (e.g. Chile, Brazil, Colombia, Venezuela) or providing new arrangements for access to land through state collectives or cooperative enterprises (e.g. Bulgaria, Romania, Vietnam, Cuba and Mexico). See FAO 2003 and Borras, Kay & Lodhi 2005 for excellent short reviews.

<sup>4</sup> Population Reference Bureau 2005.

<sup>5</sup> Grace and Pain 2004, Rigg 2006.

<sup>6</sup> Respectively 70% and 66% of people in South Central Asia and Sub-Saharan Africa live in rural areas and 75% of both groups live on less than \$2 a day (Population Reference Bureau 2005).

<sup>7</sup> Hurwitz et al. 2005.

<sup>8</sup> Unruh 2004, Huggins et al. 2005, Alden Wily 2003a, Johnson 2003, Alden Wily forthcoming.

## Looking for cause

Interrogation of the causes of tenure insecurity of tenure is imperative not just for peace but for fighting poverty. The bold targets of the Millennium Development Goals add urgency. The correlation between insecurity of tenure and being poor hardly needs review, routinely illustrated in vulnerability assessments. These throw up other pertinent correlates that need to be kept in mind. One such finding is that achieving sufficient and secure access to land could have more direct impact on poverty alleviation in the hands of rural women than men, given the well-documented prioritisation by female farmers towards feeding children and investing in their health care and education.<sup>9</sup> Attending to women's land rights thus becomes yet more important.

## The product of modern policy

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

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

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

## A focus on Africa

In pursuing this thesis, the focus is upon Sub-Saharan Africa, where more than 90 percent of the rural population regulate their day-to-day land relations on a customary basis building upon systems that are indigenous to the area.<sup>10</sup> Around three quarters of these customary landholders or users are definably 'poor' (370 million people).<sup>11</sup> It is their interests that this paper will focus on although those interests can of course not be separated from the interests of that quarter of customary landholders who are not poor.

Lessons are also drawn from other regions where customary or indigenous (the terminology is interchangeable) tenure operates. This is the case in parts of Central and South Asia (e.g. Afghanistan, India & Indonesia) where several hundred million people organise their land rights by customary

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<sup>9</sup> Carter 2005.

<sup>10</sup> This is reflected in the fact that *by area*, statutory rights are the basis of rural occupancy and use for less than 2-10 percent of each country area (Augustinus & Deininger 2005). Many of these rights are evidenced by deeds of purchase, not cadastral registration.

<sup>11</sup> Population Reference Bureau 2005.

norms.<sup>12</sup> This may be integrated with religious tenure norms and particularly those of Islam, the Koran and Shari'a law attending in detail to property matters. Thus for example an estimated 10 million rural people in Afghanistan access and secure land through a mix of customary and Islamic principles and procedures.<sup>13</sup> Customary tenure is also the norm in arid pastoral zones (North Africa, Central Asia and the Middle East). In Latin America around 40 million indigenous people traditionally hold land through customary mechanisms, and represent the majority rural population several states.<sup>14</sup>

### **The statutory context of customary tenure regimes**

In all cases the exercise of customary tenure is significantly modified, regulated and/or nested within other, dominant State law regimes. The nature of that context is a necessary subject of this paper. As the ambitions of mid 20<sup>th</sup> century conversionary entitlement programmes all too well illustrated, until very recently, customary mechanisms persisted thanks only to the limited reach of imported tenure regimes. Conversion into non-customary regimes is one matter, but gaining national law support is another. This paper will show that in the world of modern states, customary rights require the support of national law to exist as legal land tenure regimes.

### **The essentiality of community to customary tenure**

The common characteristics of customary/indigenous land tenure systems are many and equally resilient across customary societies. This is largely because they share one single powerful and immovable structural foundation, and from which most norms proceed: they are community based in their reference and adherence. They are distinct from other pre-State landholding systems (e.g. feudal tenure) in that the right holders are voluntary participants of the system. Customary land relations both depend upon the continuance of 'community' and are generally the main fabric for continuance of 'community', along with a natural socio-spatial logic that sees those living within variably-scaled areas interacting and sharing certain socio-political, logistical and economic norms. This does not mean that some communities do not break down and disappear, a fairly common fate where urbanisation overtakes a rural zone. Nor does it mean that the customs and composition of the rural community do not alter over time, or that internal community relations do not change their shape and balance.

On the contrary, intra-community relations and composition are in constant flux and tension and contestation among different interest groups fairly routine, as community members demand or respond and adjust to changing authority systems, ease of access to other areas, economic opportunities, education and social norms. On the whole, the core unit of rural community - the village - is growing in social size and declining in space and in terms of per capita resource assets. Any idea however that the modern rural African community is static and moribund or an archaic and disappearing remnant of pre-modern society needs to be eschewed. As modern national development documents such as poverty alleviation strategies amply illustrate, the notion and construct of rural community, generally socially and spatially self-identifying, is alive and well and the dominant context for delivery of services and supporting development change. Indeed, it is commonly the case that 'community' gains practical and political force as rural people battle to survive and to protect their shared social and material interests in ever-challenging times.

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<sup>12</sup> For example around 60 million people in Indonesia self-identify themselves as 'people living by custom' (indigenous peoples) (Colchester et al. 2004).

<sup>13</sup> Alden Wily 2003a.

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

## **The customary facility of sharing resources**

Another characteristic of customary/indigenous tenure regimes that needs background note is that they are essentially agrarian in character and within which *shared* ownership and access to certain natural land resources like pastures, forests, swamps and moors are frequently a key feature in especially drier and less fertile zones. High dependence upon such resources is another factor in the resilience of customary norms. The fate of these common assets is a key subject of this paper.

## **II The Subordination of Customary Land Rights**

From a governance rather than economic transformation perspective, three widely consistent trends affecting customary rights have jeopardised their security. The first has interfered with localised control over land relations, the second with spheres of that jurisdiction and the third with the nature of customary land rights themselves. The three combined in suppression and/or reconstruction of ‘native’ or indigenous rights. This continues unchecked in many parts of the poor agrarian world today.<sup>15</sup>

### **Disempowering localised land authority**

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

Existing indigenous systems for governing land relations were widely disabled. Or they were reconstructed to the service of a new central authority, a norm that was eventually institutionalised as Native Administration or Indirect Rule in Anglophone Africa, and which has reflective elements in Francophone Africa.<sup>16</sup> The transformations that occurred still make it difficult to determine how far current customary land administration is a manufacture of the colonial era.<sup>17</sup>

What *is* known is that consensual mechanisms for land decision-making *narrowed* throughout the continent into the hands of Government appointed ‘native authorities’. Chiefs were recognised (or not recognised) according to criteria set by central administrations, not their people. Their new role as tax collectors - and the source of their own new ‘wages’ – encouraged rent-seeking in land matters and reinforced their upward looking accountability to Governors. Landlord-like attributes were sometimes acquired along the way. This is perhaps most developed in Ghana where revenue derived from common properties is today not even constitutionally required to be shared by chiefs with their community members.<sup>18</sup> An important concern of current reforms surrounds the meaning of chiefly trusteeship, a problematic also receiving attention at higher levels, where undue powers of disposition over national property have been steadily acquired by many presidents.<sup>19</sup>

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<sup>15</sup> How far these occurred wilfully, through benign neglect, or through lack of understanding need not preoccupy us. In Africa, colonial policies, from whence subordination derives, indisputably had well-intentioned sides. A common example was to deny ‘natives’ the right to sell land, “to safeguard the ignorant and improvident peasant from selling his whole heritage”.

<sup>16</sup> Ribot 1999, Ribot & Larson (eds) 2005. There are also echoes in the early period of Spanish colonialism in Latin America (Colchester (ed.) 2001, Kay and Urioste 2005).

<sup>17</sup> The issue generated an enormous critical literature e.g. Biebuyck 1963 and Colson 1971 and later Chanock 1982 for Anglophone Africa and Snyder 1982 and Le Roy 1985 for Francophone Africa.

<sup>18</sup> Alden Wily & Hammond 2001.

<sup>19</sup> Alden Wily & Mbaya 2001.

The quality of indigenous regimes for land allocation and administration or the justice they advanced in their operation do not concern us here - except to note that the pre-colonial forms were probably sufficient for the pressures of the time, and could pragmatically evolve to meet new demands. The latter is a capacity that has seen steady truncation through advancing State regulation, as well as recurrent enthusiastic initiatives to codify rules. Both have contributed to stultification of norms that could and should have evolved over the last century of dramatic socio-economic transformation. Of more immediate concern is the community level disempowerment over land relations which has occurred. Ironically, it is precisely the community consensual framework of pre-State regimes to which decentralised and devolutionary good governance now looks.

### **Reconstructing the communal domain**

Customary domains have often been rearranged, dismantled or diminished in the process to suit the geographical logic of administrative demand. All over Africa smaller village based systems were widely disrobed of authority during colonial periods, often absorbed into more powerful domains.<sup>20</sup> Areas of particular interest to administrations were simply excluded from customary aegis. A well-intentioned case was the removal of valuable forests from local custodianship from around the 1930s. Restitution of partial or full authority to community levels is an important thrust of modern forest policy today, following the broad failure of centralization.<sup>21</sup>

### **Diminishing the right to land**

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

### **Reducing customary ownership to usufruct**

The most fundamental of these was in widespread denial that customary rights amounted to private property rights that could accord with European notions of private property or even eventually become equivalent to those imported norms, without a conversion (and individualising) procedure. Thus, while the occupancy and use of customary land holders was widely accepted (it could not be otherwise), customary land owners were in law and practice viewed as mere tenants of the State, living on what was increasingly defined as 'public land'. Thus began the orthodoxy of African usufruct, one of the more powerful instruments of subordination, and only recently seeing review. The approach was applied throughout Anglophone, Francophone, Lusophone and Belgium-controlled Africa.<sup>22</sup> Similar approaches were meted upon the indigenous properties in the Indian sub-continent and Spanish and Portuguese colonised Latin America.<sup>23</sup>

A main benefit to colonisers was clear: customary landholders could be easily evicted at will and with compensation generally only payable for the loss of beneficial use, such as for the value of standing crops lost. Such terms were everywhere retained in post-independence law.<sup>24</sup>

While the presumed prerogative of the conqueror came into play, the effects amount to much more than establishing sovereignty, spilling over into appropriating all existing property rights to the land conquered. This was despite being warned that this was neither just nor permitted in metropolitan law

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<sup>20</sup> Salih 1982 details a case by case example of how this was accomplished in one province of Sudan.

<sup>21</sup> FAO 2002, Alden Wily 2000b.

<sup>22</sup> A main exception was in Ghana where Ashanti Chiefs managed to hold onto 'allodial title' with critical effect today (Alden Wily & Hammond 2001).

<sup>23</sup> Griffiths 2001.

<sup>24</sup> Alden Wily & Mbaya 2001.

by Spanish jurists as early as the 15<sup>th</sup> and 16<sup>th</sup> centuries, Dutch and English scholars in the 16<sup>th</sup> and 17<sup>th</sup> century, and the US Supreme Court in 1823, the New Zealand Supreme Court in 1847 and British Privy Council decisions in respect of the colonies of Southern Rhodesia and Nigeria in 1919 and 1921.<sup>25</sup>

Such opinions did not alter the position of colonising states, nor governments that have followed. Indeed, if anything, the evident fusion of sovereignty with property rights has been entrenched with the majority of post-independent governments; through this Governments have secured to themselves not just control over property relations, but also the ultimate rights of ownership of the land itself.<sup>26</sup>

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

The situation in neighbouring Sudan was, and remains, yet more pernicious. Through a new law in 1970 all customarily owned land (‘unregistered land’) not only was deemed to be Government Land overnight, but the Administration then began to systematically reallocate land to entrepreneurs, both local and foreign, of its choice.<sup>27</sup> In one province alone, local customary owners have thus been ‘legally’ dispossessed of 3.4 million acres. Needless to say, such blatant abuse of customary land rights was an important trigger to civil war and persists as a factor in continuing conflicts, including in Darfur and Beja.<sup>28</sup>

### **Reducing complex ownership patterns to eurocentric simplicity**

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

The existence of rights of access or decision-making in land relations that do not traditionally amount to ownership have also been jeopardized, either not provided for at all in modern systems or incorrectly upgraded to ownership, engendering a great deal of conflict in both situations. Much has been written on how systematic conversionary registration of (customary) ownership, where it has been advanced at scale (e.g. Kenya) has caused great loss especially to women’s rights.

Regulation of access rights to pasture has been as widely disturbed through policies which have ignored critical customary distinctions between ownership and access rights. Depending upon political or administrative interest, shared ownership of pastures has not been acknowledged. At other times pastoral groups have been granted lands to settle in areas which they themselves traditionally acknowledged belonged to others and to which they possess seasonal use rights only. Many Sahelian conflicts have mismanagement of different layers of interest at their root; contributing in places like Sudan to civil war.<sup>29</sup>

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<sup>25</sup> Colchester (ed.) 2001.

<sup>26</sup> Details in Alden Wily and Mbaya 2001.

<sup>27</sup> Johnson 2003, Alden Wily forthcoming.

<sup>28</sup> Alden Wily forthcoming.

<sup>29</sup> Johnson 2003, Alden Wily forthcoming.

Not unrelated is manipulation of the principle of freedom to settle anywhere, which may be promoted or denied in accordance with political interest and generally overrides customary norms. In both Ghana and Cote D'Ivoire settled communities may themselves reconstruct custom to protect their own land interests against those of outsiders, invited to cultivate their lands as tenants but denied status as community members even over three or more generations, a conflict which has directly contributed to civil war in Cote D'Ivoire.<sup>30</sup>

### **Denying collective ownership of uncultivated lands**

A common root of much of the above has been to deny or weaken ownership of property held in common. The dominant strategy has been to administratively treat these as ownerless lands (*res nullius*) and for these to be accordingly co-opted by the State. In Sudan for example, an early proclamation by the British-Egyptian Condominium was to declare all 'waste, forest and unoccupied lands' the property of Government (1905). In one fell sweep, more than 150 million hectares of invaluable (albeit often arid) pasture and woodlands of property were lost to communities, in law, and progressively activated in practice particularly from 1970.<sup>31</sup>

In practice, a certain amount of 'cherry picking' occurs: normally settlements are left with their nearest commons into which to expand settlement and farming, and the rest is definitively treated as Government or public land. Local use generally continues, reinforcing the idea of customary tenure as amounting to nothing more than usufruct. At the same time the deprivation of acknowledgement of tenure removes the incentive for community based regulation to evolve to meet advancing pressures.

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

### **Misunderstanding the foundations**

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

This distinction manifests itself at the local level in the following manner. Traditionally a community (or chief on its behalf) holds authority over a specific area, usefully referred to as a 'communal domain' or 'community land area'. This represents a spatial sphere of jurisdiction, not a property *per se*. Characteristically, the domain comprises a range of customarily private properties; houses, farms and shops typically owned by individuals or families; sacred groves, hill-tops or areas owned by a subset of the community such as male elders; and common properties – resources within the domain that are owned by all members of the community in undivided shares, such as in respect to woodlands, forests and pastures. Each acknowledged community member is an equal shareholder of this asset. Use of these zones may be portioned out as appropriate, but root ownership of the resource is held communally. Failure to recognize these properties as owned lies at the root of much abuse of customary interests.

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<sup>30</sup> See Lavigne Delville et al. 2002 for this and other West African examples.

<sup>31</sup> Alden Wily forthcoming.

### III Attempts to Make Amends

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

In Africa, the majority were tenants of the State, living permissively on State Lands, Government Lands, Public Lands, Homelands, Communal Lands or Trust Lands – all distinguished by being under the *de jure* or *de facto* **ownership** of the state and in all cases under the **control** of government, either directly or through agencies or local authorities to which this function has been mandated.

This is not to say that attempts to remedy the situation did not take place. On the contrary, the 20<sup>th</sup> century was replete with reformism. This occurred in waves, from early Russian and Mexican reforms before the First World War to those in the Soviet Socialist Republics after that war, to a flurry of reforms from the 1940s to 1980s involving Latin American and Asian states. These had redistribution of unequally owned farmland as their objective and were usually targeted at tenants and farm workers and mainly delivered in subdivision of large estates or the creation of large state collective or cooperative farms.<sup>32</sup>

#### Securing customary holdings through conversionary titling

Apart from Ethiopia (1975) and Zimbabwe (1980) redistributive reform passed Sub-Saharan Africa by. Such action as there was mainly focused upon securing existing rights of small farmers through systematic registration, an emerging theme of land reform in itself and implemented in a number of countries within Africa and beyond.<sup>33</sup> Customary interests were converted into European-derived freeholds or leaseholds or other such statutory rights. This was intensively implemented only in Kenya (from 1954) with smaller initiatives in other states notably including Uganda, Senegal, Ghana and Somalia.<sup>34</sup> Despite enormous investment and effort, particularly in Kenya, where rural titling continues 50 years on, less than two percent of rural lands in most countries are today covered by formal survey and entitlement, and only 15 percent of Kenya.<sup>35</sup>

As elsewhere, these titling exercises gained the correct denotation of ‘ITR’ - individualization, registration and titling - given their uniform effects of registering ownership of family houses and farms in the name of (usually male) household heads (see below). The success of first world property mortgaging drove the programme: the idea that farmers needed loans to raise production or to buy up the unproductive farms of their less progressive neighbours; to obtain loans they needed they needed certificates of formal entitlement as collateral, most not having regular salaries to provide this collateral. It was also asserted that disputes would decline as everyone would have clear surveyed boundaries.

#### The limits of formal titling as the key to raising loans or productivity

In hindsight, the mortgaging of peasant farms in Sub-Saharan Africa has proved largely a non-starter. The overall consensus is that while in countries like Vietnam, Thailand, China, and Paraguay a

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<sup>32</sup> Cox et al. 2003 & Borras, Kay & Lodhi 2005.

<sup>33</sup> For example implemented at scale in Afghanistan between 1963-1978 by USAID, expending what in today's terms would have been billions of dollars, involving over 400 Ford vehicles in the field at any one time and 645 technicians, and yet covered (in non-cadastral survey) only 45% of farmers. The exercise was also used to entrench government ownership of all pastures and ‘barren’ land and over 800,000 ha of farmland for which peasants could not pay taxes was made government land (Alden Wily 2003a).

<sup>34</sup> Bruce & Migot-Adholla (eds.) 1994.

<sup>35</sup> Augustinus & Deininger 2005.

positive relationship between titling and farm productivity and investment may be demonstrated, this has rarely been the case in Sub Saharan Africa. Exceptions seemed confined to very high value peri-urban land or where both exceptional fertility and excellent marketing infrastructure and export marketing opportunities combine. Intensification potential and market opportunities appear more important than formal titling as a route to moving out of poverty through the farm – especially where well-developed indigenous land rights systems already exist.<sup>36</sup>

In Kenya for instance, farm production has risen (or not risen) to similar degree in both the titled and un-titled sectors and without mortgaging being a factor.<sup>37</sup> Research on the impact of titling in Uganda and Somalia and more recently Madagascar also suggest that there is limited or no significant effect of having a title on farm investment, productivity and land value.<sup>38</sup> Rates of rural mortgaging also remain very low, partly due to low demand, partly due to availability of less risky alternative sources of loans than possible foreclosure threatens and in the past partly due to low values in a market where land is not yet chronically unavailable.<sup>39</sup> In any event there is limited access to mortgages in rural areas, given the reluctance of banks to destroy the entire livelihood of a poor rural family in the event of foreclosure and the likelihood of local resistance to attempts to take or sell off the collateralized farm.<sup>40</sup> Nor has the promise of decline in disputes through titling materialized; while boundary disputes have fallen, a new generation of conflicts has arisen due to titling and clogging up the courts to unimaginable dimensions. Most of the cases stem from contradictory customary and statutory routes of sale and inheritance.<sup>41</sup>

Most damningly, the delivery of security itself is in doubt. The much-touted sanctity of title deeds has not been delivered, given much corrupted procedure. The register in Kenya is also famously out-of-date due to erratic recording of transactions post first registration. The greater proportion of original title deeds remains uncollected several decades on. This is partly due to the unaffordable costs incurred in collecting these from remote and fee-charging offices.<sup>42</sup> More interestingly, it is partly because owners do not always consider the deed necessary for security; research shows that many Kenyan farmers have found the actual process of adjudication positive, clarifying and confirming who owns what in the community, but see no purpose in collecting written evidence.<sup>43</sup> This reflects the importance of social-embeddedness in tenure security; and from whence, for customary owners, it derives - the consensus of neighbours and community, not a remote and manipulable title deed or registry. As Bromley has remarked drawing upon more widespread trends:

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

### **Ignoring or abusing collective ownership**

It is also now well known that many land rights have been lost or de-secured through conversionary entitlement. As noted earlier, women have been a main group of losers, their spouses, brothers or fathers conventionally named as owners. Secondary rights as held by customary access right holders to

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<sup>36</sup> Bruce & Migot-Adholla (eds) 1994, The World Bank, 2003a, 2003b, van den Brink et al. 2006.

<sup>37</sup> Migot-Adholla et al. 1994.

<sup>38</sup> Bruce & Migot-Adholla (eds) 1994, passim and Jacoby and Minten 2005.

<sup>39</sup> Van den Brink et al. 2006.

<sup>40</sup> Bruce & Migot-Adholla (eds) 1994, Platteau 2000, World Bank 2003a.

<sup>41</sup> Hard data on this in Alden Wily & Mbaya 2001.

<sup>42</sup> KLC 2003.

<sup>43</sup> Hunt forthcoming.

the registered property were extinguished by failure to record these on the title, a title much later now routinely upheld by the courts and creating much anger among the dispossessed.<sup>44</sup>

Most shareholdings in collective properties also disappeared, commons in the community often being subdivided among the better-off few who were considered to have the capacity to expand farming into these lands. The larger and more valuable commons of the community such as natural forests have generally been handed over to local government authorities to manage, and which in turn have frequently disposed of these valuable properties to the benefit of their own institutions or for widely-alleged personal benefit.<sup>45</sup>

Even where collective titles *were* provided, such as through the creation of over 300 group ranches for pastoral Masai in Kenya, the fashioning of these around raised livestock production saw the poorer non-livestock owning members of the clan often excluded as members.<sup>46</sup> Subsequent subdivision of most ranches has seen further losses.<sup>47</sup> Broadly similar effects have been experienced elsewhere, including in South Africa<sup>48</sup> and Botswana where group ranches on communal land may be seen as no more than cooption of common resources by elites, often not even from the area.<sup>49</sup>

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

Before the 20<sup>th</sup> century ended, important breaks on dispossessory public policies and actions against customary land rights began to be made. Many (but not all) who traditionally access land through customary mechanisms could benefit from the initiatives started. The consistent route is through better treatment of the customary right to land itself, generally aided by growing support for community-based mechanisms to deliver and sustain those rights.

Such reforms are not limited to Africa. In Indonesia, for example there are signs that many millions - and particularly those 60 million who self-identify themselves as 'people living by custom' could also begin to benefit from the slowly improving legal treatment of custom in land tenure and governance, and more specifically from opportunities to put the accepting principle of collective title (*hak ulayat*) into practice.<sup>50</sup>

A more advanced wave of reform is affecting the rights of millions of people who 'live by custom' in Latin America (indigenous peoples). Twelve countries have passed new constitutions and land laws which offer improved protection of indigenous land rights in ways not seen before (nor provided through redistributive access reforms).<sup>51</sup> These changes allow for mainly collective forms of entitlement, leaving community members to parcel out rights within those domains, Governments routinely holding onto the radical title of the land however. In Bolivia, for example, where indigenous people constitute over half the rural population, a new land law in 1996 creates the concept of Community Lands of Origin and enables the restitution of large territories in favour of original inhabitants. As Kay and Urioste describe, this is a complex matter, requiring review and regularization of land titles handed out by the agrarian reform since 1953, and is slow and inevitably contested

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<sup>44</sup> Kameri-Mbote 2005.

<sup>45</sup> Cases cited in Alden Wily & Mbaya 2001.

<sup>46</sup> Examples in Alden Wily & Mbaya 2001. Also see Mwangi & Dohrn 2005.

<sup>47</sup> Ibid.

<sup>48</sup> Cousins et al. 2005.

<sup>49</sup> Cullis & Watson 2005.

<sup>50</sup> Colchester, Sirait and Widjardjo 2004.

<sup>51</sup> Griffiths 2001.

(2005). Conflict between indigenous and non-indigenous interests is widespread elsewhere in the region as similar adjustments are made. Competition with logging, gas and mining concessionaires, backed by substantial international capital, complicate resolution.<sup>52</sup> Demarcation of boundaries is slow, although with innovative community based mapping initiatives successfully now operating in Peru and Belize.<sup>53</sup> Colombia and Mexico are advanced in recognizing customary regimes and their authorities as the lawful administrators of these lands.<sup>54</sup>

The global aspect of the shifting position is also seen in relevant First World states, in Supreme Court rulings in Canada (1973, 1997), Australia (1992, 1998); as well as in Malaysia (1997, 2001). These respond to demands for land rights recognition by indigenous minorities in those states. Significantly these rulings less overturn existing law than reinterpret it. They concur that customary land rights are private property rights that must be respected and upheld and continue to exist for as long as they are not explicitly extinguished such as through the granting of freehold estates over those lands.<sup>55</sup> Establishing sovereignty – the main route for subordination of customary land rights throughout the world, as illustrated earlier in respect of Africa – does not in itself extinguish existing property rights in those lands.<sup>56</sup> Fortuitously, much of Sub-Saharan Africa has done away with the issue of freehold tenure, locating the State (or Government) as the primary landholder and issuing statutory leaseholds or rights of occupancy to those seeking tenure. Moreover, these rulings consistently make it clear that customary property includes lands which are not necessarily occupied or farmed, enabling the status of common properties as un-owned public lands to be challenged.

These rulings have already begun to impact upon customary rights in other areas, notably in the constitutional court ruling in South Africa in 2003 that the Richtersveld area must be returned to the San (Bushmen) owners,<sup>57</sup> and claims from comparable indigenous groups in Guyana and Belize.<sup>58</sup> As outlined below use of international precedent to change policies and laws regarding unregistered customary rights is not always proving necessary. It does prove necessary where resistance to recognition of the real nature and scope of customary rights persists such as currently the case in Sudan.<sup>59</sup>

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

Rarely are such legal positions as above emerging from policies which make the tenure security of customary or other informal occupants their priority. They arise everywhere under a new wave of land reform. Unlike the character of previous reforms towards redistribution, this new phase is distinctively market-based.<sup>60</sup> These drivers are clearest outside the African continent, in the privatization of the large state and collective farms established under earlier reforms in rural land relations. In Africa it is best reflected in the ‘willing buyer willing seller’ mechanism being used (with limited success) in South Africa towards redistribution.<sup>61</sup>

In line with this shift, the flagging collateralization approach is also being widely revitalized, encouraged (once again) by international lending and development agencies. In the hands of its most

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<sup>52</sup> Colchester (ed.) 2001.

<sup>53</sup> Griffiths 2001.

<sup>54</sup> Griffiths 2001.

<sup>55</sup> Colchester (ed.) 2001.

<sup>56</sup> McAuslan 2005b.

<sup>57</sup> Constitutional Court of South Africa, 14 October 2003 following a judgement of the Land Claims Court reported as *Richtersveld Community and Others v. Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC).

<sup>58</sup> Colchester (ed.) 2001.

<sup>59</sup> McAuslan 2005a, Alden Wily forthcoming.

<sup>60</sup> Refer Borras, Kay and Lodhi 2005 for an excellent analysis.

<sup>61</sup> Oxfam 2005a, Lahiff 2005, van den Brink et al. 2006.

famous new advocate, Hernando de Soto, it gains a stronger foothold in the land market camp with the implication that tenure security is *only worth pursuing* if the affected property can be turned to profit; the old ‘sand to gold’ trail now one of ‘turning dead capital into live capital’.<sup>62</sup>

### **Making customarily owned land freely available to investors**

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

This has origins in the economic liberalization policies that began to emerge in the late 1980s under the persuasive guiding hand of the World Bank and the IMF.<sup>63</sup> The argument was familiar: vast injections of investment (and specifically lucrative foreign investment) were needed to restart stagnant agrarian economies; investors, especially agribusiness, need land, and they need (their version of) secure title to that land. In addition they need efficient land administration systems to speedily process and guarantee that tenure.<sup>64</sup>

Thus the stronger driving force has been not to help poor farmers get their hands on investment, but to help investors get their hands on the land of poor farmers.

Getting hold of that land was, however, not to prove so easy, despite the much-proclaimed abundance of available public land (i.e. assumed as ‘un-owned’) for investors.<sup>65</sup> Investigation tended to show that there that there was not so much ‘spare land’ after all; that is was widely used, if not occupied, and that questions of customary access rights might arise. The titling theology was revitalized; occupation needed to get transformed and certificated in ways that would not lead to challenge of bills of sale. At the same time, interrogation as to the nature of that customary occupancy gathered. Social justice and common and civil law principle began to get in the way. Putting draft policy ideas out to increasingly obligatory public consultation did not help the sense of urgency in officialdom towards easing the land investment climate.<sup>66</sup> Before they knew it, policy makers were forced to examine how properties in the so-called public lands could be regularized, from the perspective of the landholders.

Investment objectives continued to be strongly catered for. Titling for market purposes remained the cornerstone of reforms that were to emerge. This is indicative in the prominent treatment eventually entrenched in new laws as to foreigners’ rights to land, in the elaborated procedures in the new land laws for non-local and non-citizen access to land in customary areas, and in widespread revision of the meaning of compulsory acquisition of land for ‘public purpose’ to ensure this covers private sector development.<sup>67</sup>

### **Legalising custom: the quiet revolution**

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

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<sup>62</sup> De Soto 2000.

<sup>63</sup> Alden Wily 2000a.

<sup>64</sup> See Alden Wily & Mbaya 2001 for scrutiny of the origins of fourteen first generation reforms.

<sup>65</sup> In Uganda, the President himself publicly invited investors to come and see for themselves the vast lands they could acquire, and Tanzanian, Zambia and other administrations followed suit (Alden Wily & Mbaya 2001).

<sup>66</sup> Negrao 1999, Palmer 2000, Alden Wily & Mbaya 2001.

<sup>67</sup> Examples in Alden Wily & Mbaya 2001.

has changed: *rights are less to be converted into statutory forms than statutory support given to customary property in its own right.*

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

## V Launching Reform through New Policy and Law

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

Important corollary reform is occurring, the better spirit of which is driven by the democratizing imperative.<sup>68</sup> This is reflected in a spate of new national constitutions in Sub Saharan Africa (around 15 since 1990) and new local government laws (around the same number). Natural resource management reform is also well underway, prompted by dramatic losses of forest cover and species, and worldwide (and therefore donor) conservation consciousness. Environmental, wildlife and water laws have multiplied and new forest laws especially, with more than 30 new national forest laws enacted since 1990. Without exception new forest acts make community participation a main strategy towards conservation and management - along with private sector promotion.<sup>69</sup>

The interrelationship among these new bodies of policy and legislation is close. Key provisions affecting customary land owners oftentimes first appear in constitutions.<sup>70</sup> Or, more practically, they emerge from changing resource management norms on the ground, triggering local government expansion and attention to customary land norms. The role of community forest reserves deserves special note in prompting and/or giving practical substance to the recognition of common property as a distinct estate class.<sup>71</sup> Facilitated local resource use agreements in Sahelian states have played an important role in triggering local level institutional building for natural resource management, and thence land board institutions.<sup>72</sup> All these initiatives share important building blocks towards the clarification of ownership and access relations at the local level, and between communities and the State.

Though widespread, new national land policy and law development is still evolving. This has moved barely beyond declamatory intent in a number of cases (e.g. Kenya, Zambia, Swaziland) and is unsteadily or extremely slowly evolving in many others (e.g. Ghana, Malawi, Burundi, DRC, Angola, Burkina Faso, Mali, Senegal, Rwanda). Significant new policies affecting customary rights have however been finalized and entrenched in new law in around ten states (Cote D'Ivoire, Niger, South

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<sup>68</sup> Alden Wily 2000a.

<sup>69</sup> Alden Wily and Mbaya 2001.

<sup>70</sup> For example it was the Uganda Constitution, 1995 that removed ultimate state ownership of land (with resulting effect of abolishing 'Public Land') and accorded all existing tenure rights (freehold, leasehold, *mailo* and customary) legal status, later elaborated in the Land Act 1998.

<sup>71</sup> Although in most cases (except The Gambia and Tanzania) this construct is first put in place to encompass community *management* of resources only, demand for clarification of the ownership of the reserve logically follows (Alden Wily 2000b, 2003b).

<sup>72</sup> Yacouba 1999, Banshaf et al. 2000, Ribot 1999, Hesse & Trench 2000, Shitarek 2001.

Africa, Namibia, Mozambique, Guinea, Uganda, Tanzania, Ethiopia and Eritrea), and are in near-final Bills in several others (e.g. Lesotho, Benin).<sup>73</sup>

### **The time-old problem of delivering on promises**

Even where new supporting law is entrenched, implementation or application of the law is limited. Publicity programmes about the new laws is usually a lead activity and often the only activity, and often targeted to officials. More actively, regional governments in Ethiopia have launched mass rural certification of land occupancy with mixed success,<sup>74</sup> and piloted at very small scale (seven villages) in Tanzania.<sup>75</sup> Under Rural Land Plans in Cote D'Ivoire, Benin, Guinea and Burkina Faso, local rights are similarly beginning to be certified at community level, but with yet uncertain consequence at actual registration.<sup>76</sup> Application of new legal terms is occurring on an erratic basis in Mozambique (see below).

Local institution building is more active, especially Francophone West Africa, but is mainly not yet fully decentralized to community level and/or without real devolution of authority.<sup>77</sup> Several new district level institutions have been established to support customary land registration in Uganda.<sup>78</sup> Although important steps towards simplification of procedure have been laid, this of necessity correlates with the level of institutional devolution of controlling authority over those rights – for example, in the form of community level registers – thus far limited as a construct to Tanzania and partially being delivered in Niger and other Francophone and Sahelian states.<sup>79</sup>

**Box 1** below gives examples of changes in the treatment of customary land rights around the continent.

#### **Box 1: Trends in the Treatment of Customary Rights in Sub-Saharan Africa<sup>80</sup>**

##### **Improvement in the legal status and protection of customary rights**

- Customary rights may now be directly registered without conversion into introduced forms in Uganda, Tanzania and Mozambique and proposed in Lesotho, Malawi and Madagascar. Customary properties other than common properties may be registered in Namibia and Botswana (since 1968). Although not defined as customary rights given their abolition in 1975, existing occupancy may also be registered 'as is' in Ethiopia.
- Customary rights in Mali, Niger, Burkina Faso, Benin, Cote D'Ivoire, Ghana and South Africa may be certificated with substantial effect, but with required or implied conversion into existing statutory forms on final registration.
- Described incidents of customary rights reflect 'customary freehold' and/or as customarily agreed by the modern community. Most laws allow for customary rights to be held in perpetuity, raising their status above that of leasehold or similar statutory forms common to most of Africa (Freehold is available mainly only in Southern Africa).
- Only Tanzania and Mozambique endow customary interests with unequivocal equivalency with imported tenure forms. Uganda proclaims this but also provides for conversion of customary certificates into freehold

<sup>73</sup> Alden Wily & Mbaya 2001, Alden Wily 2003c.

<sup>74</sup> Zevenbergen 2005.

<sup>75</sup> Oxfam Ireland, Trocaire and Concern 2005.

<sup>76</sup> Stamm 2000, Chaveau 2003, Lavigne Delville 2005.

<sup>77</sup> Alden Wily 2003c.

<sup>78</sup> Adoko 2005, Hunt 2004.

<sup>79</sup> Alden Wily 2003c.

<sup>80</sup> Sources: Alden Wily & Mbaya 2001 and Alden Wily 2003c.

tenure. Lesotho and Malawi propose something similar. Mozambique does not practice what it preaches, giving investor interests in customary lands more support than customary interests.

- The status of unregistered customary rights (90+% of all rural landholding) is often ambivalent and continues mainly to be permissive, pending registration. Customary rights that are not registered are most explicitly protected in Uganda, Tanzania and Mozambique and in a different manner in Ghana. Customary owners in Cote Ivoire have a short time limit within which their rights must be registered to be sustained.
- The movement of customarily-held land out of government land/public land classes is clearest in Uganda (where public land is abolished) and Tanzania (where it becomes 'village land').

***More than individual title is recognized***

- Family title is quite widely provided for especially in Ethiopian law and Malawian policy.
- Adoption of procedures which limit transfers of family land without the support of spouses is provided in Uganda and Rwanda and proposed in Malawi and Lesotho.
- A presumption of spousal co-ownership exists in Tanzania land law. Efforts to secure such a presumption failed in Uganda. Ethiopia and Eritrea recognize male and female property rights distinctly.
- Secondary rights as encumbrances to primary rights is not well provided for in many laws but with significant development of certified contracts in West African states where migrant landholders have inferior security even after generations, due to not belonging to the tribe which holds root title (Ghana, Cote D'Ivoire).

***Recognition of collective title and common property as community private property is still incomplete***

- Some new policies and laws provide in principle for any ownership cluster to be recognized as the lawful owner e.g. 'by a person, a family unit or a group of persons recognized in the community as capable of being a landholder' (Tanzania, Uganda), providing various levels of collective entitlement.
- While communal property is widely acknowledged in new laws as existing, few laws go so far as to provide clear or easy routes for registering these as private, group owned estates. Indirect routes exist in South Africa and Uganda through expensive and complex formation of legal bodies by community members, rarely adopted. Similar routes are proposed in Malawi and Lesotho and in many Francophone States. Only in Amhara/Ethiopia are common properties unambivalently registrable as private group owned properties.
- Often the distinction between the community as land controller and owner of real property is not clear in new policies and laws. In Mozambique and Cote D'Ivoire collective entitlement represents more delimitation of the area controlled by the community than outright shared ownership.
- Francophone rural land plans and mainly draft laws helpfully draw a distinction between land managers and land owners, critical given the history in West Africa of chiefs transforming jurisdiction and custodianship into outright ownership.
- Tanzania overcomes the problem by distinguishing between the area over which the community has authority ('village land area') and specific community owned estates within this (commons). The location, size and use rights of the latter have to be recorded in the Village Land Register prior to adjudication and registration of individual or family properties to protect these against encroachment or claim during registration. This does not however appear to amount to registration of the commons as private community owned properties.

### ***Formal land administration over customary lands is devolving***

- The logical need to recognize (and revitalize) customary land administration once customary rights are recognized is carried through into most new policies and laws.
- Devolution of authority to community levels is in practice limited. Tanzania is a main exception where each elected village government is declared the lawful land manager and has substantial independent powers. Partially elected community bodies in Ethiopia, Burkina Faso and Lesotho also have these powers.
- Bodies at community level are being recognized or created but most are committees advising and assisting higher government or government-serviced bodies (e.g. Botswana, Namibia, Uganda, Benin, Cote D'Ivoire, Senegal, Mali).
- Most local institutions are being remade with declining chiefly authority. In some cases chiefs have no representation (e.g. Tanzania, Ethiopia, Eritrea, Rwanda, Uganda). Mostly chiefs are advisers or carry out minor functions reporting to higher bodies (e.g. Namibia, Botswana, Angola) or are members of community land bodies (e.g. Malawi, Lesotho, Niger, Mali, Senegal, Benin, Cote D'Ivoire). In Ghana, Mozambique and Nigeria chiefs retain dominant roles as customary land administrators.
- Reining in rent-seeking histories or potentials by chiefs is specifically provided in newer proposals (e.g. Malawi, Lesotho) but insufficiently managed in others (e.g. Ghana, Niger, Mozambique).

### ***Registration of rights is still a primary objective***

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

### **The central issue of the value of a customary land right**

Registration of rural land rights remains the dominant instrument and is a main subject in new land laws. The real change lies in what can be registered, best exemplified in the new land classes of Customary Right of Occupancy and Certificate of Customary Ownership. Without this, reforms would

amount to little more than an activation and extension of the arm of the State in its efforts to capture occupation and land use into its own systems.

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

It also suggests that great progress may be made *simply by changing the law* to upgrade the permissive status of customary usufruct to ownership rights – in short, liberating customary tenure from landlordism by the State. This is precisely what has occurred in Uganda, Tanzania and Mozambique.<sup>81</sup> Legally speaking, the poor in these three countries *now have no insecurity of tenure*. This sets these countries somewhat apart from others where the routes to this status are circuitous (e.g. South Africa, Ghana) or the promised integrity of customary interests as private property is incomplete (e.g. Cote D'Ivoire, Niger), such as still denying common properties the status of registrable real estate as collectively owned private property (e.g. Botswana, Tigray/Ethiopia, Namibia, Rwanda).

### **Knowing who owns what is still essential**

Of course even in the 'model' states above the reality on the ground is not as rosy. Legal declamation has its limits, even where popular dissemination takes place and rule of law is observed. Threats to practical security abound from within and without. Women continue to be main losers in intra-household land dispute, even where their right to share in decision-making is assured in statute.<sup>82</sup> Unregulated expansion of farming into community lands continues, often by elites within the community in alliance with leaders or investors, and reinforces the need for more democratic and accountable customary land governance reform. The most serious threat however derives from outside the community, shortly discussed.

Whatever the source, level of certainty of ownership invariably correlates with level of threat. Certainty is high in respect of house plots and farms, given their lesser scale and generally observed boundaries. Social certainty around common properties is much lower, due to their expansive dimensions and because, as elaborated earlier, their status as locally-owned has been severely undermined by their wholesale characterization as un-owned and/or public lands. Nor, as shown above, has provision for their entrenchment as definitively private (community-owned) properties been widely delivered in even new policies and laws. It is this lack of certainty that makes the commons ripe for elite capture from within and from without.

### **Rights certification in some form is inescapable**

It also illustrates why clarification of owners and boundaries and entrenchment of the results in one form or another have a key role to play in customary tenure securitization, and why titling is such a main subject of reform. The issues that now confront the process are not if such formalization of certainty of tenure has utility, but how it should be achieved, with what level of technical requirement (and especially survey), and with what levels of written recordation. Even more central questions are in whose hands should guarantee of security rest, and upon which types of property should securitization be first focused? How uniform across urban and rural sectors, and the local and national domain must these mechanisms for security be?

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<sup>81</sup> And which has been the case in Botswana for some time in respect of houses and farms.

<sup>82</sup> See Adoko 2005 for clear examples of this in Apac District, Uganda.

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

## **VI The Need to Assure Success**

Given the extraordinary speed and uptake of at least commitment to limit insecurity of rural tenure in Sub-Saharan Africa, it would be churlish to upbraid Governments for the slowness with which this is being achieved. Nonetheless causes for this slowness need redress and these four fundamental constraints in particular -

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

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

- ii. Still incomplete understanding of customary rights and their embedded systems, producing cloudy strategies; and
- iii. Poor process, insufficiently grounded in the local and the practical in the design of reforms and their application, preventing necessary 'out of the box' strategising to overcome chronic constraints, adoption of the commonsensical over the conventional, or departure from entrenched norms already known to have limited resonance in the majority rural poor environment.

### **The Need to Get to the Balance of Rights Assurance and Land Market Promotion Right**

Examples of the interrelated effects are not difficult to find. Prominently, after the first flush of social justification in final national land policies, early market interest in the customary domain tends to resurge, and begins to suggest that real 'growth with equity' may be as difficult to achieve in Africa as elsewhere.<sup>83</sup>

In **Mozambique** for example, where much is made of the legal validity and protection of customary rights under the new land law of 1997, this was accompanied (and indeed triggered) by the introduction of local consultation exercises to enable communities to indicate where a proposed land concession to a non-local person or foreigner will interfere with their own occupation and use, at once demonstrating where the balance of interest is presumed to lie. This is coming to fruition with a paucity of documented community consultation, fairly routine cooption of local leaders by investors to approve their applications to acquire customary lands, and increasingly, use of the fact that there is nothing in the law that actually requires Government to *not* allocate that desired area should it be found to be occupied or used by communities.<sup>84</sup> While procedures have since been introduced to enable communities to at least delimit the areas they do not want to be interfered with, this is in practice only undertaken where NGO or other external facilitation and funds are available, due to the high costs of formal survey and demarcation still required for such delimitation. The result by end

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<sup>83</sup> See Borrás, Kay & Lodhi 2005.

<sup>84</sup> Norfolk & Liversage 2002, Hanlon 2002.

2004 was some 10,000 or more approved investor applications over sometimes vast expanses of communal property, while only 180 communities had managed to demarcate their claimed domains.<sup>85</sup>

In **Uganda**, state encroachment into the common properties of local communities is becoming more common a decade after landmark constitutional recognition of the legality of customary interests as legal property, registered or not. Thus while thousands of Acholi in the north of Uganda have been forced to linger in protected camps around towns against threatened incursions by the rebel Lords Resistance Army, survey and development of their consequently ‘abandoned’ lands are allegedly underway to provide government, army and related private sector interests areas for logging and commercial farming and ranching enterprise.<sup>86</sup>

Even in Tanzania, identified as providing perhaps most explicit protection of customary rights, comparable state-supported encroachment into unfarmed commonage periodically occurs,<sup>87</sup> together with more formal coercion upon village authorities to surrender land for foreign investment, now proudly deposited in a growing Land Bank for investors.<sup>88</sup> The fact that the Land Act 1999 and Village Land Act 1999 are inconsistent as to how far ‘unoccupied lands’ fall under community or Government control renders the estimated 30 million or more hectares of invaluable common property especially vulnerable.<sup>89</sup>

In these and in other cases, the notion of ‘un-owned’ land, set aside during policy-making periods as largely a figment of imagination and adoption of the position that “all land is owned” is seeing resurgence, in much the same way as the Elias’s powerful thesis in 1955 that there is no such thing as un-owned land in Africa was briefly flirted with then conveniently forgotten both in law-making and its application when compensation needed to be paid.<sup>90</sup> Lack of real assistance to communities to define and record the boundaries of their respective customary domains (village or community land areas) has contributed, adding to still limited awareness that the law itself supports their interests in this respect.<sup>91</sup> Meanwhile in both Uganda and Tanzania, some knowledgeable officials and elites within communities are making good use of the weakness of local level institution building around customary interests to themselves expand into these areas while they can.<sup>92</sup>

### ***Limiting what is titled and how to what lenders want***

While as shown earlier, the individual-centric collateralization driver in current reforms has not entirely prevented emergence of new opportunities for family and other collective entitlements, it does still hamper needed evolution in these areas and in relation to how derivative rights are identified and their attributes entrenched. As recorded in Box 1 protection of the land rights of wives are emerging, either through a presumption of spousal co-ownership (Tanzania), the requirement that the consent of all spouses is obtained and recorded prior to disposal of primary land (Uganda) and distinct registration of men and women’s land shares (Eritrea, Ethiopia).

At the same time, market interests still impede; this has played an explicit role in preventing a presumption of spousal co-ownership in Uganda and continued resistance to amendment of Kenya’s Registered Land Act, even after several decades of an extraordinary level of dispute resulting from the

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<sup>85</sup> Oxfam 2005a.

<sup>86</sup> Adoko & Levine 2004, Oxfam 2005b.

<sup>87</sup> Nelson 2005, Gayewi 2005.

<sup>88</sup> Oxfam Ireland, Trocaire and Concern 2005.

<sup>89</sup> Alden Wily 2003d.

<sup>90</sup> Elias 1955, Dunning 1968, Le Roy 1985.

<sup>91</sup> Alden Wily 2003d.

<sup>92</sup> Adoko 2005, Oxfam 2005b. Oxfam Ireland, Trocaire and Concern 2005.

routine exclusion of the names of wives on title deeds during systematic rural registration.<sup>93</sup> There also remains insufficient construct development to more precisely express the real rights of women in land, which are generally more than just a right of access and somewhat less than primary ownership.

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

Essential distinctions between collective tenure for the purposes of shared jurisdiction over the land, and collective tenure as a real property interest remain blurred. Many reforms simply do not yet unpack the complexities. Some laws provide for a community to register an entire community as collectively owned (e.g. Mozambique) without clarifying the implications for individual or family-held properties as to whether this diminishes those rights and how these should therefore be described. Conveniently this is left up to owners to determine 'in accordance with custom'. While this is all to the well and good in theory, it raises queries as much for modern customary land holders when they attempt to order their rights as is does for strategists and the courts.

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

### ***Mortgaging the commons has untapped potential***

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

The risks of excluding the poor from opportunity and benefit from common property mortgaging would also be more easily avoided. Loans could be raised for income-generating activities of benefit to the whole community, and among which eco-tourism developments already show returns.<sup>94</sup> Or a community could raise a loan on one productive part of its woodland in order to install a community-owned and managed maize grinding mill or borehole, the loan repaid through user fees, proportionately paid mainly by wealthier families as the larger users. Power 2003 provides some interesting and equally workable potentials within the clan land context of Papua New Guinea. Such potentials rest however of political and legal acknowledgement and ideally practical entrenchment that the area concerned is the common property of the community and not undefined public or government estate.

### ***Titling for collateralization is becoming more poverty-focused ...***

Within the individual focus, there has been an interesting dispersion of sub-focus in both a negative and positive sense. On the one hand titling for mortgaging has gained a new direction in its shift away from the better-off farmer (the 'progressive farmer' of the 1950s and 1960s who had to be encouraged to not just invest in his farm buy out less productive neighbours) to the genuinely poor – although in mainly urban settings. The De Soto thesis contributes significantly to this in its visionary faith that

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<sup>93</sup> Rugadya and Busingye (eds.) 2002, Kameri-Mbote 2005.

<sup>94</sup> Mogaka et al. 2001.

even the smallest parcel of land or squatter occupation may be turned into gold if only the legal title required by banks to loan money can be acquired. The alleged limited real demonstration of this consequence even outside Sub Saharan Africa need not directly concern us here.<sup>95</sup>

*... but also more investor centred*

On the other hand, there are as strong contradictory signs of a policy shift in the focus of mortgaging away from the poor (or less poor) smallholder to the investor who procures his property in the market place. This is well illustrated in Tanzania where cutting edge mortgage provisions in the new land law have been abandoned precisely because they are seen by private investors to interfere with their freedom to foreclose on poor borrowers.<sup>96</sup> Innovative provision for small mortgages shaped around the needs of poor farmers and urban dwellers has also been abandoned. The effects, McAuslan writes, are that the urban middle and upper classes will benefit by the new arrangements and the poor will lose out (2005).

*Inhibiting the devolutionary course of reform*

The focus on titling for borrowing also contributes to limited real decentralization of the process or abandonment of expensive tools. As illustrated in Box 1, there have been modifications and concessions. Landholders are clearly to be more involved in early procedures like adjudication, and some of them already are actively doing so on a trial basis or otherwise (e.g. Cote D'Ivoire, Benin). In exceptional cases customary communities are empowered to conduct those processes entirely themselves with more external facilitation than supervision (e.g. Ethiopia, Mali). In Tanzania the rural land register is a composite of more than 10,000 Village Land Registers to be established and maintained independently by each village community.

The stronger trend has been to better promote the (assumed) sanctity of classical entitlement by adopting a two-stage process, the first providing for local level certification producing low-grade 'titles' which may later be converted in a second stage (or in some cases must be so converted to gain status as private rights) into 'final titles' on the basis of formal survey and registration, thereby raising cost and administration and limiting mass opportunity.<sup>97</sup>

Agricultural investors sustain the pressure for titling in the most formal way possible. Thus in Ethiopia, perfectly serviceable and rapidly expanding local level titling developed in recent reforms has been deemed by central policy makers 'not good enough for collateralization purposes' and is now being made subject to second level formal survey which neither local administrations nor landholders can afford.<sup>98</sup>

The instrument of formal survey is particularly obstructive to 'out of the box' thinking. Even in Tanzania, where the Village Land Act, 1999 specifically makes it possible for definition of community domains ('Village Land Areas') for to be reflected in Certificates of Village Land on the basis of detailed agreement and description of the boundary by concerned communities, this has given way to central government insistence that only formal survey is good enough (and even though the area described does not represent a land title, just the sphere of that community's administration).<sup>99</sup> This is

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<sup>95</sup> Cousins et al. 2005.

<sup>96</sup> Reference is made here to Chapter 10 of the Land Act 1999 and the Land (Amendment) Act 2004. Refer Mutakyamilwa 2005 and McAuslan 2005 for commentary.

<sup>97</sup> This is the case in one version or another in Ghana, Rwanda, Angola, Namibia, Cote D'Ivoire and Uganda and suggested in draft law in Lesotho, Benin, Niger and Burkina Faso. Adams & Turner 2005, Chauveau 2003, Oxfam 2005a, Oxfam 2005b. Oxfam Ireland et al. 2005.

<sup>98</sup> Zevenbergen 2005.

<sup>99</sup> Ministry of Lands and Human Settlements in Oxfam Ireland et al. 2005.

despite the long experience of villagers since the 1980s that it is only the process of detailed on-site negotiation and resulting agreed detailed *description* that entrenches the agreed location of the boundary between them, not maps or coordinates which cannot be re-found on the ground without renting GPS units or hiring a surveyor and which indicate the boundary at such low scale that disputes may still bountifully occur between the waypoints.<sup>100</sup> More recent experience with community-based delimitation is similar, suggesting the fully described boundary line to be a much more lasting, reliable, useful and accessible instrument than the map drawn from GPS readings.<sup>101</sup> These findings resonate with earlier-noted experience in Kenya that the process of adjudication can be more important as a source of certainty and upholding boundaries than resulting entitlement documents.

Common sense and continued failures suggest that continued promotion of first world systems of evidence of ownership and transaction is indefensible. Nonetheless, the search for more widely-applicable ways of implementing formal survey continues.<sup>102</sup> This inhibits identification and upgrading of sources of certainty that are more socially-embedded, localized and cheaper and which do not involve a shift in control from local to central domain, from landholder to bureaucrat, from social consensus (registered or not) to a manipulable register, of control of the process from landholder to technician or from the local domain to the centre. Another consequence has been to divert attention away from the more fundamental question of whether the cadastre really does in any event provide the security of tenure needed at the local level or is more an act of faith that Government will protect local rights as described therein.

### **The need to Demystify Customary Tenure and Root it as a Modern Regime of Community Based Land holding and Regulation**

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

Most of the issues at stake relate to the ordering of rights without loss of nuance. Often custom as past tradition gets in the way to the extent that ‘what *was*’ gets inflated at the cost of ‘what *is*’ the practice or norm today – or indeed, what *should* be the norm for justice and protection of rights to be obtained. There is plenty of anecdotal evidence to suggest that chiefs who have gained significant benefits through their position in the past will accordingly emphasize the need to adhere to ‘tradition’.<sup>103</sup> *Inter alia*, a fixation on rules has fairly routinely also sent policy makers up the blind alley of codification, entrenching relations that may not be fair or advantageous to the modern customary community or majority right-holders within it.

Academic investigation into the nature of customary rights has not always helped. In the dedicated pursuit of ‘customary truth’ a backward-looking research rather than facilitation approach may tie the subject of ‘what is custom’ up in knots, compounding the notion that customary tenure is too complex to get to grips with it and therefore too difficult to entrench as a modern tenure regime. This helps defeat what must be the primary objective, to assist the modern rural community to arrive at norms acceptable and useful to the majority, and in sufficiently comprehensible form to be easily operated and enforced both within and by the community and with reference to those from beyond the community who access local lands. This makes it important to not lose sight of the fact that customary tenure is far from mysterious but no more and no less than a community-based system for ordering

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<sup>100</sup> Alden Wily 2003b, 2003d.

<sup>101</sup> Alden Wily forthcoming.

<sup>102</sup> Augustinus & Deininger 2005.

<sup>103</sup> Reported in one respect or another to be the case in Malawi, Lesotho, South Africa, Ghana, Mali, Niger and probably others (see Lund 2000, Adams & Turner 2005, Oxfam 2005a, Oxfam 2005b, Lavigne Delville 2005).

and regulating land access at and by the community level, and only persists for as long as the living community endorses the resulting norms and practices.

Viewed this way, the location of the modern, living community as the arbiter of rules or customs is logical, and necessary and necessarily inclusive of not just elders and chiefs but majority membership of the community. It also helps understanding customary tenure as an operating governance system and opens the way to considerations of good governance; aiding its adherents to arrive at inclusive, democratic and accountable procedures in order to retain popular adherence in a modernizing world. As Adams and Turner remark, it may be necessary for tenure reform to catch up with tenure reality on the ground (2005).

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

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

#### ***Adjusting the customary-statutory relationship***

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

The status of the rules by which a social community chooses to govern those rights is less straightforward once customary law is made equal in force with national land laws. The historical strategy of avoiding conflict between the two systems of rights recognition (statutory and customary) by keeping them geographically separate still has utility but is decreasingly foolproof as statutory interests gather in customary domains and customary rights gather in more conventionally statutory domains like urban areas.<sup>104</sup> The need for continued integration of basic principles at one level of another is easier to see when a third regime is added to the equation, such as in the case of *mailo* tenure in Uganda (a proto-feudal system developed in the 1900s) or more widely, where religious land rules apply, widely the case in Islamic societies.

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

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

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<sup>104</sup> Customary control of urban areas is for example very common in Ghana.

McAuslan puts the case more bluntly:

*“Customary tenure is – and always has been – one of the foundational elements of the land laws of all states in Africa. It is not an add-on to received law; indeed received or imposed law is the add-on. Received law thus needs to be adapted and adjusted to indigenous law”* (2005).

### ***Unraveling the nuances of collective tenure***

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

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

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

### ***Boundaries do exist and do matter***

That customary regimes typically include overlapping interests is a well-established fact as described earlier. How to unpack and order these in secure ways is a main preoccupation of modern reform. Those that are most complex today are less born of customary practice than created by intervening State policies. This is the case for instance in the former South African homelands, where customary interests and access arrangements have been chronically overlaid with new occupancy and use patterns through years of malign ‘people dumping’ policies of the apartheid era.<sup>105</sup> It is also often the case in the Sahel and other arid zones where highly nuanced customary norms associated with complex sedentary and nomadic pastoral land use have been severely interfered with through political and administrative dictate and overriding co-option of decision-making and resource ownership by the State and the earlier-mentioned conflation and diminishment of all customary interests as equitably no more than use rights to public or Government land accordingly. The resulting complexities and vastness of some of the domains involved periodically encourage commentators to advocate the setting aside questions of ownership in favour of doing no more than sorting out fairer access arrangements, leaving tenure and ultimate authority at the status quo, in the hands of Government. It is even periodically implied that boundaries do not customarily exist or are too fluid to identify and that their definition will exacerbate conflict.<sup>106</sup>

Aside from denying the self-evident uniform existence of territory or ‘our land’ in indigenous regimes in hunter-gatherer, pastoral and cultivator socio-economies (“all land is owned”) these positions remove from the modern community of stakeholders – traditional or otherwise – the very instruments they need to satisfactorily at resolution and entrench new arrangements. The first instrument is the

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<sup>105</sup> Cousins 2005b.

<sup>106</sup> Cousins 2005b, Mwangi & Dohrn 2005.

essentiality of delimitation of space in order to provide the context within which various types and levels of interests are claimed and then, accepted and/or rearranged or otherwise, formally rooted. Bounded areas, large or small, are also essential platforms on which to build corollary systems of future localised administration of agreed interests. The second tool is the substantive distinction between owners and users, essential and useful to clarifying different customary interests.

To avoid issues of ownership also leaves the entire body of occupants and users in continued status of tenancy to the State, the condition from which most dispossession and deprivation of resource benefit affecting the rural poor has stemmed this last century. To ignore the issue is to limit necessary decolonisation of land relations, to settle for short-term rather than longer-term resolution of land conflicts, and to deprive rural communities of the opportunity to take control of their land relations, and in modern, democratic ways.

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

This is not to say that contestation in the process of boundary and rights definition will not occur. There is every likelihood that it will. Facilitated adjudication remains nonetheless a process through which interest holders need to work in order to move beyond chronic tenure-related conflict among themselves and to lay down the stable relations needed to challenge the subordination of their shared interests to external actors and the State. Among all processes associated with rights clarification and formalisation, facilitated adjudication enjoys a long history of overall success, with high levels of participation. Recent experiences with clarifying ownership of domains beyond the more conventional plot-based focus of titling suggests that interest levels towards the benefits of resolution are so high as to ensure that agreement is reached, later if not sooner.<sup>107</sup>

### **The Need to Get the Process of Land Rights Reform Right**

Finally there are constraints not of substance but of development strategy. Planning shortfalls abound, resulting in often unrealistic policies that will either never, or only at immense cost and difficulty, see application or implementation.<sup>108</sup> Poor process has also generated its fair share of strategic and paradigm shortfalls, with replay of demonstrably inadequate or inappropriate remedies to mass insecurity, many of which have been addressed in this paper. Perhaps most pernicious of all is where process towards reform has been poor enough to fail to sustain initial goodwill or political will to really get to grips with endemic tenure insecurity among the poor.

Even ahead of final policy or law making the last is evident. In Sudan for example, the much-proclaimed promise in the Peace Agreement (January 2005) and subsequent Interim Constitution to provide better legal protection for customary land rights in Sudan have already been downgraded in the two States where its terms are being tested, and have widely been abrogated in the practice elsewhere.<sup>109</sup> Commitment to local level empowerment in land decision-making is quite frequently

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<sup>107</sup> Reference is made here to first the definition of village land areas in Tanzania (broadly founded in most cases upon customary community domains) and second to more recent village and tribal land area delimitation in central Sudan (Alden Wily forthcoming).

<sup>108</sup> E.g. see Hunt 2004 for the oft-examined case of Uganda.

<sup>109</sup> Alden Wily forthcoming.

truncated by Governments unwilling in practice to surrender the extent of authority initially promised (seen in Uganda, Rwanda, Angola, South Africa and Niger).

Slow-down or even halt to new land policy development and law on variously spurious grounds is also not unknown, recently the case in Lesotho, DRC, Swaziland, Angola and Zambia. Notably, these retrenchments have in each case been at least partly driven by fears that private enterprise development may be constrained by protective provisions for customary owners.<sup>110</sup>

Implementation of already approved policies is similarly affected. Insufficient funding and dwindling political commitment have famously dogged South African and Namibia reforms with less than one percent of land returned thus far in the former, and only one commercial farm redistributed in the latter.<sup>111</sup> At war, implementation delays in Eritrea and Cote D'Ivoire are perhaps more excusable – although the causes notable for being land rights wars, the former played out at national territorial level.

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

- Continued and even increasing vulnerability of unoccupied customary lands – the commonage – to wrongful attrition and appropriation, and to the jeopardy of the rights and livelihood of the poor;
- Shortfalls in new paradigm development, less than needed reforms to really make a difference;
- Lack of engagement among those to whom land tenure reform matters most, the majority rural poor;
- Growing divides among what policy promises, law entrenches and what occurs on the ground; and flagging political will and rising popular disenchantment - and conflict.

## VII How To Make Land Reform Work?

Section VI has pointed to three main problem areas and identified a series of impediments and opportunities within these. Changes need to be encompassed in a more general paradigm shift in land reform. The requisite shift may be broadly summed up as a move from land administration to land rights reform, and within which a more poverty-centred focus is essential along with adoption of more developmentally sound approach to reform overall is needed.

Two practical strategies to achieve this are suggested: *first*, the restructuring of rural land reform in strict accordance with prioritisation of levels of threat to the tenure security of the rural poor, and *second*, pursuing this through a more devolved and landholder-driven approach. This is necessary to generate the focused and action-based process that is required to ensure new policies and land law is on target and to enable practical change on the ground.

Both will have the effect of bringing the security of common properties to the centre of rural land reform, as the sphere where most abuse of land rights is delivered and which concern lands which have a special potential in the relief of poverty.

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<sup>110</sup> Oxfam 2005a, Oxfam 2005b, Adams & Turner 2005.

<sup>111</sup> Oxfam 2005b.

## **The commons really do matter to the poor**

It may be necessary to briefly revisit the role of the commons in rural livelihood. While urbanisation rates are rising globally and especially in Africa, it is also a fact that per capita farm size is falling, estimated as around half what it was in the 1960.<sup>112</sup> While the profound inequities in farmland distribution in many Asian states is absent in Africa,<sup>113</sup> it is also fact that the poorer a rural household, the smaller his or her farm. Given the orthodoxy of land abundance in Africa, it is probably less well acknowledged that outright landlessness and near-landlessness in respect of cultivable land grows on the sub-continent. To the surprise of many, around one quarter of rural households in five African states were found to be farm landless or near-landless in 2003 and research in other African states confirms the trend.<sup>114</sup> What does seem more plentiful is land that is broadly uncultivable by peasant farmers, either because of their dry or rocky character and absence of potable water and their remoteness – or because of their importance for other purposes.

These are the natural forests, woodlands, rangelands and desert and non-desert pastures, the hilltops and swamplands of Sub-Saharan Africa; a significant proportion of which have been lost not just to local encroachment by customary communities themselves as they grow in number, but through the creation of State-controlled Reserves (several hundred million hectares),<sup>115</sup> commercial farming and livestock schemes, mineral development, and a steady stream of reallocation to non-customary shareholders, including local and foreign entrepreneurs.

Nonetheless it will be recalled that the residual commons are still substantial, possibly in the region of 500 million hectares. We know that these areas even though contradictory, uncertain and insecure tenure, contribute in enormous ways to the livelihood of all rural dwellers who have access to them and especially to those who are very poor.<sup>116</sup> We know for instance that in Zimbabwe some 35 percent of total rural household income derived from common woodlands alone in 1990<sup>117</sup> and has probably risen sharply as a proportion with the decline of farm and cash incomes since. We know that the poorer the African rural household, the greater the ratio of dependency upon common resources (e.g. up to 75 percent in Zambia) and that women and those with little or insufficient farmland are particularly dependent.<sup>118</sup> We also know, as this paper has illustrated, that many of the greater economic values of the rural commons continue to accrue to governments and private enterprise rather than to their customary owners. We can safely assume that the high current and potential values of the commons contribute significantly to persistent opacity in their tenure throughout much of the continent.

Nonetheless, it is this less than fulsome recognition of where primary ownership of common properties lies as well as the worrying attrition of these critical resources of the rural poor that make it essential to better address the crumbling fate of the commons. Forest and woodland, a major category of common property, now disappear at a mean rate of five million hectares annually.<sup>119</sup> Uncalculated loss of un-wooded pasturage could double total losses of these common properties.

It has been a core thesis of this paper that the uncertain ownership status of the commons lays at the root of the problem. This, it has been shown, has origins or support in muddled thinking about how

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<sup>112</sup> Jayne et al. 2003, based on research in Ethiopia, Kenya and Zambia.

<sup>113</sup> Lastarria-Cornhiel & Melmed Sanjak 1999.

<sup>114</sup> Ibid.

<sup>115</sup> Several hundred million ha; see FAO 2003b.

<sup>116</sup> FAO 2003b.

<sup>117</sup> Mogaka et al. 2001.

<sup>118</sup> Emerton 2001.

<sup>119</sup> FAO 2003b.

commonage is customarily owned and the socio-institutional context in which it is embedded. It has been argued that sustenance of such positions has been purposive or at least convenient to state-making and government agendas. It manifests today – and not just in Africa, but worldwide – in overlap of ownership interests by people and state.<sup>120</sup>

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

Ensuring that that wealth is captured in the hands of its rightful owners, must become a more central target of reform.

The wealth-generating potentials are indisputable, extending far beyond the important product values already enjoyed by communities and which need to be secured rather than permissively enjoyed. From time to time some of these potentials are already being realized; such as at the rural-urban interface in those still rare occasions where poorer community shareholders of common estates manage to gain a fair share in sharply rising property values, not entirely captured by land buyers or self-rewarding community leaders; an opportunity that cannot be realized however without clarification and recognition from both within and outside the community that the real estate involved *is* community property, neither the private property of the chief nor of government.<sup>121</sup>

Without having to sell the estate or part thereof, the potential returns to common property ownership from rental, product licensing (including up and coming bio-prospecting for medicinal and other commercially valuable products) and concession issue are immense. Should retention of natural forest (and not just replanting) earn carbon credits in future as being proposed, communities which are formally recognized as owners could gain a rightful share of credits and be assisted to sell these accordingly.<sup>122</sup> Mortgaging for community-based enterprise and development, structured to ensure minimal intra-community elite capture, has been mentioned earlier.

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

### **Empowerment is key: moving from political will to public will**

Not all the onus of reform lies upon the state. As routinely the case across successful social change, and evidentially evolving in many other parts of the customary world,<sup>123</sup> empowerment of the community and within the community is an essential building block.

In the Africa context this is best and most simply contexted in the prioritization of reform processes which assist communities towards orderly and managed changed of their land relations, both internally and with the outside world. In practical terms, this logically begins with assisted definition of spheres

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<sup>120</sup> For example, governments and communities in both Sudan and Afghanistan claim ownership under different legal systems of respectively around 150 and 50 million hectares of semi-arid or arid pasture and woodlands, a longstanding irritant to ethnic relations and civil war (Alden Wily 2004, Alden Wily forthcoming).

<sup>121</sup> Beginning to be seen in Ghana (see Alden Wily & Hammond 2001).

<sup>122</sup> Santilli et al. 2005.

<sup>123</sup> Such as in the growing success of indigenous communities in Latin America in securing shares of existing agribusiness and concessions on lands over which their collective rights have now been recognised (Griffiths 2001).

of community jurisdiction and the establishment of an institutional foundation for executing community based authority, followed up by clear identification of common estates within the domain and the establish of rules by which each will in future be accessed and regulated. Only once common assets and localized jurisdiction are so secured will it be timely to address the security of individually or family-owned estates within the defined community land area.

To date some of the more worthy reform developments begin to take precisely these steps, albeit generally with the resulting paradigms far from structurally clear or yet confirmed that they will be legally entrenched.<sup>124</sup> Alternatively relevant legislation has been enacted but has been so centrally devised and driven that the necessary element of public ownership at the periphery is missing and renders uptake and implementation virtually non-existent.<sup>125</sup> Practical experience thus far suggests the results will be on the whole straightforward, delivering discrete but adjoining community domains, and within which community real estate (common properties) are precisely defined on the ground. In more arid pastoral zones, shared ownership by several social communities may be the norm, and/or nested with acknowledged oversight by the most settled of these communities. Formulation of regulatory community based management of common properties as logically follows, and for which, on the African continent, there is a wealth of operating experience.<sup>126</sup> Only once common assets and localized jurisdiction over defined spheres

The challenge to new norm creation may at times be considerable and will almost certainly centre upon new tenure constructs which allow for nuanced distinctions among collective rights, so far the weakest link to customary land security. This is necessarily undertaken with and by communities themselves. Shifts beyond what was traditionally the case into what is agreed as required today will occur in order to reflect changing community composition and settlement patterns. This will especially be the case where communal jurisdiction has, for one reason or another, been significantly weakened, dismantled or reshaped.

Through such action-based change, more than lip-service is paid to bottom-up approaches in both planning modern land reform and its application. For the starting point is at the periphery, in the rural community itself and through facilitated learning by doing and local institution-building. This allows for arrival at tenure and land governance norms (including their localized registration as necessary) that are directly relevant and own-able in concept and practice by poor landholders themselves, and thereby also more adoptable at scale. Through local ownership of changes, the majority rural poor will be better able not only to protect their interests but also to better drive, shape and sustain sluggish political will.

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<sup>124</sup> Main reference is made here to the Rural Land Plan model of Francophone Africa, under implementation in Guinea, Burkina Faso, Benin and Cote D'Ivoire (see Chauveau 2003, Lavigne Delville 2005) and to a customary land securitization procedure underway in central Sudan (Alden Wily 2005 and forthcoming). Delimitation procedure in Mozambique are also relevant to first steps of identifying the community domain (see Norfolk & Liversage 2002 and Hanlon 2002).

<sup>125</sup> Specifically the case with the Village Land Act 1999 of Mainland Tanzania which goes a long way in legal terms towards protection of majority customary land interests.

<sup>126</sup> See Alden Wily & Mbaya 2001 for documented examples and Alden Wily 2003b.

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