

Statutory recognition of customary land rights in Africa

An investigation into best practices
for lawmaking and implementation



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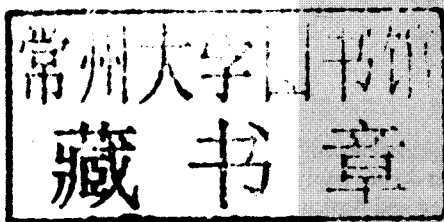
An investigation into best practices
for lawmaking and implementation

by
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for the
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STUDY**

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FOREWORD

Ensuring secure access to land is a key element of protecting the right to food of rural populations that depend on agriculture for their livelihoods. Weak governance and lack of respect for the rights of the poor contributes to tenure insecurity, which in turn can hamper human development, mire people in poverty and contribute to food insecurity. Weak governance institutions are also unable and often unwilling to tackle issues such as women's access to and control over land, which remains discriminatory throughout much of the world.

The issue of how best to increase the land tenure security of the poor and protect the land holdings of rural communities has been brought to the fore in Africa due to increasing land scarcity caused by population growth, environmental degradation, changing climate conditions, and violent conflict. This scarcity is being exacerbated by wealthy nations and private investors who are increasingly seeking to acquire large tracts of land in Africa for agro-industrial enterprises and forestry and mineral exploitation, among other uses. Some nations have received (informal) requests for up to half of their cultivatable land areas, and others are granting hundreds of thousands of hectares to private investors and other sovereign nations.

FAO has initiated a participatory process under the auspices of its Committee on World Food Security (CFS) for the development of *Voluntary Guidelines on the Responsible Governance of Tenure of Land and other Natural Resources*, which will provide guidance on governance with regard to, *inter alia*, administration of tenure, land reform, management of state land, resolving land disputes, attracting sustainable investments, improving gender equity and recognizing indigenous, customary and community rights (FAO, 2010).

Specifically in response to the increased investment interest in land around the world, FAO, IFAD, UNCTAD and the World Bank Group (The World Bank, 2010a) have proposed the following *Principles for agricultural investment that respect rights, livelihoods and resources*:

1. Existing rights to land and associated natural resources are recognized and respected.
2. Investments do not jeopardize food security but rather strengthen it.
3. Processes for accessing land and other resources and then making associated investments are transparent, monitored, and ensure

accountability by all stakeholders, within a proper business, legal, and regulatory environment.

4. All those materially affected are consulted, and agreements from consultations are recorded and enforced.
5. Investors ensure that projects respect the rule of law, reflect industry best practice, are viable economically, and result in durable shared value.
6. Investments generate desirable social and distributional impacts and do not increase vulnerability.
7. Environmental impacts due to a project are quantified and measures taken to encourage sustainable resource use while minimizing the risk/magnitude of negative impacts and mitigating them.

Generally, governments grant large land concessions with the intent of fuelling national commercial, agricultural or industrial growth and contributing to improvements in gross domestic product and local living conditions. However, there is a risk that such land concessions are dispossessing or hemming in rural communities and depriving them of access to resources vital to their food security, livelihoods and economic survival (World Bank, 2010a). Because most land in African nations is owned by the state, communities have little power to contest such grants. This powerlessness is often intensified by the fact that rural communities often operate under customary law and have no formal legal title to their lands or documentation of their claims.

Recognizing and protecting customary land rights is therefore a critical component of protecting and defending the land rights of the rural poor. This study is founded upon the notion that protecting and enforcing the land claims of rural Africans may be best done by passing laws that elevate existing customary land claims up into nations' formal legal frameworks and make customary land rights equal in weight and validity to documented land claims.

Through a close examination of the text and implementation of the land laws of Botswana, Mozambique and Tanzania, this publication investigates various over-arching issues related to statutory recognition of customary land rights, notably:

- How best to integrate statutory and customary legal systems so as to most effectively strengthen tenure security, foster national and

community prosperity, and take steps to extend all of the protections, rights and responsibilities inherent in the national legal system to rural communities;

- How to balance what happens on the ground, organically, against what the state views as "useful" or "valuable" and wants to preserve, enforce or encourage from above;
- How to write a land law that merges the practices of the people with the objectives of the state and arrives at solutions that will simultaneously: be used, adopted and successfully implemented on the ground; advance state interests; advance community interests; and advance individual interests;
- The factors that impact a law's long-term, effective and equitable implementation.

The UN Commission for the Legal Empowerment of the Poor (supported by FAO and others), the World Bank's Justice for the Poor program, and various other bilateral and international initiatives have, in the past few years, focused on understanding and leveraging customary legal systems as a way of ensuring access to justice and extending the rule of law to the poor. FAO has also been involved in supporting nations' efforts to draft and enact laws that integrate customary and statutory land holding frameworks. This publication is an extension of FAO's work in this regard; although it is based on African case studies, it is our intent that the lessons learned from this legislative study may further efforts to integrate and harmonize customary and statutory legal systems and promote greater land tenure security worldwide.

The target audience for this publication is not only legislators, lawmakers and policy analysts, but also international and national civil society groups. FAO hopes that both governmental and non-governmental actors may be able to use the findings and recommendations set out in this study to both craft good laws that protect the land claims of the rural poor as well as help to ensure that these laws are rigorously and equitably implemented.

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EXECUTIVE SUMMARY

In Africa, the issue of how best to increase the land tenure security of the poor and protect the land holdings of rural communities has been brought to the fore due to increasing land scarcity caused by population growth, environmental degradation, climate change, and violent conflict. This scarcity is being exacerbated by wealthy nations and private investors who are increasingly seeking to acquire large tracts of land in Africa for agro-industrial enterprises and forestry and mineral exploitation, among other uses. In many cases, governments grant such concessions with the intent of fuelling national commercial, agricultural or industrial growth and contributing to improvements in gross domestic product and local living conditions. However, many of these land concessions include lands upon which whole villages live; in many such cases, the concessions dispossess rural communities and deprive them of access to resources vital to their livelihoods and economic survival. Unfortunately, rural communities often have little power to contest such grants. This powerlessness is often intensified by the fact that rural communities often operate under customary law and have no formal legal title to their lands or documentation of their claims.

This study seeks to provide guidance on how best to recognize and protect the land rights of the rural poor. It is founded upon the notion that protecting and enforcing the land claims of rural Africans may be best done by passing laws that elevate existing customary land claims up into nations' formal legal frameworks and make customary land rights equal in weight and validity to documented land claims. The study takes as its starting point that rather than lawmakers inventing theoretical new legal frameworks or borrowing legal models from western nations, land tenure systems must be based in the lived realities of the people, as practiced daily on the ground. The goal is to create a stable investment environment in which communities can maintain their land claims and prosper and flourish alongside investment and national economic development.

This study examines the statutory recognition of customary land tenure in Botswana, Mozambique and Tanzania, which were chosen as case studies because of the diverse approaches to the issue they represent. Botswana's Tribal Land Act (1968) established a system of regional land boards and transferred the land administration and management powers of customary leaders to the boards, which originally included both customary leaders and

state officials among their members. It also codified the customary practices of the Tswana, and elevated their customary land rights and practices up into national legislation. Mozambique's *Lei de Terras* (1997) decrees that anyone living or working on land for ten years in good faith has an automatic *de jure* "right of use and benefit" over that land, and allows for community lands to be registered as a whole, thus formalizing communal customary rights. Communities may continue to administer and manage their lands according to custom, with the caveat that such practices should not contravene the national constitution. Tanzania's Village Land Act (1999) makes the village both the primary land-holding unit and the centre of local land administration, management, record-keeping, and land dispute resolution. It also makes customarily-held land rights equal to formally-granted land rights, and explicitly protects the land rights of vulnerable groups. In doing so, it creates a hybrid of customary and codified law – allowing the village to dictate how things are done but holding it to strictly-defined legal mandates.

Through a close examination of the text and implementation of the land laws of these three countries, this publication investigates various over-arching issues related to statutory recognition of customary land rights, notably:

- How best to integrate statutory and customary legal systems so as to most effectively strengthen tenure security, foster national and community prosperity, and take steps to extend all of the protections, rights and responsibilities inherent in the national legal system to rural communities;
- How to balance what happens on the ground, organically, against what the state views as "useful" or "valuable" and wants to preserve, enforce or encourage from above;
- How to write a land law that merges the practices of the people with the objectives of the state and arrives at solutions that will simultaneously: be used, adopted and successfully implemented on the ground; advance state interests; advance community interests; and advance individual interests;
- The factors that impact a law's long-term, effective and equitable implementation.

The analysis of the case studies in reveals that to successfully harmonize statutory and customary land rights, a law must do seven equally-important things well *within its text*:

1. Flexibly allow for the full range of customs within a nation to be expressed and practiced while implementing restrictions that impose basic human rights standards on customary practices, protect against intra-community discrimination, and ensure alignment with the national constitution.
2. Create local land administration and management structures that: come out of – and look much like – existing local and customary land management structures; are easily established; are low cost both to the state and for users; are highly accessible; and leverage local individuals' intimate knowledge of local conditions.
3. Establish administrative processes and dispute resolution mechanisms that are simple, clear, streamlined, local, and easy for rural communities to use to claim, prove and protect their land rights.
4. Establish appropriate checks and balances between customary/local leadership and state officials, create new, supervisory roles for land administrators, and ensure direct democracy and downward accountability to the people.
5. Include accessible, pragmatic and appropriate mechanisms to safeguard against intra-community discrimination against women, widows and minority groups.
6. Protect community land claims and create real tenure security while allowing for investment in rural areas, ensuring that all development will be sustainable, integrated, and beneficial for local communities.
7. Establish good governance in land administration by: creating appropriate mechanisms to ensure the law's enforcement; penalizing state officials who are contravening the law's mandates; and setting up dispute resolution mechanisms that allow for appeal of customary, community-level decisions up into the national justice system.

The study furthermore finds that for a law that harmonizes customary and statutory systems to be well and widely *implemented*, there must be political will to do so. It suggests that when land laws devolve power and control over land and natural resources management down to the community level and away from the central state - institutionalizing community-level land administration and management and decreasing central state control over land and resources, as in Mozambique and Tanzania - such laws are unlikely to have the political support of state officials, who may act to undermine the laws' successful implementation. Conversely, when land laws elevate power and control over customarily-held lands out of the domain of local leaders and into the hands of central officials - elevating customary law

upwards, clarifying it, formalizing it, making it legible to outsiders, as in Botswana - government officials will implement these laws with zeal and commitment. For the former approach to work in practice, therefore, it is of prime importance to devise ways of ensuring that there is political will to successfully implement such laws. This may be done by establishing new roles for the state and public officials on the one hand, while on the other hand creating safeguards to hinder efforts to subvert the law's intent.

Moreover, oversight mechanisms must be included to make sure that the systems are integrated in a way that promotes justice and provides for both upward and downward accountability for both state officials and customary leaders. Such integration must also ensure that should the rural need to protect or enforce their land claims, they can access and successfully navigate land administration systems. This is important because even if the formal legal system recognizes customary land claims, if the poor cannot access or successfully use the formal legal system, then they have little "real" or actual protection against land speculation by elites and investors.

As a result of such analysis, various "best practices" for statutory recognition of customary land rights have been distilled. The study recommends that laws that seek to recognize customary land rights should:

1. Make customary land rights equal in weight and stature to "formal", certified land rights.
2. Seek places of overlap between customary rules and formal law and start from there.
3. Establish genuine tenure security by placing land ownership in the people themselves, vest ultimate land rights to the land in communities, and create an enforceable fiduciary duty between local land management bodies and community members (the land holders).
4. Explicitly protect the land claims of women and other vulnerable groups and establish women's right to hold or own land.
5. Define "custom" very flexibly so as to be non-exclusionary and to allow for evolution, flexibility and adaptability over time.
6. Be explicit and clear regarding rights of rural communities vis-à-vis the state or external agents, or for the protection of vulnerable groups, leaving no room for interpretations that can weaken these protections.
7. Establish procedures for documenting and protecting community lands as a whole first to protect the meta-unit from encroachment,

then slowly - over time and according to landholders' volition - allow for documentation of family and individual lands.

8. Create local land administration and management structures that come out of – and look much like – existing local and customary management structures; are easily established; are highly accessible; and leverage local individuals' intimate knowledge of local conditions.
9. Establish land administration and management systems that are free or low-cost for the poor.
10. Integrate customary practices and direct democracy and promote good governance in land administration by establishing systems of checks and balances between rights holders, state land administrators, and local/customary leaders and establishing systems that ensure both downward accountability to community members and upward accountability to the state.
11. Locate customary land administration and management systems close to the land and communities they govern.
12. Include accessible, pragmatic and appropriate safeguards against intra-community discrimination.
13. Align legal proof of land claims with customary practice by formalizing landscape-based evidence and allowing oral testimony as proof of land rights.
14. Explicitly protect communal areas, customary rights of way and shared land use and access rights.
15. Provide for and encourage the creation of community bylaws and land and natural resource management plans.
16. Create new technical advisory and supervisory roles and responsibilities for state officials.
17. Establish a clear system of judicial appeal leading straight from the lowest level of local customary conflict resolution all the way to highest court of the nation.
18. Make legal representation for communities mandatory during negotiations concerning land-sharing agreements with investors, and ensure that all community-investor agreements are written down and considered to be formal contracts, enforceable or voidable according to national contract law.
19. Make customary land transactions legal and enforceable or voidable under contract law.
20. Extend compulsory acquisition laws to state expropriation of community common areas, even those that appear to be "unused."

The study concludes that while each nation should define for itself the most appropriate mechanism to recognize customary land rights within its formal legal system, the harmonizing or integration of customary land rights and formal law may best be done by recognizing custom as the effective, local, and locally-valid means that communities have established over time to administer and manage their lands and natural resources. It suggests that customary and statutory legal systems are not as divergent as may be thought, and identifies areas of overlap that may be useful starting points for creative integration of statutory and customary land law. It recommends that such integration may best be done not through not through strict codification at the national level, but through national laws carving out a space for custom within their legal framework, and then allowing each local community to determine and define for itself its rules and governance structures through fully-participatory processes. Community custom should then be written down *at the local level only* to ensure transparency and justice and to allow it to be held accountable to standards of sustainability, equity, and the protection of the rights of vulnerable groups.

Before they can be protected against outsiders, customary land rights must be recognized under national law. To allow customary land systems to flounder in the realm of illegality deprives the poor of state sanction for and protection of their basic rights. When the rural poor's customary land claims are not considered to be valid because they lack formal recognition, then only the rich and the legally savvy have tenure security. In consideration of various African nations' recent trend of granting of vast areas of land to foreign investors, the urgency of placing real ownership in the hands of the people living and making their livelihood upon lands held according to custom cannot be overstated. True tenure security will only come from elevating customary land rights up into formal law, and making customary land rights equal in weight to registered rights. Accountability systems and oversight mechanisms must then be put into place to ensure that the law is properly implemented, the land claims of rural communities are protected, and the legislative intent of the law is realized.

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INTRODUCTION

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1.1 Overview and context

Over the past two decades, a number of African governments have overhauled their governing land legislation and crafted new laws. The aim of such efforts has been to increase national development and prosperity by both strengthening the land claims of the poor and by attracting investment with the promise of greater tenure security. In many cases, the land laws previously in place were vestiges of colonial rule, perpetuating colonial systems of race-based land categorization. Such laws were neither adequate for addressing modern land-related transactions, particularly the growing land markets in urban and peri-urban areas throughout Africa, nor relevant to the complex and multiple ways that rural Africans use, share and transact land.

However, African lawmakers faced and continue to confront a complex situation, in which the injustices of colonialism and the difficulties of accessing and successfully navigating state land tenure systems have meant that customary land laws and land management practices have flourished alongside the formal ones. In some nations, over 90 percent of land transactions are still governed by customary legal paradigms, and the decisions and rules established under customary systems are recognized as legally valid and binding by their users. The result has been a wide gap between nations' formal legal systems and the rules that govern the lived realities of the majority of those nations' citizens. While the different systems do not operate in complete isolation from one another, a fissure exists between the constructs and laws of the modern nation state, and the legal paradigms and rules that dictate the myriad interactions of the rural poor. The end result is two or more legal systems functioning side by side, blending and mixing, and occasionally clashing at places of intersection. In some nations, the greater part of rural populations govern themselves and their land according to a legal system outside of and unregulated by the state while relevant national legislation remains largely unknown, ignored, or distorted.

Moreover, customary systems, much like common law systems, are in a constant state of evolution, adapting to the changing political, legislative, demographic and ecological circumstances and choosing innovations that work best to accomplish the desired ends. It may be argued that very little pure "tradition" remains; today's "customary law" is a mixture of various practices that have been inherited, observed, transmuted, learned and adopted. As well-stated by Cotula and Toulmin (2007 at 109): "Far from