

Custom and commonage in Africa rethinking the orthodoxies

Liz Alden Wily^{*,1}

Box 440-00621, Village Market Post Office, Nairobi, Kenya

Received 19 January 2006; received in revised form 2 August 2006; accepted 26 February 2007

Abstract

The founding argument of this paper is that the commons have been dangerously neglected in agrarian reform and with greatest ill-effect upon the poor. Neglect stems from analytical failures as to the ownership of commons, exacerbated by the dominance of collateralization as the rationale for rights registration and built around individually owned properties. Agrarian reform in the 21st century needs to change focus, making security of the commons a primary objective. For it is these properties—not farms and houses—which are most vulnerable to wrongful appropriation and other involuntary losses. New strategy needs to be founded upon legal acknowledgement for commons as the private and registrable group-owned property of communities and integral support for the community-based customary regimes which deliver and sustain those interests. Side benefits include practical opportunity for overcoming perceived and real conflict between statutory and customary law and provision of a viable route to realising democratic devolution of majority rural land administration.

© 2007 Elsevier Ltd. All rights reserved.

Keywords: Common property; Communal domain; Customary land tenure; Community based land tenure administration; Collateralization

Introduction

Research and opinion as to the nature and fate of the commons has a solid 40 year history so it is all the more surprising that confusions still impede realization of the outstanding need to secure community ownership of these properties.² This paper outlines a practical way forward, a version of which is being implemented in central Sudan (and imminently in Afghanistan) (Part II). This is prefaced by a review of the shifts in concepts needed to give the commons the treatment they deserve on the land reform agenda (Part I).

First, the abundance of commonage in agrarian states needs note. In Africa up to one quarter of the total land mass is common property (740 million hectares) if this is defined as areas over which communities still exercise *de*

jure or *de facto* customary tenure.³ This excludes commons voluntarily subdivided into farms and settlements by their owners over the last century; commonage that has been less voluntarily co-opted through urban expansion; and around 100 million hectares of arguably ‘national commons’ like forest and game reserves, withdrawn from local jurisdiction into the assumed superior guardianship of the State (Alden Wily and Mbaya, 2001). The figure also less evenly excludes the millions of hectares of land designated state or public land but customarily understood as community property. This domain embodies a conflict in tenure which reaches into the very heart of the status of the commons addressed below, is widespread around the agrarian world, and a source of conflict and even war. For example, governments and communities in Sudan and Afghanistan claim ownership under different legal systems of, respectively, around 150 and 50 million hectares of woodlands or pasture, a longstanding irritant to ethnic relations, rejection of

*Tel.: +254 2 07120053.

E-mail address: lizaldenwily@wananchi.com.

¹Political Scientist and Independent Tenure Adviser.

²Triggered Hardin’s ‘The Tragedy of the Commons’ in *Science* (162) by 1968.

³This figure is arrived at by taking one half of the forest and woodland estate known to be outside the formal reserve or park sector (FAO, 2005) and extrapolating this proportion to the known total non-farmed rural estate of Africa (FAO, 2005).

political regimes, and civil war (Alden Wily, 2004; Johnson, 2003).

Whether under clear or opaque community ownership or jurisdiction, the importance of the commons to rural economies is now widely accepted. We know for example that in Zimbabwe 35% of rural household income derived from common woodlands even prior to the sharp decline in cash incomes (Mogaka et al., 2001), that the poorer the household the greater the ratio of dependency upon common resources (e.g. up to 75% in Zambia) and that women and the land poor—those with too little farmland to survive from—are especially dependent upon the commons. We also know—or need to know—that more substantial values such as forest revenues accrue to governments rather than to their customary owners, helping to maintain political and legal unclarity as to their real possessors of commonage.

It is this, as well as continuing attrition of common resources, that necessitates better address of the status of commons. Forest and woodland, a major class, now disappear at a mean rate of five million hectares annually in Africa (FAO, 2005). Uncalculated loss of pasturage could double losses. While population growth and expansion of farming and urbanization are immediate triggers, it is the thesis of this paper that uncertainty of tenure is the root of the problem. This has origins in muddled thinking about how the commonage is customarily owned. Contributing to clarification is the purpose of this paper.

Part 1—Challenging the orthodoxies

Commons are private properties

At the root of conceptual confusions about the commons lies the persistent myth that these are customarily unowned lands, and which *inter alia*, gave rise to the open access tragedy of the commons expounded so influentially by Gareth Hardin in the 1960s—and which has proven increasingly self-fulfilling in the absence of alternative policy and legal support.

The understanding of commonage as *res nullius* has origins in especially colonial policies which, whether Anglophone, Francophone or Lusophone, preferred to locate indigenous land occupation as in no way equating to European understanding of private property.⁴ At most, indigenous populations were declared to possess temporal usufruct over their farms and homesteads and those interests could only attain the status of property rights through their conversion into scheduled European norms. Usufructuary farmland tenure was—and still is in some systems—the reality, but what was not understood is that

⁴Refer Cousins, 2005 and Pottier, 2005 for recent reviews among a plethora of reviews of customary land tenure since the 1960s (e.g. Colson, 1971). See Colchester (Ed.) 2001 and McAuslan *passim* for more precise legal treatment of common properties over the last century (McAuslan, 2006a–c; The World Bank, 2003a,b, 2006).

these rights exist in context of the area as a whole being owned by the community, and which accordingly issues and sustains allocations. Lands like pastures and woodlands which were unsettled or cultivated were almost everywhere considered unowned. Hunting and gathering, causing least transformation in the land, was considered especially incapable of generating ownership, rendering even the most ancient landowners of Africa landless, an injustice notably under challenged by, for example, the Kahahari San of Botswana (COHRE, 2005).

Linked to this was inattention to the fact that customarily properties are ownable not just by individuals and families but by interest groups, clans and tribes, social formations that both in the past and present often correlate with villages or village clusters. The common result was that permissive occupancy and use of land for farms and residences were widely accepted into colonial and post-colonial law, but the remainder variously fell to the new central State in the form of public, state or government lands.⁵

How far these conceptions arose from ignorance or were deliberate has long been debated, every decade of persistence favouring the latter (Alden Wily, 2006a). Certainly, they were a convenience enabling state-building administrations of the colonial and post-colonial era to secure vast expanses of common property to themselves and particularly where timber or mineral values were evident.⁶ The customary reality is that such lands are the shared property of specific communities, either at village, village cluster or tribal level. As mainly pasture, swamp and woodland, this ownership is sensibly held in undivided shares.

Ownership and access rights must not be confused

Sometimes this primary ownership is overlaid with a complex of secondary rights, allowing for example, members from adjacent non-owning communities to access resources like resin, special grasses or water sources not available in their own domains. Just as commonly, non-local pastoralists often sustain customary *seasonal* access rights to pasture, the rules around which are periodically renegotiated. In arid zones like the Sahel, it may be the case that pastoralists themselves own or share large domains and wherein cultivation rights represent the derivative level of access right (Mwangi and Dohrn, 2006).

Common property and communal tenure are different

Related failure to distinguish between communal real estate and communal tenure (or customary tenure) also widely persists, inhibiting workable policy making. The first is real property that may be mapped, described and its

⁵Concrete cases of this in the forestry sector in around 20 Sub-Saharan States are elaborated in Alden Wily and Mbaya, 2001.

⁶See above footnote.

owner(s) identified. The second is a regime of land administration comprising norms, regulations and enforcement mechanisms, and which, when clarified essentially involves identification of the customary authority (traditionally chiefs and today often elected community councils). Such customary regimes are distinctive by virtue of being indigenous, not imported from metropolitan states and by being rooted in the community level, neither arising nor delivered through state mechanisms. This is not to say that national statutes should not entrench those customary norms, as discussed later.

Communal domain and common property are also different

Once appreciated as a land administration system, the geographical extent of its jurisdiction becomes important. The resulting geographical area may be referred to as the ‘communal domain’ or more descriptively in most instances, as ‘the village land area’ and in the past as usually larger tribal areas. Normally, such a domain includes a complex of properties owned by individuals, families and groups, such as shops, family-owned homesteads and village-owned woodland, pasture or public service areas. These are all real estate, the acquisition, use and transfer of which are governed by community norms. Even where shifting cultivation operates, the usufruct can be regarded today as a (very) short term customary lease from the owner—the community.

Identifying domain boundaries is prerequisite to securing customary estates

Throughout Africa, most customary domains or territories exist today as discrete village land areas or sometimes larger, clan or tribal land areas. Nonetheless, their precise boundaries are often unclear. At times the extent of these dominions was so large or the boundary areas defined by substantial resources like a forest or swamp, not a more easily definable river or road, that the boundaries between the territory of one community and its neighbours was imprecise. Over the last century of colonial and post-colonial governance, the very idea of customary domain has been suppressed or in demise, or overlaid with new administrative boundaries more convenient to extension of government authority. For example, in countries as far apart as Zambia, Sudan and Nigeria, British Indirect Rule routinely reconstructed tribal areas and their leadership in accordance with its own convenience (Colson, 1971; Cousins, 2005; Pottier, 2005). Usually significant forest, wood and pasture resources were excluded from the remade territories and broadly designated public or government property.⁷

Where boundaries are especially complex in their overlapping, fear of contestation makes policymakers (and academicians) wary of unpacking and reordering these to

everyone’s satisfaction (Cousins, 2005; Mwangi and Dohrn, 2006). Nevertheless, the exercise is unavoidable for modern communities seeking to regain control over their own land relations and to entrench their ownership over vulnerable commonage. Over the last decade, the entry into this process has often been community forestry developments, whereby identification of the boundaries of the community-owned forest estate has triggered or required agreement with neighbouring communities as to the boundaries of their respective jurisdiction and property.

The process of identifying and agreeing outer community area boundaries is contentious to one degree or another. Experience in the community forestry sector in Sub-Saharan Africa shows that this occurs at two levels when communal assets are identified; first within the community as to where the boundaries of private farm lands give way to community-owned estates and second, with neighbouring communities as to the reach of their respective assets (Alden Wily, 2003a). In post-conflict situations such as Sudan, where customary land securitization initiatives are underway, inter-community dispute tends to be heated and in direct proportion to the size of the property; where communities have determined to identify their domains on the basis of tribal affiliation such as in Southern Kordofan State, the resulting ‘community land areas’ are so vast that disputes are complex and highly time-consuming to resolve. Where local populations have determined to found modern community land areas on the village domain, disputes are fewer and more quickly resolved (Alden Wily, 2005).

Nonetheless, a consistent trend is evident throughout; that the benefits to be gained from agreeing to the extent of respective customary territories in order for these to be entrenched as legally governed by one or other community and the communal estates within to be protected from further appropriation or loss, are so high that conflicts are almost always eventually resolved.

A critical side-benefit of this is that the process itself is a profoundly empowering experience for communities, clarifying and entrenching general and specific notions of customary land rights and jurisdiction (Alden Wily, 2003b). Inevitably a degree of innovation in practice or custom occurs, as community members arrive at new norms essential to protect their interests. It is frequently the case that usufructary rights are reinterpreted in effect as ‘customary freeholds’. This is especially so where farming is settled, not shifting over large areas (Alden Wily, 2006b). It may well be the case that rights within a customary territory shift themselves from usufruct to more direct norms of outright ownership such as understood by the overriding legal framework of the modern state (Alden Wily, 2006a). While purist of tradition may dispute this remaking of custom by customary adherents it is justifiable in the competitive tenure circumstances of the present and arguably no more than a current manifestation of the much-touted ability of custom to alter as needed.

⁷Alden Wily and Mbaya, 2001; Alden Wily, 2005.

Such processes are widely occurring in Tanzania triggered by the practical and legal opportunity for rural communities to identify and entrench community-owned and managed forest reserves (Forest Policy, 1995, Forests Act, 2002, Village Land Act, 1999) (Alden Wily, 2003a; FBD, 2006). It is also occurring in Mozambique where external investor interests force local communities to establish where their respective jurisdiction begins and ends in order to secure their rightful share of benefits (Norfolk and Liversage, 2002). In Sudan, the incentive towards inter-community clarification of communal domains is driven by the need to be able to inform forthcoming Land Commissions as to which community should unjustly appropriated commonage should be restored (McAuslan, 2006b, Alden Wily, 2005).

Customary land rights are inseparable from customary jurisdiction

Logically, customary interests cannot be recognised in their own right without at the same time recognising the existence of the (customary) regimes which sustain them. For one to operate, the other, governing framework must operate. Whether individual or shared, these land rights gain their existence and legitimacy from community systems of support, in much the same way as freeholds and leaseholds exist only because statute declares them to exist and provides a system for their issue, transfer and administration. Steps to statutorily recognise and develop the customary regime are essential. This is already an objective of much current land tenure reform underway on the continent (see below).

Customary land tenure is a community based system of land administration

Clearer thinking as to what needs entrenchment is needed however. ‘Tradition’ (or custom) especially need to be put in context, for it is not necessarily the substance of old rules or even the identity of rule-makers that needs embedding in statute but that such arrangements derive from the ‘communal reference’—the fact that local community, not state is the source of decision making, norm making, regulation and enforcement. This on its own provides a powerful source of security, which thus far on the continent has not been readily obtained from remotely run state systems of land administration. As Bromley (2005) observes, entitlement via non-indigenous regimes tends to require the poor to exchange a known and secure embeddedness in one system for embeddedness in another which is not obviously superior.

Building upon existing community-based regimes is beginning to be perceived as a preferable strategy and deeply helpful *inter alia* to accountability, not just reduction in uptake and cost (e.g. The World Bank *passim*). There is less clarity on the need to recognise the modern, living community, not historical entities, as the

source of jurisdiction. Those to whom the community confers authority may well not be chiefs, but democratically formed entities. As illustrated above, even the rules to be embedded in statute may contain limited historical continuity, the modern living community adopting norms that reconstruct versions handed down from a century past and/or their colonial and post-colonial interpretation. What does not change is the stability of ‘the communal reference’, providing a rock-solid template through time.

Locating customary tenure regimes as *community-based systems* also opens routes to realization of the modern mantra that formal procedures surrounding land registration and transaction must be widely accessible, cheap to use and easily sustainable (The World Bank *passim*). Remote from the field, tenure reform planning too often slips back into unworkable technical and procedural paradigms. While for example, land surveyors may persist in favouring expensive mapping and cadastre-centred registration as evidence of customary ownership, communities may demonstrate that not only is locally recorded description of the agreed boundary by neighbours an acceptable basis of security, but one that has more accessibility, precision and reliability than map coordinates and significantly more sanctity than demonstrably corruptible national land registers and entitlements. This is not to say mapping does not have a place but may need to be limited to larger estates such as the overall domain of the relevant community.

Customary law needs statutory law to operate

A related paradigm shift concerns the statutory–customary law relationship. First pursuance of statutory or customary legal regimes is not an either/or. The customary rights of the majority, including common property rights, depend profoundly upon the support of statute—i.e. national or state laws deriving from acts of elected parliaments. Assurance that customary regimes may operate in designated spheres and that the rights they deliver will be upheld as private property rights needs constitutional or at the very least modern land law support. To this extent legal integration rather than legal dualism or pluralism must be the objective. This is in essence what new land legislation in Mozambique (1997), Uganda (1998) and Tanzania (1999) effect. Such examples make it timely to reconstruct the orthodoxy that statutory land tenure is necessarily inseparable from European-derived tenure and obverse to custom.

The commons are the capital of the very poor

Returning to the estates of our primary concern, those that are owned in common, these need to be seen as possibly the only capital asset of the poor. While outright rural landlessness in Africa is still distant from Asian proportions, those classifiably poor in Africa comprise a staggering 564 million rural dwellers, expected to rise to 1.3

billion by 2050 (Population Reference Bureau, 2005). Additionally, a significant number are ‘land poor’ — that is, possessing too little farmland to live from, as a result of generational subdivision, distress sales or other factors. For these people especially, the commons are important contributors to livelihood. This is not just in the immediate access or products which commons provide (e.g. timber, fuelwood and pasture) but in the profounder fact that African custom generally accepts all members of the defined local community, not just the better-off and landed as shareholders in the ownership of the common estate.⁸ Losses of the resource and continuing insecurity of tenure therefore may have most impact upon the poor.

The commons possess significant untapped potential

Because commons are not directly part of the market place, their real estate values are ignored. Nonetheless, these values are enormous; even at the modest rate of \$100 per acre, African communities have a resource on their hands worth at least 70 billion dollars—not much in the bigger budget picture but of immense value to the majority poor, should these revenues be securable by them. With demand, values are dramatically higher, most evident at the rural–urban interface where community properties as well as private farms are swallowed up by expanding housing estates, and with benefits generally reaped by governments, commercial interests or sometimes community elites. In Ghana for example, many chiefs have been quick to reconstruct custom to indicate themselves as outright owners of community properties, not as trustees for community members precisely in order to capture most benefits of rural to urban land conversion (Alden Wily and Hammond, 2001).

Even without sale, the *rental value* of the commons is considerable, visible in the revenue which administrations today derive through the lease of these lands for mineral, logging or commercial farming enterprise. In Sudan, for example, over the last 35 years the Government has systematically appropriated local commonage and leased this to outsider commercial farming and banking interests, now amounting to five million acres in Southern Kordofan State alone, and providing the trigger for affected customary owners to enter the North–South War (Johnson, 2003). Product licensing is also visibly lucrative to governments, such as through widespread timber harvesting (Mogaka et al., 2001). Ecotourism is already proving lucrative where communities have secured rights over their wildlife range (Nelson, 2004). Environmental values also deserve consideration; should for example the upcoming Kyoto period agree, as is being suggested, to pay carbon credits for the sustained existence value of forest cover, not

just the reforestation of denuded areas, then substantial benefits could accrue to communities if they are recognized as the legal owners. Otherwise the benefits will accrue to Governments only.

The obvious missing element is simply that thus far, communities throughout most if now not all Sub-Saharan Africa, do not have secure recognition of their tenure. The question at this point is not whether the commons have value or not, but to whom their values rightfully accrue. For as long as these properties remain in a tenure limbo-land and are de jure or de facto public or government lands, the majority rural poor are deprived of not just their land rights but a critical capital base which could help them step out of poverty.

Formalisation of rights is essential to entrench commons as community-owned properties

Whether we like it or not, this means formalization of rights of most direct import to the otherwise landless or land poor—the commons. Methodology is relevant. The position taken here is that such rights are best clarified and legally embedded at the local level, within the context of the community-based (customary) regimes which created and now sustains those rights, but that national state law support is needed to both entrench the process and protect the resulting tenure. Registration in community or district land registers of common properties is envisioned. Inter-community and intra-community agreement will normally be needed, as outlined earlier.

Establishment of institutional representation is also required, to provide a tangible entity into which the formalised ownership of the estate may be vested. While simply naming the community to whom the estate belongs could be sufficient for registration purposes, the need for the property to be governed suggests a more precisely constituted body is required. In Tanzania where considerable progress has been made on this matter, the elected village government is now legally empowered as the local land authority and cost-effectively provides this role, serving, inter alia, as trustee owner and manager of the common property on behalf of all members of the community (Village Land Act, 1999). Where the collective asset is a forest, dedicated forest committees tend to be created by the elected council, mandated to manage the forest. Community-owned and managed forest reserves now number 382 and cover around one million hectares (FBD, 2006). In contrast in Uganda and South Africa where the nature of commonage as private property is also legally provided for, the absence of formal governance institutions at community level necessitates the time-consuming and costly process of forming new associations, not once yet adopted in Uganda and only awkwardly achieved in South Africa (Adoko, 2005; Mostert and Pienaar, 2004).

⁸This is not necessarily the case in Asia; in Afghanistan for example only community members who own irrigated farms are considered shareholders of ‘common’ pastureland (Alden Wily, 2004, 2006c).

Securing rightful tenure not collateralization needs to drive rights registration

Rights recordation is hardly new but throughout the 20th century targeted individual properties — and continues to do so. The reasons are not difficult to identify, stemming from above-mentioned failure to understand commons as owned in the first instance or as capable of collateralization in the second, and with titling accordingly tailored to the individualisation of estates. Much has been written on the effects of classical titling in de-securing the rights of women and family tenure and very little upon its effect in de-securing collective properties (e.g. see the World Bank *passim*). The longstanding conjunction of rights registration with individualisation and collateralization now needs to be de-linked.

Collateralization in any event, is increasingly demonstrated as a red herring in poor agrarian contexts (Bruce and Migot-Adholla, 1994; The World Bank *passim*, Bromley, 2005; Cousins et al., 2005; Jacoby and Minten, 2005). The evidence and arguments need not be reiterated here except to note that common impediments in Africa centre upon lack of demand in stagnant or slow rural agricultural economies, the risks of losing livelihoods associated with foreclosure on peasant farms, and availability of alternative and less risky routes to obtain loans, such as through group-based micro-credit.

What may be observed is that 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 low risk to their individual estates should foreclosure be administered. The risks of excluding the poor from opportunity and benefit could also be more easily avoided. Loans could be raised for income-generating activities of benefit to the whole community, and among which ecotourism developments already show much potential. Or a community could raise a loan on a 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 equally workable possibilities within the can land context of Papua New Guinea.

Mortgaging (and leasing) are of course notoriously complex at the best of times and likely to be only more so in respect of common properties, given the greater level of consultation and accountable decision-making required among all the shareholders, or in the monitoring of powers and decisions exercised by its agent land council, nonetheless, the possibilities are tantalising and deserve exploration. More urgently, such developments can only begin to be considered once legal acknowledgement of common properties as privately owned (group) lands is achieved, boundaries clearly agreed and the right institutional basis to serve the legal owner—the community.

Part II—Getting the strategy right

The general argument of the above has been that it is timely to shift the focus of land tenure security programmes from farm to commons. While as outlined below, the last decade of reforms has begun to acknowledge that customary interests could after all, viably continue to exist in their own right, and additionally remain embedded in their own local norms, these reforms also persist upon a focus upon the individual estate and with bountiful procedure towards this end (e.g. as in the Uganda Land Act, 1998 and Tanzania Village Land Act, 1999). Delivery is currently most powerfully illustrated in the intentions of the multi-million dollar programme of mass customary registration of houses and farms proposed by the Institute for Liberation and Democracy in Tanzania, again for the purpose of collateralization and requiring formal survey (ILD, 2006; Alden Wily, 2006b).

This is the wrong target in poor agrarian conditions. Priority in any form of customary land registration at this point should be upon the rural commons. The reason is simple; that it is these properties, *not* the family farm or house, that have been and remain today *at most risk* from involuntary loss—and which represent losses with most real and potential jeopardy to the rights of the majority rural poor. This is not to say that private farms are not invulnerable to wrongful appropriation by the State or others including local elites but that the risk and likelihood of losing these estates and of receiving absolutely no compensation in the process, is much less. Reconstructing land security strategy in Africa is deserved and needed.

Important steps towards this are being made. Salient developments have been accruing in case law for some time towards the recognition of customary rights as property rights due to the full support of law and affecting collective as well as family and individual properties (e.g. Nigeria in 1921 and Tanzania in 1994). Landmark cases in the first world are emerging from challenges by indigenous minorities (e.g. Australia in 1992, Canada in 1997) with positive impact in Africa as witnessed by the catalytic Richtersveld ruling in South Africa (Constitutional Court, 2003). Broadly, these concur in ruling that ‘native title’ is not extinguished simply by overlaying indigenous lands with statutory leaseholds and that only purposive abolition of customary rights may achieve this, an argument now beginning to be used in Sudan to trigger practical restitution where no such policy was made (McAuslan, 2006b). There is also new academic interest as to strategic mechanisms for securing customary collective interests (e.g. Fitzpatrick, 2005).

New land laws in Sub-Saharan Africa also take up the cause of majority customary land interests (Alden Wily, 2003b, 2006a, The World Bank *passim*). New land laws in Uganda, Niger, South Africa, Mozambique and especially Tanzania are best practice examples. Nonetheless uptake or implementation remains limited. This is mainly a consequence of unsound development process, top-down

policy formulation lacking the public ownership and practicality of strategies developed at the local level nor able to provide the experiential learning needed to safely arrive at and entrench new norms, and over which customary landholders themselves have control (Alden Wily, 2003b).

In specific regard to common properties, even less has been achieved. As observed earlier, it is the mainly the forestry sector, not the tenure sector, that is making the most running in bringing (forest and woodland) commons closer to legal entrenchment as community owned and regulated estates, through the construct of Community Forest Reserves, now widely provided for in many of the 40 or so new forest enactments on the continent (Alden Wily, 2003a).

Much remains to be done. Despite the reformism underway, most of Africa's 56 mainland and island states still do not acknowledge *the commons* as the private, group-owned property of rural communities or do so insufficiently (Alden Wily, 2006a). In law and practice most still hold this land to be unowned public land, deemed to be Government Land in some states (e.g. Eritrea, Sudan, Liberia).

Or the commons remain in legal limbo-land, not recognised as private property because they are unregistered and only tangentially held to be customary property, being held by government or local governments as trustees with powers that clearly exceed those required to implement trust or entrench community tenure (e.g. Kenya, Zambia, Zimbabwe).

Or national policies and laws acknowledge customary rights as private rights but do not extend this acknowledgement beyond rights which are held individually such as affecting farms and house plots, leaving the commons as under some form of community jurisdiction but not amounting to private property (e.g. Botswana, Namibia).

Or, in a fewer number of cases, the commons are recognised as potential private estates but in the absence of representative organs, may only be realised through laborious constitution of new legal entities (e.g. South Africa, Uganda).

Or, finally, there remains confusion as to the necessary distinctions between communal jurisdiction and communal real estate, with inattention paid to the need to formally register the latter (e.g. South Africa, Tanzania).

A practical approach to moving forward

Issues of practical implementation arise. Few land tenure projects look to the commons or attempt to resolve the conundrums they pose (Mwangi, 2006). A exception is a strategy now under testing in central Sudan as the USAID-funded Customary Land Security Project and for which step by step guidelines have been drafted (Alden Wily, 2005). Key elements of the approach are also shortly to be tested in Afghanistan (Alden Wily, 2006c). Testing in post-conflict societies has special importance given that failure

to acknowledge communal properties as locally owned private estates has frequently led to civil war. Broad stages outlined below give a flavour of the practical steps that are being undertaken.

Stage 1: Committing to the approach. First, a technical facilitator working with government representatives invites representatives of local communities in the selected area to a meeting to hear about the proposed approach and to indicate their interest in pursuing this. If positive, these same representatives determine the basis upon which they will identify respective community domains with facilitated debate as to the advantages of adopting smaller scale, village based spheres as the operating framework.

Stage 2: Delimiting the community domain. Each community, usually a village or village cluster, is then assisted to form a representative Boundary Committee responsible for working with neighbouring Boundary Committees to identify and agree exactly where boundaries between their respective domains lie. This must be accomplished on site and therefore may require many days walking and negotiation by Committees. No matter how insistent communities are that they 'know their boundaries', preparation for the contestation is necessarily made, including external facilitation and mediation by the Facilitator and assisting Field Team.

Either during the boundary agreeing process or subsequent to it, the Facilitation Team drafts a detailed description of the boundary with Boundary Committee representatives and approved and signed by both Committees. The resulting village land areas or other forms of 'community domain' are subsequently mapped on the basis of GPS readings taken by the Facilitator. Each Boundary Committee reports back to the entire community membership to secure majority approval (and understanding of) the exact location of the agreed boundary. Designated community leaders from each neighbouring community must also be present at this minuted meeting, record of which is submitted to government authorities.

Stage 3: Securing support from seasonal right holders. Where the proposed village land area or other community domain is routinely accessed by outsiders who hold acknowledged customary access rights consultation with these parties is held. This is also an opportunity for the community representatives to lay out draft agreements with those users as to how their rights will be respected, regulated and managed. Compromises are reached. This stage is especially important in pastoral zones or where pastoralists seasonally access pastures which lie within domains otherwise owned by settled communities. Key targets are shared agreement as to the nature of pastoral interests as *use rights* not ownership rights, and agreement that those interest holders will be represented in the future governing land council and thus decision-making.

Stage 4: Establishing modern customary land management. This sees each community assisted to form a Community Land Council. This body will serve as both trustee owner on behalf of the community membership and

as formal Land Administrator, responsible for land use planning and regulation of access and use.

The composition of the Council depends upon popular demand but will often include elected representatives alongside certain ex officio members such as traditional chiefs and elders. The Secretary of the Council must be literate. Annual training of Councils is normally essential and must be planned for. A key feature of this institution is that whilst it is designed to have the backing of state law, it is a strictly community based organ—not paid by Government. This is essential to ensure self-reliance and sustainability. Should in due course members of the Council be seen to need and deserve reward, internal community arrangements must be devised, in the form of fees or other revenue.⁹

Stage 5: Securing policy and legal support. This begins long ahead of Stage 1 but is ideally refined during the above stages and not finalised until several pilot developments have demonstrated the exact constructs and procedures required. Key new legislation is devised to lay out the parameters as to how customary land authorities will be legally formed, operate and be accountable to the land owners on whose behalf they act. The new law will provide for the creation of district or provincial registers of Community Land Areas (or ‘Domains’) and for the registration of common properties within those areas. Preferably, they will enable the new Land Councils to fulfil this function in the form of Community Land Registers. Those same Councils should be empowered to register non-communal properties such as farms and houses within the Domain, if needed and demanded.

Where restitution of parts or all of the Community Domain is demanded and constitutionally provided for (e.g. Sudan), other legislation may need to be formulated to guide procedures for this through the creation of Land Commissions or otherwise.

Stage 6: Final registration of community domains. Final registration of Community Domains should take place at district or other most proximate local government level. This will occur only subsequent to certified agreement of perimeter boundaries by neighbouring communities, and once the governing land council for that domain or land area has been instituted. Registration should encompass both registration of the domain and recognition of the Land Council as the lawful authority.

Stage 7: Simple land use planning and regulation. An early task of the new community Land Council will be to carry out simple land use planning to zone land within the domain, for example into Current Farming Zone, Reserved Land for Future Farming; Potential Investment Zone (e.g. for allocation of customary leases to investors on specified conditions and term); Public Service Area(s); Community Pastures or Grasslands for community member access and

Protected Areas (e.g. to enable Community Forest Reserves to be established).

It is also the responsibility of the Council to devise and put into effect Customary Land Regulations for each zone as appropriate. Model By-Laws for this purpose are developed by the Facilitation Team.

Stage 8: Restoring wrongly appropriated properties. This applies in cases (such as central Sudan) where sometimes over half the area of a Customary Domain is subject to overlapping rights. This stage is necessary where national law provides for restitution (e.g. the Comprehensive Peace Agreement in Sudan). In these cases, facilitation assists each Council to identify affected areas and to make relevant claims for restitution or to make applications for compensation to the legal body founded to consider such claims. Where it is acceptable to the community that leases continue, the community will also request the Commission to order future rental to be paid to the community.

Stage 9: Formalizing common properties. The formalisation of Community Domains and the related establishment of the Land Council as the Land Authority go a long way to protecting common properties within the Domain. Over time this is rarely sufficient protection. Registration of these estates as the private group owned property of the community (or sub-group within the community) can more precisely protect those lands from wilful expropriation or claim, from corrupt behaviour on the part of community authorities, creeping encroachment in the absence of clear boundaries of the common property, or wilful elite capture of resources by elites within the community itself. A useful technique is to declare a relevant common property as a Community Conservation Reserve (or Community Forest Reserve, Community Wildlife Reserve, Community Pasture Reserve, as appropriate) thereby bringing the property under the double protection offered by conservation status — and double the potential compensation value should Government or other party persist in co-opting the land. Formalisation of the ownership of the common property also opens up opportunities for enterprise development, in relevant parts of the community land area. Even collateralization, if appropriate, could be explored at this stage, to enable the community to access loans for development projects.

Stage 10: Establishing community-based land dispute resolution machinery. This puts reworked traditional regimes for resolving intra-community and inter-community disputes into effect. For relevance, cost and speed, it is practical for these to be community based with appeal to higher level formal courts.

Processes like those described above are underway in central Sudan, and key elements of which are being advanced elsewhere, including in regard to highly contested pasture resources in central Afghanistan (Alden Wily, 2006c). Progress thus far in both central Sudan and central Afghanistan has been positive although in both cases the process of communities reaching agreements as to their respective territories, has been much slower than expected,

⁹Experience with Community Forest Committees/Councils suggests this is perfectly viable.

and more contested. Additional difficulties stem from the reluctance of the national pledges to honour majority land rights, in the case of Sudan, already entrenched in the Interim Constitution. Progress is being made nonetheless. This is evident in the very high level of community ownership of the idea of securing their land areas, the need to overcome conflicts with neighbours, notwithstanding. Within a short time, the process gains a locally - driven momentum and becomes increasingly difficult for Government officials to limit. Even where project support falters (the case especially in the USAID-funded project in central Sudan), communities continue themselves with the process of agreeing boundaries. Their eyes are fixed firmly on the novel opportunity to 'secure' their community property, not just their farms, and they recognize that compromises ultimately have to be arrived at to achieve this. In both Sudan and Afghanistan word of the opportunities spreads quickly to areas outside the project area, representatives making request for assistance to launch the process of boundary definition and entrenchment in their own areas.

Full reporting on both trials will in due course be made. For the moment these potential benefits need note in their impact in

- (a) refocusing attention away from the homestead to those customary properties which are most at risk from loss by fair means or foul, the commons;
- (b) providing a practical procedure for clarifying customary rights at levels that do not involve costly registration of every property within an area;
- (c) clarifying longstanding confusion between spheres of communal jurisdiction and collective real estate as properties owned in common by community members, or groups within the community, or even groups comprising several communities as relevant, but in all cases amounting to collectively-owned private properties;
- (d) through demarcation of discrete customary domains availing a founding socio-spatial construct within which customary land rights and their administration may be practically protected, ordered and administered;
- (e) inter-linking the twin developments of securing customary rights and providing a local and community based institutional basis for their modern administration;
- (f) launching action at and by the local level in ways that mobilise and empower community actors and help them clarify conundrums and confusions as to different levels of tenure which governments have taken advantage of in the past. This effect is most important where governments are half-hearted in their legal or practical intentions to acknowledge customary tenure. As aware constituents, this helps drive demand on politicians and officials;
- (g) developing practical and fair new norms; through allowing for practical learning by doing new legal norms for ownership have a better chance of attuned to what is wanted, workable and sustainable within the average rural poor community;
- (h) enabling contesting land interests to be unpacked by the parties themselves through the process of delimitation and agreement and accordingly holding out more chance of resulting compromises and agreements being adhered to over the longer term;
- (i) providing a route through which blurred distinctions between customary *ownership* and *access* rights may be sorted out and entrenched;
- (j) opportunity for customary land rights and customary land administration to be acknowledged and managed in modern ways, and
- (k) restoring and developing the lynchpin of customary tenure; the right of communities to define and control their own land relations and forms of land holding.

References

- Adoko, J., 2005. Land rights: where are we and where we need to go. A review of the situation of land rights in Apac district in Uganda and of Opportunities for Land Rights Protection Work. Berkeley Trust, Uganda.
- Alden Wily, L., 2003a. Community Forest Management in Africa Progress & Challenges in the 21st Century. Defining the way forward: sustainable livelihoods and sustainable forest management through participatory forestry, FAO, Rome, pp. 31–58.
- Alden Wily, L., 2003b. Governance and Land Relations. A Review of Decentralization of Land Administration and Management in Africa. Land Tenure and Resources Series. International Institute for Environment and Development [IIED] London.
- Alden Wily, L., 2004. Looking for peace on the pastures: rural land relations in Afghanistan. Synthesis Paper Series. Afghanistan Research and Evaluation Unit, Kabul.
- Alden Wily, L., 2005. Technical guidelines for the securitization of customary land rights in Southern Kordofan and Blue Nile States, Sudan. Customary Land Security Project for the Contested Areas, USDA/USAID, Nairobi.
- Alden Wily, L., 2006a. Land rights reform and governance in Africa how to make it work in the 21st Century? Discussion Paper. Drylands Development Centre and Oslo Governance Centre, UNDP, Nairobi and Oslo.
- Alden Wily, L., 2006b. Where is the Institute for Liberation and Democracy going in Tanzania? Time to See the Wood for the Trees. A critique of the institute's proposals for property and business development. Institute of Liberation and Democracy. Lima, Peru.
- Alden Wily, L., 2006c. Guidelines towards community based pasture ownership and Management in the Hindu Kush. FAO Afghanistan.
- Alden Wily, L., Hammond, D., 2001. Land security and the poor in Ghana. Is there a way forward? A land sector scoping study. DFID, London.
- Alden Wily, L., Mbaya, S., 2001. Land, people and forests in Eastern and Southern Africa at the beginning of the 21st century. The impact of land relations of the role of communities in forest future. The World Conservation Union, Nairobi.
- Bromley, D., 2005. The empty promises of formal titles: creating Potempkin Villages in the tropics. University of Wisconsin.
- Bruce, J., Migot-Adholla, S. (Eds.), 1994. Searching for Land Tenure Security in Africa. Iowa.
- COHRE (Centre for Housing Rights and Evictions). 13 September 2005. Open Letter to the President of Botswana on the Eviction of San Hunter Gatherers from the Central Kalahari.

- Colchester, M. (Ed.). 2001. *A Survey of Indigenous Land Tenure*. Forest Peoples Programme, UK. A Report to the Land Tenure Service of FAO. FAO, Rome.
- Colson, E., 1971. The impact of the Colonial Period on the definition of land rights. In: Turner, C. (Ed.) *The Impact of Colonialism*, Cambridge University Press, Cambridge, MA.
- Constitutional Court of South Africa. 2003. Judgment Case CCT 19/03 *Alexkor Limited and Government of the Republic of South Africa versus The Richtersveld Community and Others* heard on 4 and 5 September 2003 and decided on 14 October 2003.
- Cousins, B., 2005. African land tenure and the failure of titling. *Forum for Development Studies*, South Africa.
- Cousins, B., Cousins, T., Hornby, D., Kingwill, R., Royston, L., Smit, W., 2005. Will formalising property rights reduce poverty in South Africa's 'second economy'? Policy Brief 18 October 2005. Programme for Land and Agrarian Studies, University of the Western Cape.
- FAO, 2005. *The World Survey of Forests*. Rome.
- Fitzpatrick, D., 2005. 'Best Practice' options for the legal recognition of customary tenure. *Development and Change* 36 (3), 449–475.
- FBD (Forests and Beekeeping Division). Status of Participatory Forest Management in Tanzania, July 2006. Ministry of Tourism and Natural Resources, Tanzania.
- ILD (Institute for Liberation and Democracy) Program to Formalize the Assets of the Poor of Tanzania and Strengthen The Rule of Law, Work Plan Reform Design Stage, March 2006, Dar es Salaam and Lima.
- Jacoby, H., Minten, B., 2005. Is land titling in Sub-Saharan Africa cost-effective? Evidence from Madagascar.
- Johnson, D., 2003. *The Root Causes of Sudan's Civil Wars*. James Currey, Indiana University Press and Fountain Publishers.
- McAuslan, P., 2006a. In: Mwangi (Ed.). *Legal pluralism as a policy option: Is it desirable, is it doable?*
- McAuslan, P., 2006b. High theory low practice: Where's the Social Justice? Paper presented to Human Rights and Global Justice Conference, 29–31 March 2006, Warwick Law School, UK.
- McAuslan, P., 2006c. Property and Empire. Paper presented to the Sixth Biennial Conference 21–23 March 2006, The Centre for Property Law, the University of Reading.
- Mogaka, H., Simons, G., Turpie, J., Emerton, L., Karanja, F., 2001. *Economic Aspects of Community Involvement in Sustainable Forest Management in Eastern and Southern Africa*. IUCN, Nairobi.
- Mostert, H., Pienaar, P., (2004). *Communal land title: An Assessment of the Efficacy of Legislative Intervention for Tenure Security and Access to Land*. Cape Town.
- Mwangi, E. (Ed.), 2006. *Land Rights for African Development From Knowledge to Action*. CAPRI, Washington.
- Mwangi, E., Dohrn, S., 2006. In: Mwangi (Ed.) *Biting the Bullet: How to Secure Access to Drylands Resources for Multiple Users*.
- Nelson, F., 2004. The evolution and impacts of community based ecotourism in Tanzania. *Drylands Issue Paper no. 131*. Drylands Programme, IIED, London.
- Norfolk, S., Liversage, H., 2002. Land reform and poverty alleviation in Mozambique. Paper for the Southern African Regional Poverty Network, Human Sciences Research Council.
- Population Reference Bureau, 2005. 2005 World Population Data Sheet.
- Pottier, J., 2005. 'Customary Land Tenure' in Sub-Saharan Africa Today: meanings and Contexts. In: Chris, H., Jenny, C. (Eds.), *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa*, Nairobi and Pretoria: ACTS and ISS, June 2005.
- Power, A., 2003. *Creation of Melanesian property rights—building bridges between custom and commerce*.
- The World Bank, 2003a. 'Agricultural Investment Source Book', Draft, September 2 2003.
- The World Bank, 2003b. *Land Policies for Growth and Poverty Reduction* (Klaus Deininger). World Bank Policy Research Report). Oxford University Press for the World Bank, New York.
- The World Bank, 2006. *Consensus, Confusion and Controversy Selected Land Reform Issues in Sub-Saharan Africa*. (R. Van den Brink, R., G. Thomas, H. Binswanger, J. Bruce and F. Byamughisha) World Bank Working Paper no. 71, Washington.