



# Customary Land Tenure in the Modern World

## Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa - Brief #1 of 5

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Liz Alden Wily\*

### Briefs on Reviewing the Fate of Customary Tenure in Africa

1. **Customary Land Tenure in the Modern World**
2. *Putting 20th-Century Land Policies in Perspective*
3. *Land Reform in Africa: A Reappraisal*
4. *The Status of Customary Land Rights in Africa Today*
5. *The Global Land Rush: What It Means for Customary Rights*

This is the first in a series of briefs about modern African land tenure that provides up-to-date analysis on the status of customary land rights in Sub-Saharan Africa. The purpose of the series is to inform and help to structure advocacy and action aimed at challenging the weak legal status of customary land rights in many African countries.

The focus of the five briefs is the tenure status of naturally collective resources such as forests, rangelands, marshlands and other uncultivated lands. Governments often regard such lands as un-owned public lands or state property, making them particularly vulnerable to involuntary loss. A premise of this series is that most of these lands are rightfully the property of rural communities, in accordance with customary norms. This conflict of claim and interest directly affects most rural Africans and among whom 75 percent still live on less than US\$2 a day.<sup>1</sup> As affirmed by international development agencies, the poorer the household the greater its dependence on off-farm natural resources.<sup>2</sup> Just as importantly, many African rural poor no longer have sufficient access to farmlands to compensate for the loss of their collective lands.

This first brief provides a general background to customary land tenure today. A main conclusion is that this form of tenure represents the *major* tenure regime on the continent and one which is vibrantly active. This is not least because it is community-based and thus easily attuned to the concerns of present-day communities. Changes in customary land tenure also reflect often

inequitable trends, including accelerating class formation and the concentration of landholding. Such trends, which jeopardize the rights of the majority poor, are increasingly having a direct effect on precious local common resources such as forests. Advocates must seek to ensure that land reforms are structured with the interests of poor majorities in mind.

### 1 What is customary land tenure?

Tenure means landholding. *Customary land tenure* refers to the systems that most rural African communities operate to express and order ownership, possession, and access, and to regulate use and transfer. Unlike introduced landholding regimes, the norms of customary tenure derive from and are sustained by the community itself rather than the state or state law (*statutory land tenure*). Although the rules which a particular local community follows are known as customary law, they are rarely binding beyond that community. Customary land tenure is as much a social system as a legal code and from the former obtains its enormous resilience, continuity, and flexibility. Of critical importance to modern customary landholders is how far national law supports the land rights it delivers and the norms operated to sustain these. This is a main subject of these Briefs.

Another term for customary land tenure is *indigenous tenure*. This is contested in Africa because, although all Africans are indigenous to the continent, the African Union's Commission on

### RRI PARTNERS



\* Liz Alden Wily is an international land tenure specialist and a Rights and Resources Fellow.

Human and People's Rights defines indigenous peoples as mainly hunter-gatherers and pastoralists.<sup>3</sup> This grouping comprises around 25 million people in Sub-Saharan Africa, only six percent of Africans who govern their land relations through customary norms today. In this series of briefs, all Africans are regarded as indigenous, and accordingly the terms customary and indigenous tenure are used interchangeably.

## 2 How widespread is customary land tenure?

Customary or indigenous land tenure is a major tenure system on a worldwide scale. It is not confined to Africa. Customary land tenure even governs lands in industrial economies, such as rural commons in Spain, Portugal, Italy, and Switzerland and territories belonging to indigenous minorities in Europe, North America, and Oceania. The system operates most expansively in *agrarian economies*, that is, those societies where most of the population is dependent on, and most of the gross domestic product is derived from, land-based production and use, not off-farm industry and urban employment.

## CUSTOMARY LAND TENURE IS A MAJOR GLOBAL SYSTEM FOR LANDHOLDING

The global reach of customary land tenure may be estimated conservatively by counting populations in regions where introduced forms of landholding have not replaced local indigenous norms to a significant extent. This may then be narrowed to poor rural populations on the grounds that wealthier landholders are among the first to extinguish their customary rights in favor of (costly) registered statutory ownership. In 2009 there were more than two billion rural poor in Asia (excluding China), Latin America, and Africa, of whom 428 million lived in Sub-Saharan Africa. This may be taken as a guide to the *minimum* number of customary landholders in Sub-Saharan Africa today. When better-off customary landholders are included, the number rises to over half a

billion people.<sup>4</sup> An increasing number of customary land occupants have no or insufficient farmlands, making the status of their collective resources even more important.

The land area used by the customary sector is immense.<sup>5</sup> An indicator of its extent may be obtained by excluding from the total land area formally titled properties governed by statutory law. Most titled properties are in cities and towns, which account for less than one percent of the land area of Sub-Saharan Africa.<sup>6</sup> The number of *rural* parcels under title is surprisingly small, although these involve large areas in mainly Zimbabwe, Namibia, and especially South Africa (the former white farms). One quarter to a third of Kenya's area and 12-15 percent of Uganda's area are subject to formal title. Elsewhere rural titled lands usually account for only 1-2 percent of the country area. Despite recent expansion of rural titling in Ethiopia, Madagascar, Rwanda, and Namibia, the process focuses only on household farms, excluding communal assets, meaning that comparatively small areas are being brought under non-customary entitlement.

Most of the customary sector is overlaid with definition as in fact public, state, national or government lands, not the property of the customary owners. Within this sector, nearly 300 million hectares of wildlife and forest reserves and parks are most definitely excluded from the customary sector; this is because the procedure for their creation normally extinguishes customary interests in favor of the state. In most Francophone states, declaration of a national reserve automatically renders the land the private property of the state.

Even after excluding wildlife and forest reserves, urban lands and privately titled lands, the customary domain for which access and rights are governed by community-evolved norms (i.e. customary land tenure) potentially extends to 1.4 billion hectares. Given that only 12-14 million hectares of Sub-Saharan Africa are under permanent cultivation, it may safely be assumed that most of the customary sector comprises unfarmed forests, rangelands, and marshlands. These lands may be

referred to as the *commons* of customary tenure, those assets in the customary sector which are not owned and used by individuals or families but by all members of the community.

Few commons are acknowledged as the property of communities in national land laws. Exceptions include the village land areas of mainland Tanzania (approximately 60 million hectares), the stool, skin, and family lands of Ghana (18 million hectares) and the delimited community areas of Mozambique (7 million hectares). Most of the remaining 1.4 billion hectares of untitled rural lands are claimed by the state, although some are delimited as trust, tribal, *zones de terroir*, or other land classes which at least acknowledge that customary occupancy and use dominate in those areas.

### 3 How identifiable is the customary domain?

Customary domains are rarely homogenous. Parks and mining, timber, and agricultural concessions create large "holes" in the customary domain. When wealthier farmers obtain formal statutory title for their homesteads they extinguish customary title, thereby creating smaller holes in the overall community land area.

Customary domains are also fuzzy at their edges, especially where they adjoin Africa's ferociously expanding cities and multiplying towns. Chiefs or farmers routinely sell lands on the urban fringe to developers or have these taken.<sup>7</sup> There are instances where rural communities retain control over urbanized lands. This is partly the case, for example, in Accra, the capital city of Ghana, where transactions in outer neighbourhoods are formally conducted according to customary norms and under the aegis of formal Customary Secretariats run by chiefs.<sup>8</sup> It is also common for urban poor to use customary norms to secure and authenticate occupation in slums and informal settlements in cities.<sup>9</sup>

## THE CUSTOMARY DOMAIN HAS SOCIAL AND PHYSICAL DIMENSIONS; THE FORMER MAY EXTEND INTO URBAN AREAS

A more complex blurring of the physical and social edges of the customary domain has arisen through the common practice around the continent of persons moving to live in cities nevertheless often retaining land, or the right to land, in their home villages. The influence and wealth of this sector often influences land customs of villagers. This phenomenon comes sharply into focus when urban members of a community has sufficient influence to carve out large farms from the commons, and privately title these to entrench their security according to state law, and to be able to sell these parcels on to others, irrespective of wider community support for this.<sup>10</sup> Tensions may also arise when wealthy villagers living in town send large numbers of livestock to their home villages, consuming a disproportionate share of the common grazing areas.<sup>11</sup> The global land rush (Brief 5) is stimulating domestic land grabs of this kind for profit, in turn accelerating concentration, the introduction of market-based norms and placing pressure on common resources.<sup>12</sup>

The greater the value of the resources affected, the greater the tension over norms. It is unclear, for example, if Liberian villagers will agree that village members who live permanently in Monrovia or other towns should receive a share of the rent and royalties they hope to earn from timber concessions. Even more dispersed and urbanized indigenous populations in North America, Europe, Australia, and New Zealand have had to grapple with this issue, raising complex questions about the extent to which customary ownership is residentially or ethnically defined. Similar questions are being asked about the meaning of ancestral lands in Kenya.<sup>13</sup> In Africa, a rising distinction is being drawn between those who belong to the rural community as (absent) social members and those who are residential members, with greater use and benefit privileges to the commons.

#### 4 Why do customary regimes persist?

Last century in Africa and elsewhere there was a broad expectation and political intention (especially from the 1950s) that customary landholding and governance would disappear.<sup>34</sup> Clearly this has not happened. Nevertheless the sector has endured great attrition due to:

- a. chronic encroachment since the 1890s as a result of specific land-takings to provide areas for white settlers; government and private-sector developments for rubber, cotton, sisal, and food crops; and more recent expansion of agricultural, biofuel, and carbon-trading enterprises,
- b. the withdrawal by the state of prime forests, rangelands, and marshlands for protection purposes (terrestrial protected areas),
- c. the removal of other assets from customary landholders through the nationalization of water, foreshores, minerals, oils, wildlife, and often forests or at least the trees growing on those lands,
- d. the suppression of customary rights through policies and laws that deem such rights to be less than ownership, and
- e. titling programs designed to replace customary interests with introduced European forms of tenure, and mainly freehold and leasehold rights.

### DESPITE ENDLESS ENCROACHMENTS AND SUPPRESSION OF RIGHTS, THE CUSTOMARY SECTOR REMAINS STRONG AND ACTIVE

Reasons for the failure of customary land tenure to disappear include:

- a. a gap between what national law dictates and what continues to exist on the ground; best illustrated in

overlapping state and community tenure over public lands,

- b. with notable exceptions (e.g. Rwanda and Eritrea), the reluctance of African governments to formally extinguish customary rights as a genus, and rather to reinterpret what these mean; this allows customary norms and interests in land to continue until they clash directly with incoming state or private-sector interests,
- c. the limited reach of conversionary titling programs, and
- d. the continuing relevance of customary norms to existing patterns of land use and rights and the way they tightly interweave with social relations.

Kenya's land and titling policies can be used as an example.<sup>35</sup> While administrations since 1922 have enjoyed root ownership and control over customary lands, this has in theory been in the interests of occupants, while in fact granting these administrations legal powers to dispose of those lands at will. The program begun in the 1960s to convert occupancy into freehold entitlements was not entirely successful: less than one-third of the country area was covered, leaving other customary tenants uncertain of their rights. Even people who obtained titles through compulsory titling have preferred to regulate land transfer and use on the basis of local community customs. Most have not even collected their deeds and/or recorded change of ownership since. Nevertheless, millions of rights owned by women and family members were in law lost in the process of converting farm ownership to individual and absolute entitlement in the name of (usually male) household heads. Bureaucracy and corruption in land procedures and registries have seriously undermined the proclaimed sanctity of registered entitlement, upon which trust the statutory system depends. Many communities feel more confident relying upon customary norms for their tenure security.

This is because the socially-embedded nature of customary land norms means they are accessible, largely

cost-free (payments to chiefs for land allocation and other services notwithstanding),<sup>16</sup> and inseparable from the realities of present-day land use. The arbiter of norms is always the living community, obviously acutely responsive to changes in conditions that affect its land-based livelihood. Although accountability can be an issue, control is retained in the community rather than removed to unreachable and unaccountable government authorities and who charge fees for their services. The intertwining of customary norms and actual land use also provides greater nuance and flexibility; communities can more easily differentiate rights to land, such as distinguishing between primary ownership and secondary access rights, which may be necessary to regulate seasonal access among and by pastoralists.<sup>17</sup>

Compared with non-indigenous systems, customary regimes are also inherently better able to integrate cultural aspects, such as inheritance practices, where deceased may be buried, and the protection of sacred groves. Communal rights to forests, rangelands, marshlands, and other shared resources are most obviously unsuited to the individualization project which has proven the bedrock of coerced conversion of interests into statutory entitlements. Retention of control over collective assets has a tremendous influence over the strength of community-based landholding norms generally. Introduced tenure regimes generally treat such resources as un-owned and un-ownable by communities. At registration, such as in Kenya, commons have routinely been made the property of the state, or divided among better-off community members.<sup>18</sup>

There are other, more recent political reasons lessening the drive to extinguish customary tenure systems. These include public demand for more democratic and decentralized governance, arising from political changes sweeping the continent since the 1990s. This has had an impact on the forestry sector, contributing to local wariness about the justice or necessity of handing over precious common forest lands to governments to own and manage.

There is also increasing recognition, at home and abroad, that security of existing tenure is a basic human right in an agrarian society. It is becoming accepted that the subordination of customary land interests has largely been a state invention and rests on the embarrassing presumption that Africa was “empty of owners” when the colonial era, followed by modern state-making, got under way.<sup>19</sup> International law, in the form of declarations and protocols, plays some role in lessening tolerance of mass dispossession, although argued elsewhere as entirely inadequate.<sup>20</sup>

## THE LEGAL ATTITUDE TO CUSTOMARY RIGHTS AND REGIMES IS CHANGING

Such factors are helping to drive domestic reform in legal perceptions of customary tenure.<sup>21</sup> Titling has not been abandoned but with important differences in approaches. Most notably, in some countries it is now possible for customary rights to be registered *without being extinguished and replaced* with a different (and usually highly individualized) form of tenure. In some cases, collectively held properties like forests and rangelands may also be titled as belonging to a community.<sup>22</sup> One impact of these changes is that customary rights to land are becoming *statutory rights of customary ownership*. The new land laws of Mozambique (1997), Uganda (1998), Tanzania (1999), and Southern Sudan (2009) provide most comprehensively for this integrated plural legalism. The continent-wide extension of such changes would bring to an end the century-long attempt to subordinate and suppress customary tenure as a legal means of land ownership.

### 5 How archaic is customary land tenure?

In the hands of anthropologists and political scientists of both neo-classical and Marxist bent, a main orthodoxy of the 20th century was that indigenous forms of tenure were born of a static, pre-capitalist past and

therefore structurally inimical to the requirements of capitalist transformation.<sup>23</sup> With the active encouragement of the international aid community, communal possession was especially reviled from the 1950s as obstructive to modernization.<sup>24</sup> Gareth Hardin, as is well known, added his penny's worth to destructive effort in his confusion of collective landholding with open-access regimes (1968).<sup>25</sup> These positions played admirably into the hands of resource-grabbing post-colonial administrations, who could safely sustain the myth that landholding rights existing under customary tenure could not be legally accepted as amounting to more than occupancy and use rights ("possession"). Unfarmed forests and rangelands in particular were treated as un-owned and were taken by governments.

Sometimes communities have been able to defend their lands without resorting to physical means by dramatically influencing policy. An early example of this was when, three times in the 1890s, Ghanaian coastal chiefs successfully prevented the British from declaring their gold-rich forests to be Crown property by showing that the communal nature of indigenous tenure meant that "no land is un-owned in Gold Coast", not even uncultivated lands.<sup>26</sup> This worked well: almost uniquely, customary lands in Ghana have since been treated as a private property, owned by chiefdoms and families.

## NOT ALL CUSTOMARY NORMS ARE TRADITIONAL; MANY ARE MADE BY PRESENT-DAY COMMUNITIES

In less positive ways, the institution from the 1920s of so-called Indirect Rule in Anglophone Africa and Liberia and more direct rule or *Indigenat* in Francophone Africa reshaped customary norms, often empowering or creating chiefs as *de facto* owners and controllers.<sup>27</sup> A legacy today is recurrent tension between the rights of chiefs and subjects in those areas where chiefs remain supported in state law in unreformed (un-democratised) ways. These tensions centre firmly upon the right of

traditional leaders to dispose communal lands, often for profit and without permission of the community. There is a fine line between chiefs as (often self-declared) owners of all land in customary laws, and chiefs as trustee administrators of the commons. The issue is so contested within the customary sector in some countries that constitutional provisions have begun to be laid down (e.g. Ghana, 1992) and issue of undue prerogative to chiefs helped see an important land act struck down recently in South Africa as unconstitutional (2010).

Another legacy of indirect rule is the power that (now more democratically formed) district and county governments wield over customary land, even though they are remote from villages. Despite this, it can also be shown that colonial administrations enforced a degree of equity as to land access within some traditionally inequitable societies. As yet as the colonial era advanced, such inequities were also nurtured as elites became allies of colonial administrations, often for the sake of land.<sup>28</sup>

A multitude of other factors have affected customary regimes, often in ways that make it difficult to determine the extent to which change is externally or internally driven. Religion also is a factor, perhaps best seen in the manner in which customary norms of inheritance in Mauritania, Chad and Senegal are entirely determined by *Shari'a*.

More pervasively, state policies, land scarcity, education, and especially the commoditisation of land and polarisation of communities into rich and poor classes through continuing capitalist transformation have all affected the way in which customary land relations are formed and regulated. Therefore it is not surprising that notions of what constitutes a customary right to land do seem to move closer to the norms of introduced statutory tenure, favouring the rich more than the poor. A frequent result is a disproportionate appropriation of community resources by leaders, larger farmers, and stock owners.<sup>29</sup>

From all such factors customary regimes are distinctively malleable. In recent decades these shifts

within the customary sector have been quite widely visible around the continent:

- a. declining sanction against the sale of family lands,
- b. the introduction of written witnessing of transactions,
- c. a shift of farming usufructs into rights of perpetual and absolute ownership, especially where houses and crops are permanent,
- d. an increase in democratic decision-making in the exercise of customary jurisdiction, although with an opposing trend in some case whereby chiefs are even more forceful than customarily the case in defining and exercising powers,
- e. shifts in the centre of gravity of communal domains from tribal territory to clan area to village domain as population grows,
- f. a reduction in the proportion of communal to farmed land within many village domains,
- g. a hardening of perimeter boundaries between neighbouring villages,
- h. a hardening of attitudes to customary access and tenure by outsiders, as the effects of land shortages are felt,
- i. signs of increased pressure on vulnerable groups within communities, such as women, orphans, in-laws, and ethnic minorities when it comes to accessing new lands to farm,<sup>30</sup> and
- j. lessening adherence to old norms which dictate that there should be land for every family in the community, along with a polarization of wealth within modern customary communities, and yet contrary hardening demands for equity, especially where this did not historically exist (many customary regimes, particularly in coastal West

African areas, were not as equitable as traditionally presumed).

There are many inconsistencies in such trends, often engineered by public policy. As a result of both political and popular pressure, for example, the 2010 Lesotho Land Act makes women co-owners of family land, posing difficulties in distinguishing between customary and statutory landholding norms. South African women have also recently been shown to actively change customs to assure their modern rights.<sup>31</sup> The Village Land Act, 1999 in Tanzania purposely makes decision-making around customary norms the prerogative of the elected village government.

## 6 How similar are customary regimes?

Each customary regime is distinctive to its community but there are also commonalities that apply within and between countries and even continents. Thus, despite being nested in industrial economies, Maoris in New Zealand, community-forest and pasture owners in Spain and Portugal, and Indians in North America share foundational norms with indigenous land systems in Africa.

### THE GLOBAL COMMONALITIES IN THE PRINCIPLES OF CUSTOMARY REGIMES IS STRIKING

These norms stem from the shared template of community-based regimes. This is expressed in:

- a. community-based *jurisdiction* over landholding,
- b. territories, domains or community land areas: acknowledgement within the customary sector that each community owns and controls a discrete areas (and may access others by arrangement and which themselves become customary rights of access),

## LANDLESSNESS AND LARGE ESTATES ARE NOW FOUND IN THE AFRICAN CUSTOMARY SECTOR

- c. collective ownership or possession and control over naturally communal resources such as forests, rangelands, and marshlands, and
- d. the tendency for the size of customary territories or domains to be periodically adjusted so that they remain at the scale at which community-based control can be effective.<sup>32</sup>

Differences between customary regimes are most actively determined by the systems of land use employed. Five broad patterns of customary tenure are discernible in Africa today:

- a. By custom, a hunter-gatherer group or band (e.g. Ogiek in Kenya, San in Botswana, and Baka in Cameroon and the Democratic Republic of the Congo) usually owns a single, discrete—but often vast—land area. The owning group settles at different places within this territory over a year, using different resources. Reciprocal rights of access and use are accorded to neighbouring bands.
- b. Pastoralists in East Africa and the Sahel generally pattern their land rights and access in more complicated ways than hunter-gatherers (or cultivators). A typical pattern is for the group to own a home domain, respected as its land by other pastoralist group (with periodic disputes). The group may co-own a second area or resource (often water) with several other clans. Nomadic pastoralists typically also acquire seasonal access rights to lands belonging to another (often settled) community or cluster of communities. Pastoralists also establish transit, watering, and pasturing rights along their migration routes to these domains.

- c. Where shifting cultivation is practised (e.g. in many parts of West Africa), it is usual for the land to be community-owned and for farmers to hold usufructuary rights to the areas they clear and cultivate. As the availability of land declines, the conditions of the usufruct become more stringent, including a reduction in the number of years that fields may be left fallow and still belong to the clearer.
- d. Where farming is permanent, usufructuary rights generally mature into absolute rights as reflected in the term “customary freehold” used by customary landholders in Nigeria, Sierra Leone and Ghana. Unsettled and unfarmed lands remain common property.
- e. There are cases where communal property is now limited to service areas. However, even in the most densely populated and commons-deprived areas of Rwanda, Burundi, Kenya, southern Uganda, and Tanzania, communities often retain forests and marshlands as community property (although the governments of Rwanda, Burundi, and Kenya now claim ownership of these assets). Even when commons have almost entirely disappeared, communal jurisdiction often remains in the form of socially-enforced rules on inheritance and ownership transfer.

### 7 How equitable are customary norms?

A popular orthodoxy is that African tenures are equitable, that there is no landlessness, and family size serves as the key determinant of differences in farm size. Historically this was true in areas where fertile land was abundant and pioneer farming the rule.<sup>33</sup> The right to access land and resources remains a dominant principle in most African regimes, but it has become less easy to deliver as the population has increased (nine-fold over the 20th century) and as the gap between rich and poor has grown.

It is startling to note that the Gini Coefficient for smallholder farming in Mozambique, Rwanda, Ethiopia, Zambia, and Zimbabwe is comparable to feudal ratios in Asia in the 1960s and 1970s.<sup>34</sup> When the large estate sector is included, the inequities are even worse. Accordingly, some poverty reduction strategies identify rising rural landlessness, alongside the paradox of “idle lands”, as an issue in African countries.<sup>35</sup> Studies also remark on a rise in absentee landholding, tenancy, and unsatisfactory farm labor conditions.<sup>36</sup>

Historical inequities should not be ignored, either. Feudal-like tenure—with landlordism, the outright exclusion of most poor classes, and even slavery—existed widely in pre-colonial times in both farming and pastoral communities.<sup>37</sup> Indebted chiefs were even known to have sold whole communities and their lands to other chiefs.<sup>38</sup> It is likely that such inequities grew during the pre-colonial mercantile era, as kings, chiefs, and emirs traded slaves, ivory, skins, gold, and later palm oil and cacao with European privateers.

The influence of such practices on modern-day relations is significant; there are reports that slavery continues in the Sudanic states (and was only made a criminal offence in Mauritania in 2007). Landlord–tenant relations were only outlawed in Tanzania in 1968 and Burundi in 1977, and they remain nominally lawful in *mailo* tenure in Uganda.

A milder but more pervasive trend of institutionalized inequity exists around traditional authorities. Some of their privileges are long-inherited and sustained. Others have been created more recently, such as through the practices of indirect rule in Anglophone colonies mentioned above. Still other privileges are reconstructions of the past: for example, it is commonly reported in West Africa that tribute relations have become *de facto* rental payments for sustained permission to occupy lands.<sup>39</sup> This most affects migrants but also makes it difficult for youthful indigenes to access land. The “drinks money” paid to

chiefs in eastern Nigeria to secure new land for shifting cultivation is reported to be so inflated that it constrains farming by the poor.<sup>40</sup>

The inequity that traditionally affects women in modern customary regimes is addressed in all new national land policies and legislation.<sup>41</sup> There is consensus that cash-cropping targeting male farmers and titling programs vesting ownership in men have exaggerated gender inequalities, and there is concern that HIV AIDS is diminishing the land rights of widows and orphans.<sup>42</sup> Despite legal or policy improvements, there is uneven acceptance of gender-equitable ownership within the customary sector. Sometimes women succeed in their struggle.<sup>43</sup> Sometimes they fail, as illustrated by the still unsuccessful decade-long struggle of Ugandan women to secure co-ownership of family farms.<sup>44</sup>

## OUTSTANDING STRESS ON CUSTOMARY LAND RELATIONS IS BETWEEN STATE AND PEOPLE

### 8 Conclusions

This brief has challenged conventional positions that customary land tenure is an anachronism that is diminishing. Rather, customary land tenure is clearly being practised by the majority of communities in Africa, is vigorous in its norms, has considerable commonalities across boundaries, and mirrors existing rural society in all its complexities, contradictions, and trends. Tugs of war abound—between genders, generations, chiefs and subjects, indigenes and immigrants, hunter-gatherers and cultivators, settled populations and nomadic pastoralists, village members who live in towns and those who remain, those who have secure statutory deeds over their farms and those who remain with undocumented rights, and those who are (comparatively) rich and poor.

Too concerted a focus on traditionalism in customary regimes may blind us not only to the natural

and increasing heterogeneity of rural communities but also to the painful reality of majority land insecurity. The weak status of customary land rights in national laws is a condition shared by many (although no longer all) rural communities in Sub-Saharan Africa. The bottom line is that *most* rural Africans occupy and use lands that are not accepted in statutes as their private individual or collective property. This particularly affects their tenure over forests, rangelands, and marshlands. Revitalized co-option of these lands through the global land rush now increases this vulnerability.

## A PRO-POOR APPROACH TO SECURING CUSTOMARY RIGHTS IS NECESSARY

Four avenues to greater progress present themselves.

*Changing the law is a priority.* As long as individuals, families, and collective holdings in the customary sector do not have legal force as properties in this highly commoditised world, half a billion Africans will remain tenants of the state, or, in the words of an appeal court judge in Tanzania in 1994, “squatters on their own lands”.

A more strategically sensible approach is to recognize that customary rights to land have the force of modern real property, whether registered or not. The forces against such recognition, however, are as strong today as they were a century ago. They may even be more so, given the way that elite interests dovetail with policies that aim to keep as much untitled land as possible under the *de facto* ownership of governments; this enables them to dispose of their citizens’ lands at will, including to domestic and foreign investors.

*Furthering democratization of land and resource administration is also crucial.* Solidarity within and between communities is handicapped by the absence of enabling institutional mechanisms and powers. The

devolution of forest governance has played an important role in Africa in increasing recognition that many forests belong to communities, but has in practice delivered on this tenure in only a handful of states (Gambia, Liberia, South Africa, Mozambique, and Tanzania).

*Tenure security policies need to shift focus from farms to commons.* Many governments are loath to remove customary-sector families from their houses and farms but have no compunction in reallocating their commons to other uses and users. This is because compensation, albeit of a token nature, is now normally required when houses and crops are interfered with, even on untitled customary lands, but is rarely extended to commonly held forests, rangelands, and marshlands. Yet such unfarmed commons are the major asset of most rural communities. They are often the main or only source of livelihood for the land-poor and landless; with assistance, they have the income-generating potential to raise millions out of poverty.

Reasons to pursue a pro-poor approach to customary rights include:

- a. the poor are the majority in the customary sector (75% by international measures),
- b. the poor are *most* dependent on common resources, and which are the natural capital most easy for states and private sectors to appropriate,
- c. not just the state but local elites have proven best able to manipulate customary norms in their own favor, and at the expense of the majority poor, and
- d. elites have proven most able to escape the subordination by governments of rights to customary landholdings.

## 9 Implications for forest tenure

Governments are the majority owners of forests in Africa today. Nevertheless, state ownership is a

comparatively recent phenomenon stemming from colonial capture of valuable resources. Previously, forests by tradition were the property of individual communities.

The restitution of forest ownership from state to people in Africa should be on the agenda because:

- a. forests are a critical source of livelihood for most rural communities and especially the majority rural poor,
- b. forests still constitute a significant proportion of the customary land assets of communities, but their benefits are lost to ordinary citizens because of state appropriation,
- c. the (human) land rights of the majority of African people are at stake—justice cannot be done until the indigenous ownership of forests is acknowledged,
- d. governments have not proven effective as forest managers. In contrast, where communities are empowered to manage forests, conservation improves, and at much less cost to treasuries.<sup>45</sup> A major incentive for communities to sustain forests in good condition is to be recognized formally as the owner, albeit without the right to sell, clear, or subdivide the resource. Even the most valuable of forest resources can be protected and sustained just as well under local ownership as under state ownership.

## Endnotes

<sup>1</sup> See: [http://www.prb.org/pdf05/05WorldDataSheet\\_Eng.pdf](http://www.prb.org/pdf05/05WorldDataSheet_Eng.pdf) and <http://www.prb.org/Publications/Datasheets/2010/2010wpds.aspx>.

<sup>2</sup> Emerton, L. 2010. *Quantifying the Impacts of Barriers to Pro-poor Forest Management. Livelihoods and Landscapes Strategy: Markets and Incentives Discussion Paper*. Gland: IUCN.

<sup>3</sup> *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*. Adopted by the African Commission on Human and People's Rights, May 2003, Niamey, Niger.

<sup>4</sup> The rural population of sub-Saharan Africa was 571 million people in 2010 (see endnote 1).

<sup>5</sup> For data see Alden Wily, Liz. 2011. *The Tragedy of Public Lands: The Fate of the Commons under Global Commercial Pressure*. Rome: International Land Coalition. <http://www.landcoalition.org/publications/tragedy-public-lands-fate-commons-under-global-commercial-pressure>.

<sup>6</sup> In fact most recent remote sensing suggests that cities and towns cover only 31,052 square kilometres of 0.13 percent of the total land area of Sub Saharan Africa; A. Schneider, M. Friedl and D. Potere. 2009. A New map of Global Urban Extent from MODIS Satellite Data. *IOP Science Electronic Journals*.

<sup>7</sup> Development Workshop and Centre for Environment & Human Settlements (UK), 2005. *Terra. Urban land reform in postwar Angola: research, advocacy and policy development*. Occasional Paper No. 5, London; Ubink, Janine. 2008. Struggles for land in peri-urban Kumasi and their effect on popular perceptions of chiefs and chieftaincy. In *Contesting Land and Custom in Ghana*. Ubink, Janine and Kojo Amanor, eds. Leiden: Leiden University Press.

<sup>8</sup> Ubink 2008. As cited in endnote 7.

<sup>9</sup> Development Workshop 2005 as cited in endnote 7.

<sup>10</sup> For Liberia, see Alden Wily, Liz. 2007. *So Who Owns the Forest? An Investigation into Forest Ownership and Customary Land Rights in Liberia*. Monrovia: Sustainable Development Institute. [http://www.rightsandresources.org/publication\\_details.php?publicationID=102](http://www.rightsandresources.org/publication_details.php?publicationID=102). For Ghana, see Ubink, Janine and Kojo Amanor, eds. 2008 (endnote 7). For Botswana, see Cullis, Adrian and Cathy Watson. 2005. *Winners and Losers: Privatizing the Commons in Botswana*. London: International Institute for Sustainable Development. For Malawi, see Peters, Pauline and Daimon Kambewa. 2007. *Whose Security? Deepening Social Conflict over Customary Land in the Shadow of Land Tenure Reform in Malawi*. Boston:

Harvard University Centre for International Development.

<sup>11</sup> Nori, Michelle, Michael Taylor, and Alessandra Sensi. 2008. *Browsing on Fences: Pastoral Land Rights, Livelihoods and Adaption to Climate Change*. London: International Institute for Sustainable Development.

<sup>12</sup> For up-to-date examples of this in Benin, Burkina Faso, Niger, and Mali, see Hilhorst, Thea, Joost Nelen, and Nata Traoré. 2011. Agrarian change under the radar screen: rising farmland acquisitions by domestic investors in francophone West Africa. Presentation made at the International Conference on Global Land Grabbing, 4–8 April 2011. [http://www.future-agricultures.org/index.php?option=com\\_docman&Itemid=971](http://www.future-agricultures.org/index.php?option=com_docman&Itemid=971).

<sup>13</sup> e.g. [http://findarticles.com/p/articles/mi\\_qa5327/is\\_302/ai\\_n29130466/](http://findarticles.com/p/articles/mi_qa5327/is_302/ai_n29130466/) and <http://www.standardmedia.co.ke/InsidePage.php?id=2000027073&cid=470&story=Squatters%20on%20their%20ancestral%20land>.

<sup>14</sup> As first laid out by the East African Royal Commission, 1953–1955 (Cmd. 9475) and later reflected in the Report of the Commission on Land Tenure in Francophone Africa (1959).

<sup>15</sup> For Kenya, see National Land Policy of Kenya, 2009; Wily, Liz and Sue Mbaya. 2001. *Land, People and Forests in Eastern and Southern Africa at the beginning of the 21st Century*. Nairobi: IUCN; Bruce, John and Shem Migot-Adholla, eds. 1994. *Searching for Land Tenure Security in Africa*. Iowa: Kendall/Hunt; and Hunt, Diane. 2005. Some outstanding issues in the debate on external promotion of land privatization. *Development Policy Review* 23(2).

<sup>16</sup> Among famous studies see: for Botswana, Schapera, Isaac. 1970. *Tribal Innovators: Tswana Chiefs and Social Change 1795–1940*. London: Athlone Press; for Zambia and Malawi, see Chanock, M. 1991. Paradigms, policies and property: a review of the customary law of land tenure. In *Law in Colonial Africa*. Mann, K. and R. Roberts, eds. London: Heinemann; and for Senegal, see Snyder, F. 1982. Colonialism and legal form: the creation of ‘customary law’ in Senegal. In *Crime, Justice and Underdevelopment*. C. Sumner, ed. Cambridge Studies in Criminology XLVI. London: Heinemann. See also Cotula, L., ed. 2007. *Changes in ‘Customary’ Land Tenure Systems in Africa* London:

International Institute for Environment and Development.

<sup>17</sup> See endnote 16 for examples.

<sup>18</sup> See references in endnote 15.

<sup>19</sup> See brief 2.

<sup>20</sup> See brief 5 and also Alden Wily, 2011 as cited in endnote 4.

<sup>21</sup> See brief 3.

<sup>22</sup> See brief 4.

<sup>23</sup> See Bates, R. 2001. *Prosperity and Violence the Political Economy of Development*. London: W.W. Norton & Company.

<sup>24</sup> *Report of the East African Royal Commission on Land* as cited in endnote 14; and The World Bank. 1975. *Land Reform: A Sector Policy Paper*. Washington, D.C.: The World Bank.

<sup>25</sup> See brief 2.

<sup>26</sup> Amanor, Kojo. 2008. The changing face of customary land tenure. In Ubink and Amanor 2008, as cited in endnote 7.

<sup>27</sup> See Snyder (1982, as cited in endnote 16), for Senegal; Chanock (1991, as cited in endnote 16) for Malawi and Zambia; and Amanor (2008, as cited in endnote 26) for Ghana.

<sup>28</sup> See Amanor, Kojo and Sam Moyo (eds). 2008. *Land and Sustainable Development in Africa*, Zed Books.

<sup>29</sup> A case of which is well-exemplified by Simo Mope 2011; Land grabbing, governance and social peace-building in Cameroon: Case study of the role of elites in land deals and commoditisation in the North West Region. Presentation made at the International Conference on Global Land Grabbing, 4–8 April 2011. [http://www.future-agricultures.org/index.php?option=com\\_docman&Itemid=971](http://www.future-agricultures.org/index.php?option=com_docman&Itemid=971)

<sup>30</sup> Examples of these changes are variously provided in Alden Wily (2007, as cited in endnote 10), Nori et al. (2008, as cited in endnote 11), Ubink (2008, as cited in endnote 7), Amanor (2008, as cited in endnote 24), Cotula (2007, as cited in endnote 16) and Chaveau, J-P., J-P. Colin, J-P. Jacob, P. Lavigne Delville, and P. Le Meur. 2006. *Changes in Land Access and Governance in West Africa: Markets, Social Mediations and Public Policies*. London: International Institute for Environment and Development.

<sup>31</sup> Budlender, Debbie, Sibongile Mgweba, Keteletso Motsepe, and Leilanie Williams. 2011. *Women, Land and Customary Law*. Johannesburg: Community Agency for Social Enquiry.

<sup>32</sup> That is, over-large villages will divide into two to keep manageable the operational sphere of community-based norms. When land is less scarce, younger families migrate to unoccupied areas, thus establishing controlling rights.

<sup>33</sup> Bohannan, P. 1963. Land, tenure and land tenure. In *African Agrarian Systems*. Part II. D. Biebuyck, ed. London: International Africa Institute.

<sup>34</sup> T. Jayne, D. Mather, and E. Mghenyi. 2005. Smallholder farming in difficult circumstances: policy issues for Africa. Paper presented at the Conference on the Future of Small Farms, June 2005, Withersdane Conference Centre, Wye, United Kingdom.

<sup>35</sup> e.g. See Government of Ghana. 2003. *Poverty Reduction Strategy*. Accra: Government of Ghana.

<sup>36</sup> e.g. See Government of Kenya. 2010. *Kenya's National Land Policy*. Nairobi: Government of Kenya.

<sup>37</sup> For Liberia see Alden Wily, Liz. 2007, as cited in endnote 10. For Ghana see Amanor 2008 (as cited in endnote 26) and Ubink 2008 (as cited in endnote 7). For Côte d'Ivoire see Sara Berry, 2008. Ancestral property: Land, politics and 'the deeds of the ancestors' in Ghana and Cote d'Ivoire. In Ubink and Amanor (eds) as cited in endnote 7; for Niger see Cotula and Cisse 2007 in Cotula 2007 (as cited in endnote 16); for Malawi see Peters and Kambewa 2007 (as cited in endnote 10). See also Komey, Guma. 2008. The denied land rights of the indigenous

peoples and their endangered livelihood and survival: the case of the Nuba of the Sudan. *Ethnic and Racial Studies* 31:5, 991–1008; and J. Clover 2005. Land reform in Angola: establishing the ground rules. In *From the Ground Up: Land Rights, Conflict and Peace in Sub Saharan Africa*. J. Clover and C. Huggins, eds. Nairobi: ACTS.

<sup>38</sup> Amanor 2008, as cited in endnote 26.

<sup>39</sup> Amanor 2008, as cited in endnote 26, Berry 2008, as cited in endnote 37.

<sup>40</sup> For Nigeria see Adedipe, N.O., J.E. Olawoye, E.S. Olarinde, and A.Y. Okediran. 1997. *Rural Communal Tenure Regimes and Private Landownership in Western Nigeria*. <http://www.fao.org/docrep/w6728t/w6728t13.htm#E11E11>

<sup>41</sup> See [http://www.undp.org/oslocentre/docso7/Land\\_Rights\\_Reform\\_and\\_Governance\\_in\\_Africa.pdf](http://www.undp.org/oslocentre/docso7/Land_Rights_Reform_and_Governance_in_Africa.pdf).

<sup>42</sup> Walker, Cheryl. 2002. *Land Reform in Southern and Eastern Africa: Key Issues for Strengthening Women's Access to and Rights in Land*. <http://info.worldbank.org/etools/docs/library/36270/WWalker-Land%20Reform%20and%20Gender.pdf>.

<sup>43</sup> Gender discrimination was another reason why the Communal Land Reform Act, 2004 was overturned by the Constitutional Court of South Africa in 2010. Women led the lobby against this law.

<sup>44</sup> Uganda Land Alliance Statement on the Occasion of International Women's Day, 8 March 2011.

<sup>45</sup> See Porter-Bolland, Luciana and others (2011) Community managed forests and forest protected areas: An assessment of their conservation effectiveness across the tropics. *Forest Ecology and Management* 2011.

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*The Rights and Resources Initiative (RRI) is a strategic coalition comprised of international, regional, and community organizations engaged in development, research and conservation to advance forest tenure, policy and market reforms globally.*

*The mission of the Rights and Resources Initiative is to support local communities' and indigenous peoples' struggles against poverty and marginalization by promoting greater global commitment and action towards policy, market and legal reforms that secure their rights to own, control, and benefit from natural resources, especially land and forests. RRI is coordinated by the Rights and Resources Group, a non-profit organization based in Washington, D.C. For more information, please visit [www.rightsandresources.org](http://www.rightsandresources.org).*

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