

NRI, IIED, DFID & AFRA

SECURING CUSTOMARY LAND TENURE IN AFRICA: ALTERNATIVE APPROACHES TO THE LOCAL RECORDING AND REGISTRATION OF LAND RIGHTS

**Report of a workshop held at
IIED, 3 Endsleigh Street, London, UK on 8th November 2000**

Introduction and background

(Julian Quan, Land Tenure Adviser, Rural Livelihoods Department DFID)

Land and its good management are central to agrarian development, environmental security and rural governance in Africa - and therefore for livelihoods and poverty reduction. In recognition of this, and in the face of internal demands and external pressure for change, African nations have, since the 1990s, been undergoing a groundswell of policy and legislative change in matters of land tenure and land administration.

In 1998 DFID established a Land Tenure Advisory Group (LTAG) comprising staff from the Rural Livelihoods Department, together with representatives from IIED, NRI and Oxfam, as well as other DFID departments. The group organised a major international conference for African policy makers and land tenure practitioners in February 1999. As a result much of LTAG's work over last 2 years has been directed at extending knowledge and capacity in land policy and land tenure amongst African governments and civil society organisations through support to the emergence of African regional networks - which have come to be known as LANDNET Africa.

This workshop was the first in a series of ad hoc workshops organised by the LTAG, and offered an opportunity for networking and debate amongst UK based researchers and practitioners involved in land issues in Africa.

There are now clear indications that both governments and donors are recognising the enduring importance of customary tenure systems, and seeking to integrate these into sustainable arrangements for the allocation and management of land rights at local level. Conventional freehold and leasehold titles may never meet the needs of rural African society as a whole. Land titling and attempts to do away with customary tenure have proved expensive and divisive, undermining the legitimate rights of many land and resource users. A new, pluralistic African paradigm in land policy is now emerging.

Nevertheless, African rural people generally need both secure individual rights to farm plots and secure collective rights to common pool resources upon which whole villages depend. Households and communities may also need to be able to exchange their rights, sometimes through the market. Traditional authorities and chiefs retain a legitimate role in land management, sometimes also acting as landowners, although their authority is frequently contested. In addition rural Africa requires policy frameworks which provide some incentives for domestic and inward investments in land and natural resources development, while protecting the rights of local people and encouraging business partnerships with them.

Amongst all this, it is clear that secure land rights need to be delivered locally, especially in the context of political and administrative decentralisation. Effective services, clear transparent rules and legitimate, accountable authority over land are all needed to ensure good rural governance in

Africa. The demarcation of community lands, recording of rights and resolution of disputes requires robust and transparent systems - procedures, documents and institutions, plus accessible, appropriate technologies - simple and cheap enough to be operated and understood at local level.

This presents a challenge for land legislation and land administration institutions in Africa, both formal and customary. These need to evolve so that pluralistic, pro-poor systems of tenure can develop in practice. A number of experiments and pilot projects are underway - and there are various possible solutions involving a varying mix of responsibilities amongst village and community institutions, traditional leaders, local and central governments, surveys departments and land boards. Examples abound - however there is a lack of documentation, and of clear evidence as to what works under different circumstances.

The main paper presented and discussed at the workshop was *Piloting local administration of land records in Ekuthuleni, South Africa*. by Donna Hornby, from AFRA, an NGO working in KwaZulu-Natal province. This details a pioneering and well documented case study in the development of local systems for recording land rights.

The workshop's objectives were

- to provide AFRA with constructive feedback on their work;
- to pool knowledge and information on a complex issue derived from a range of case studies, and to make this available to land tenure practitioners in Africa, DFID and other international agencies;
- to provide an opportunity for networking amongst researchers and consultants based in the UK, especially between social scientists and those with a background in surveying and land information systems.

Workshop Agenda

10.00am	Introduction - Julian Quan, Rural Livelihoods Department, DFID
10.15	Piloting local administration of records in Ekuthuleni, KwaZulu-Natal - Donna Hornby, AFRA South Africa
11.00	Discussion
11.30	Refreshments
11.45	Ivory Coast's <i>Plan Foncier Rural</i>: lessons from a pilot project to register customary rights - Camilla Toulmin, IIED
12.15pm	Registering customary rights and demarcating customary land in Mozambique – Chris Tanner, freelance consultant
12.45	Lunch
1.30	Local Strategies for securing rights in land - experience from the Sahel (Niger) - Christian Lund, University of Roskilde, Denmark (paper produced for IDS workshop)
2.00	Supporting local rights: will the centre let go? reflections from Uganda and Tanzania: Patrick McAuslan, Department of Law, Birkbeck College, University of London
2.30	Discussion – led by Julian Quan, DFID and Camilla Toulmin, IIED Refreshments
3.30	Next Steps
4.00	Close

Piloting local administration of records in Ekuthuleni, South Africa - Donna Hornby, AFRA South Africa

1. Introduction

The key issue this presentation deals with is how to provide, update and manage land records for people living under common property regimes. The question arises in the cases study area for three main reasons:

- Some people are requesting title deeds as proof of their property rights because they feel insecure in relation to neighbours, the tribal authority and government.
- Some people want title deeds as a means of mortgaging properties and accessing credit.
- Local governments need to know who the legal rights holders are in order to negotiate expropriations for infrastructural development.

This arises in the broader context of the expense and inaccessibility of freehold property rights in South Africa.

The objectives of the PILAR (Piloting of Local Administration of Records) Project are therefore:

- To provide affordable, accessible, legal property records to people living under common property arrangements, and in so doing,
- To consider what the appropriate legal, institutional and technical requirements will be, and
- The implications of such records for rights held in common, for the adaptability and flexibility of common property systems and for marginalised people's access to resources.

We suggest that the following need to be explored to achieve these objectives:

- Mapping and photography as a means of affordable demarcation
- Institutional arrangements that locate records management and dispute resolution at community level, with administrative and arbitration linkages to local and provincial government
- A national legal and policy framework that defines procedures rather than rights

2. Current legal frameworks in South Africa

Rural people wishing to access land reform benefits as groups have to create legal entities that can take transfer of the property they will buy. Official practice is increasingly to encourage communities to opt for legal entities known as Communal Property Associations.

There is also awareness in government that there is a need to reform tenure administration and institutions to protect the property rights of individuals in common property regimes, including tribal or customary systems.

Communal Property Associations Act (1996)

The CPA Act enables communities to form juristic persons, known as communal property associations, in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution. Individual members property rights are protected through contractual agreement with the association. The Department of Agriculture and Land Affairs has a legal duty to monitor, mediate and arbitrate on membership disputes, but this hasn't happened in practice.

Land Rights Bill

The proposed Land Rights Bill was to have provided the following for rights holders living under group systems:

- Individual users of land to be granted statutory rights while nominal title remained in the name of the state or legal entity (eg. Communal Property Association);
- Rights holders to choose their own local institutions for land management;
- Decentralised state institutions to monitor local land management institutions and to mediate and arbitrate on individual versus group disputes.

Unfortunately, the new Minister of Land and Agriculture last year deemed the Bill inappropriate and too expensive to implement. Nothing has yet replaced it. There is rumour that state land will be transferred to “traditional communities”. It isn’t clear what this means.

Registration Facilitation Bill

This proposed Bill was to have supported the Land Rights Bill. Its key provisions were:

- to amend the Deeds Registry Act to enable the registration of statutory rights
- to create land rights officers to substitute for conveyancers.

This Bill was also not passed last year and it is unclear what its current status is.

3. Case Study Area - Ekuthuleni

- 178 households on a 1 160 hectare farm about 15 kilometres south-east of Melmoth in the uThungulu Region of KwaZulu-Natal.
- previously owned by Lutheran Church and sold to the state in 1971
- falls under the jurisdiction of the Entembeni Tribal Authority

3.1. History

The headman approached DLA in 1997 requesting PTOs (Permissions to Occupy).

The catalyst for the request was a desire to access credit for agricultural expansion but people needed records of their land rights to do so. In addition, the community members consider themselves to be the owners because of the duration of their occupation.

DLA appointed AFRA as consultants in 1988 who found:

- a strong, but minority, demand for individual titles in order to secure landholdings
- costs of surveying and transfer unaffordable for most people
- desire to remain part of a tribal structure that defined culture, membership and mechanisms for land allocation, adjudication and dispute resolution
- community decision to request transfer to a common property institution

The DLA decided to process the application:

- as a redistribution of state land project which was designated in 1999
- with an allocated budget of about R3.5 million
- and appointed consultants to produce a Business Plan and develop a community legal entity to take ownership of the land.

The draft Business Plan and legal entity (a CPA) were completed at the end of March 2000, and the project now awaits ministerial approval after which DLA can transfer the land to the CPA.

4. AFRA’s research

AFRA undertook research in Ekuthuleni in 1998 and 1999 to:

- To assess the impact of DLA’s interventions on the tenure rights and practices of the community
- To inform the development of the Land Rights and Registration Facilitation Bills and policies for their implementation

Findings

- Access to land is contingent upon tribal membership controlled by the chief.
- Tribal members are entitled to residential land and access to commonage. Arable land is subject to availability.
- Demarcation of land parcels involves parties to the transfer, the headman and *an ibandla*.
- Household transfer rights include giving, loaning and bequeathing land and selling top structures.
- Households have strong, exclusive residential rights, seasonally exclusive rights to arable land, shared rights to grazing land and natural resources.

Areas of internal contestation over rules of allocation and transfer were:

- Whether abandoned land reverted to the chief or to the original owner.
- Whether unmarried men and women could be allocated land – indications of changing practices in this regard.
- Whether loans were permanent or temporary transfers.
- Whether payment to “owners” was legitimate or not.
- Whether payment to the headman was legitimate or not.
- Whether “owners” can allocate land without the headman or not.
- Polygamous marriages and inheritance

Areas of internal contestation over substantive rights were:

- Land allocated through disputed rules
- Boundary disputes with neighbours
- Rights to arable fields
- Claims from neighbouring wards
- Trees – seeding and fruit

5. Piloting records delivery – some issues arising

5.1. Community issues

Cheap land access

Land access is contingent on tribal/group membership. As a member one is entitled to residential land and access to commonage. Recording systems may up the costs of land access.

Cheap land adjudication and enforcement

Land disputes are adjudicated locally and at no (or little) cost. Tribal courts enforce decisions also at no (or little) cost. Formalising these systems through laws and records builds linkages to formal law and formal judicial processes. These are extremely expensive.

Adaptability and flexibility versus fixing

Land access and tenure security in common property regimes are essentially about negotiation within locally accepted rules that change over time. This means that any person’s particular needs can potentially be accommodated. Records, and systems for their registration, maintenance and updating, fix rights and rules and often simplify them. This could have the consequence of reducing vulnerable people’s access and security. Can one have flexibility and records?

Other trade-offs that have an impact at community level if recording systems are put in place are:

Voluntary versus compulsory

The trend seems to be that registration and titling should be voluntary. However, if it is voluntary across a single community, there are questions about the relationship between formal and informal property transactions that would have to be resolved. Failure to resolve them would, I believe, result in some records losing accuracy over time, thus invalidating all the records.

Local versus national

Communities want records for a number of reasons. Different reasons suggest different locations for the holding of the records. For example, accessing credit suggests the records should be held in the national cadastre. Securing property against neighbours suggests the records should be held locally either by the community structure or at local government level. But the national cadastre is centralised and inaccessible, while local records are subject to inaccuracies and possible abuse.

5.2. What records?

The Communal Property Associations Act requires that a community constitution together with a list of members be submitted to DLA for registration. This currently happens prior to transfer. However, the Act also requires that changes to membership lists, minutes of community meetings and audited reports are submitted to DLA annually for presentation to Parliament. This has never happened in practice and DLA does not insist on or support it.

The Ekuthuleni community at a workshop recently proposed records that reflect the following information:

- Name and signature (ID number, head of household, family including children, relatives and wife.)
- Description of land parcel (situation, size and extent, land use)
- Boundary makers (such as pegs, trees, fencing)
- Servitudes (for roads, water, electricity, telephones)
- Correct procedures for land allocation (the headman, *ibandla*, owner and allocatee should be present at the demarcation of boundaries.)
- Unique number for each record

They said principles governing these records should be:

- Protection (of children, those who have been allocated land, family)
- Land development (productive use of agricultural land, roads and services)
- Records (a central holding point, each household with its own record, copies, adaptable)
- Rights (all people should be respected, fresh assessment of boundaries)

AFRA argues that records should contain information that reflects:

- Location and extent of land parcel
- Holders of rights to the land parcel
- Nature of rights to the land parcel

These should be supported by locally agreed to rules that clarify:

- Demarcation procedures
- Dispute resolution and enforcement procedures
- General conditions under which property can be transacted
- Definitions of what constitutes a transfer
- Rules or procedures about who property can be transferred to

- Rules or procedures about who in the household decides whether a property can be transferred
- Procedures for dealing with non-transferred rights (eg. loans)

The rules should be reflected in community constitutions and supported through linkages to external but accessible institutions.

5.3 Institutions

Institutions involved in land administration at the moment are the communal property associations (or trusts), tribal authorities, Department of Land Affairs, local governments (land use and planning), Surveyor General's Office and Deeds Registry. The linkages between these various institutions are unclear, with functions and roles often duplicated across institutions:

- communal property association functions of membership determination, land allocation and adjudication and the functions of the tribal authorities;
- Department of Land Affairs function of maintaining CPA records and the CPA functions;
- tribal authority functions of land use and planning and local government,
- community/tribal practices around boundaries and boundaries reflected in the national cadastre

Our proposals:

Community institutions should be responsible for:

- Determining local rules and procedures for land demarcation, transfer and adjudication
- Managing land allocation in terms of community rules and procedures
- Demarcating land on the maps
- Ensure all necessary information for records is available
- Produce, maintain and update records (in absence of statutory rights and institutional support)

Local government structures should be responsible for:

- Provision of maps to communities
- Verifying compliance of transactions with community constitutions.
- Digitising new subdivisions and determining co-ordinates and extent of parcels for records.
- Issuing statutory rights (if this were to become a legal option).
- Transferring information to Surveyor General's Office and Deeds Registry

(In the absence of legal obligation, AFRA will undertake the first three tasks)

Surveyor General's Office and Deeds Registry

- Register statutory record against title deed and update property map.
- Monitor local government official in terms of any legislation

5.4. Technical – use of maps in the project

- Corrected colour orthophotos at a scale of 1:2000.
- Community members can identify their properties and boundaries clearly, including areas of dispute; co-ordinates are fairly accurate.
- Transparency placed over the maps in order to demarcate.
- Demarcation process to include headman, "owner" household, *ibandla*.
- Demarcations digitised and held in a GIS.
- Record consists of an "ownership document" reflecting previous "owner", location and extent of land, all rights holders names and nature of their rights.

Questions

- Future transactions would require new boundaries to be digitised. Wouldn't it be easier to use GPS? If so, how does it relate to the use of maps?
- Could this be reproduced on scale? If not, what alternatives are there?

5.5. Legal

We need a law that will:

- Grant statutory rights to members of common property regimes.
- Clarify what constitutes a statutory right – we propose that this is procedural, leaving substantive definitions to local level.
- Define roles and responsibilities of community structures and local government and clarify linkages to the Surveyor General's Office and Deeds Registry.
- Amend records management aspects of the CPA Act to be consistent.

Questions

- What are the implications of proceeding outside of a legal framework?
- How can law capture the complexity of property relationships without simplifying them?

SUMMARIES OF OTHER PAPERS PRESENTED (Full papers available)

Ivory Coast's *Plan Foncier Rural*: lessons from a pilot project to register customary rights - Camilla Toulmin, IIED

Land in Côte d'Ivoire is coming under increasing pressure, due to population growth, the inflow over recent decades of several million migrants from neighbouring countries, and the great expansion of the cocoa and coffee economy. As a result, the land question has become increasingly acute, and highly politicised. The Plan Foncier Rural (PFR, or Rural Land Plan) was begun in 1990, to survey all existing rights in rural areas, and establish an inventory of such rights. Plots were mapped at a scale of 1:10,000, with all rights associated with that plot described and listed. The pilot phase finished in 1996, when it was intended to scale the programme up to national level. The PFR approach was seen as a useful first step towards a greater formalisation of rights to land, given that 98% of land in Côte d'Ivoire is governed by customary systems. The survey approach followed by the PFR aimed to be as open and transparent as possible, with care taken to note down people's own descriptions of their rights, with efforts made to get the views of all parties to a given land contract.

Several lessons can be learned from the PFR. The process of registering rights on paper transforms to some extent the nature of those rights. Land owners may, for example, wish to assert rights which are not necessarily recognised by others. Secondary and third party rights holders (such as herders, women) may find their rights of access and use of resources have not been considered. Translation of local terms from the local language into French involves simplification of more complex social realities. Equally, rights are rarely set in stone, but are subject to continuous re-negotiation. Hence, it may be more important to establish a system for review and resolution of disputes rather than emission of paper titles. The cost of maintaining such a register of land rights is significant, but if this is not done, a larger and larger gap develops between actual rights and those listed in the register. The PFR generated some uncertainty amongst stakeholders both within and outwith the pilot areas, regarding the recognition to be granted to different rights-holders, and the position of migrants with respect to land holdings. Reliance on external funding and time pressures pushed the PFR programme to try and cover the maximum area at the expense of a more careful and painstaking approach. Nevertheless, the PFR represents a valuable set of methods of broader relevance elsewhere, with an estimated cost of £3-7/ha, depending on the ecological zone concerned. In late 1998, new legislation changed the broader legal and political context in favour of a rapid conversion of customary tenure rights into individualised titles to land. It is unclear, as yet, how far the new laws will build on the considerable experience gained by the PFR survey teams.

Customary Land Identification and Recording in Mozambique – Chris Tanner

The customary land tenure situation in Mozambique is characterised by extensive local land rights that are increasingly coming under threat from other land users, notably elite interests seeking to gain access to land, and foreign investors. In some provinces, there has been a rush for land, with local land rights frequently ignored or at best overlooked. A 1997 Land Law offers ways to avoid this. Government policy and the new legislative framework provide for an innovative approach to land use that allows both sides to gain, provided that the law and its instruments are effectively implemented. A key first step is that local land rights are first delimited and recorded.

Land 'privatisation' dates back to the FRELIMO Congress in 1983, when some areas of state farms were sectioned off and offered to selected (usually elite) interests. More fundamental change came in 1986 with the introduction of structural adjustment. In 1989/1990 the country turned more fully to a free market, pluralist economy and political system. With the end of the war in 1992, the way was clear for new investors to begin looking for land that was rapidly acquiring new value as a productive asset.

'The Land Question' moved firmly onto the political agenda in the early 1990s, as the State began to consider ways of breaking up and privatise old and bankrupt state farms. Policy and legislative reform began after the first multiparty elections in 1994. A new Land Policy was approved (September 1995) and a new Land Bill passed in 1997. The 'Land Commission' Technical Secretariat (TS) then successfully developed Land Law Regulations (approved in December 1998) and a Technical Annex to the Regulations (approved in December 1999).

An FAO technical support programme has been supporting the TS since 1995, with support from other donors. Civil society groups and NGOs have successfully been involved in the process of policy and legislative reform. The NGO movement especially is now playing a major role in disseminating the Land Law through the country and working with communities to help them exercise their new rights under the Law.

The 1997 Land Law established a number of basic principles:

1. Land rights have to be recognised for more than just currently cultivated land.
2. The law states that there is only *one use right* which can be attributed by the State in three distinct ways:
 - a) through existing occupation established by customary norms and practices (individuals or groups of individuals can acquire rights in this way)
 - b) through existing occupation 'in good faith' (where someone has occupied an area *without any objections or counterclaims* for ten years or more)
 - c) through a formal request to the StateWhichever channel is used, the use right *has the same weight*. Moreover, the law states that holders of rights acquired through occupation *do not need to register those rights* for them to be protected by law.
3. The Law creates a new *legal* concept, the 'local community', to which are attributed land rights acquired through customary norms and practices.
4. Local communities have a right and obligation to participate in the management of land and other natural resources.

This is a far more extensive vision of local land rights than that offered in the previous law. It integrates customary law into the formal law of the State without the need to codify the flexible common law systems that govern 90% of land holdings. It also provides a rapid and low cost way of offering legal protection to thousands of people.

Two instruments implement these principles on the ground: the Regulations to the Land Law; and the Technical Annex to the Regulations. The 'Technical Annex' deals with the critical question of how to identify and delimit the land of a given local community. Rather than produce a definition of 'local community' it has devised a *single, legally prescribed, methodology*.

The prescribed methodology is *participatory rural diagnosis*, through which local people are assisted by trained technical teams to in effect define themselves as a community. To do this they are encouraged to look at many aspects of their lives such as their farming systems, social and political organisation (including land management institutions), community history and the linkages with neighbouring villages. All key social groups (men, youth, women) produce their own maps which provide a tool for discussing land rights. A cartograma is produced – a coalition of the different maps. This is then geo-referenced using GPS. The borders of the community are established and outlined on a 1:50,000 scale map. Any areas where there is some uncertainty over the actual boundary location are visited or walked with community members. This reduces the costs of using technical teams because it reduces their time input. Community members then look at aerial maps and the data is transferred to topographic maps by them, with assistance from technical teams. This pre-formal map is sent to the cadastral office.

By doing this, they achieve three objectives: they *establish and prove their right*; they determine *who is inside 'the community'*; they determine *where the borders of that community are*. The map determines the area within which that community has legally defined use rights, and over which it exercises its management rights.

A key question is whether the cadastral office has the capacity to record all of these maps and which level of the cadastral service (provincial or district) should do this work.

In the Land Law, a community has use rights allocated by the state over a specific area – it is a private right. This area can be very large, which has led to a reaction from concession holders asking how will they get access. An open border model is being developed which means that use rights over a whole area belong to the community but an investor can be allocated land in consultation with local people. In this system there are two options. Firstly, a community may have no need to register its land rights especially if its own conflict resolution mechanisms work well. Secondly, a formal land registration can be carried out and the community (or an individual within the community) can apply for a land title. Sometimes this may be required for credit purposes.

The approach discussed above has been tested in at least 21 different locations throughout Mozambique, by the TS/FAO team working with Provincial Cadastral Services and NGOs. In some provinces, notably Zambezia and Nampula, strong donor support has provided the means to embark on other delimitation exercises and training programmes for local technical staff. There is still a great deal to learn about how this overall model will work in practice. For example, the process of consultation between communities and investors, and the nature of the agreements that are made.

Supporting Local Rights: will the centre let go? reflections from Uganda and Tanzania:
Patrick McAuslan, Department of Law, Birkbeck College, University of London

New land acts have been introduced in both Uganda (1998) and Tanzania (1999) with great enthusiasm from the top, but little has been achieved on the ground.

In 1903 the Crown Lands Ordinance was passed in Uganda. Since then farmers have been tenants of the state and could therefore be removed at will. This situation has been similar in Tanzania where the villagisation process meant that rural people were pushed off their land arbitrarily. This has begun to be challenged in the 1990s through the courts.

A national land policy was approved in 1995 in Tanzania with a major study carried out by a Presidential Commission. Although there is still disagreement between the chairman of this commission and the government over this report, a fairly high number of recommendations have been incorporated in the Land Act and in the Village Act in 1999.

In Uganda there is no national land policy as such, but principles have been enshrined in the constitution. For two years in the early 1990s a land commission consulted different groups around the country. A draft Bill was developed in 1997 but this was heavily criticised by civil society and withdrawn. A new land act was introduced in 1998 and passed in 1999 but little has happened since. Two workshops were held within six months after the Presidential assent which has given an illusion of progress. The Act provided for ownership under customary tenure for occupiers of land and set the process for certification (not developing titles). DFID agreed to help with implementation – particularly setting up District Registries. In 1999 tension developed in the Ministry over who was in charge of implementation of the Land Act and therefore over the resources for the process. Resources consisted of DFID funds (which were limited) and significant funds from central government (£3.2 million over 3 years). The decentralised land management provisions in the Act requires decentralisation of resources to districts and parishes (i.e. not the centre). An 'executive agency principle' was implemented first in the land department. This resulted in the land department suddenly not being part of central government nor having centralized resources.

A Land Fund was set up through the Land Act to provide funds for people to acquire land. Part of DFID's project was to study the long-term social, economic, environmental and political implications of implementing the Land Fund. DFID found the Land Fund to be unworkable and argued that it should be abandoned. Central government officials, on the other hand, wanted the Land Fund to be the central component of the implementation process and thought that they should have increasing resources with district funds decreasing over time. It seems that those in the 'centre' feel their power and status is threatened. Any process of land reform which aims to devolve resources and power therefore requires a major component of restructuring and re-educating central government officials so that they can see a new and useful role for themselves.

Different problems have been encountered in Tanzania. The Tanzanian Land Act provided for customary rights registration, but regulations have not yet been tested or passed. Training and capacity building is required to change attitudes.

Local Strategies for Securing Rights in Land - experience from the Sahel (Niger) - Christian Lund, University of Roskilde, Denmark

In the late 80s and early 1990s, a first attempt was made by the government of Niger to give people firmer control over land that they were cultivating. The Rural Code, which was adopted in 1994, promised people land title based on their customary rights. Customary rights could be confirmed by customary chiefs, before a 'deed' was issued by a land commission. When the Rural Code was announced, rural people heard two messages, firstly that private title to land would soon be possible, and second, that haste was required to register, because of competing customary claims. Some farmers responded by continuously occupying and cultivating land on which their claim was uncertain, in order to boost their claims to that land when the Rural Code was implemented later. The implementation of the Code has been slow - the state is essentially bankrupt, so local land commissions need to be funded by donors, and only a handful are working. The Land Commissions could not process many claims at the same time without more members to hear them and in the early 1990s, the system was paralysed by a deluge of claims (in Zinder, only 100 titles were agreed in an area of 500-600,000 people).

An interesting development is that publicising the Code widely, 'let the Genie out of the bottle'. Where the state has not been able to provide title quickly enough, farmers have sought out 'fictive' paper titles or confirmation of their ownership written by chiefs, who actually have no legal authority to do so. This has provided a golden opportunity for chiefs to extract tax - sometimes they will provide 'deeds' for no cost, but will charge a 10% 'protection' fee of the value of land is subsequently sold (this fee symbolises the protection the old owner had – from the state, and that the new owner will have). These 'deeds' used to be very basic, merely stating ownership of a plot of land, but are now containing more and more information. This situation in Niger has certainly led to more rural people seeing the benefit of registering their rights. It has also provided new responsibilities for the chiefs, who profit from their role and will continue to do so. One NGO has encouraged public hearings to take place about land registration, and have proposed that local magistrates or sub-prefects are given the task of issuing 'deeds'. If this becomes more common it may reduce the abuse of power by the chiefs, although access to magistrates is more difficult for rural people.

DISCUSSION AND FINDINGS

The workshop identified three inter-related sets of issues arising from the case study presentations. These provided the basis for discussion.

- Why should customary land and resource rights be formalised? – what are the demands and the risks involved ?
- What sort of survey/documentation methods or registration processes are appropriate, and at what level – including the question of costs?
- What sort of community based or decentralised institutions are appropriate for land rights management at local level?
- What is the role of state institutions, such as survey departments, in securing and protecting land rights?

The main points which emerged are summarised below under these headings:

1. Why formalise land rights? – risks and demands

- Formalisation of rights can make sense if it is part of wider policies and programmes for e.g. smallholder agricultural development or community based resource management.

- Local interest in recording land rights is related to demands for greater security of tenure which is a valid aim in itself: - to provide protection against claims by more powerful interests and a basis for adjudicating amongst local claims. Even without a legislative framework to support it, local recording can be an advantage in providing evidence of people's rights (as in the case of Ekuthuleni).
- The principal risk is that the process of recording land rights will over-simplify a complex picture, and not capture rights to common pool resources, the rights of women and weaker groups. But there are also risks that the poor will lose out to more powerful claimants if rights are not formalised.
- In practice, land rights formalisation is happening through a variety of spontaneous processes, and government and donor programmes: the question is - how should it take place in order to avoid social exclusion?
- Accordingly there is need for public debate on appropriate systems for recording local land rights.
- Flexibility is important as regards the methods for recording land rights and the level at which it is done: - the rights holders may be individuals, households, wider kin groups or whole village communities, under different circumstances.
- Demographic growth, migrations and other social changes have impacts on tenure systems and may create pressures for formalisation of land rights.
- It is important to assess the interests which different stakeholders have in land rights formalisation, including their livelihoods systems and income sources.
- Improving access to credit is one reason for formalising land rights but formal credit systems are not designed to meet small farmers' needs, and require strong property rights in the form of land titles to provide the lender with security. Only some farmers can take advantage of formal credit to make capital investments, and the need to improve access to credit should not drive land titling programmes.
- Registration of land rights should in general be voluntary, but there may be circumstances of widespread demand, tenure irregularity and disputes where comprehensive programmes are required.

2. Survey and documentation methods

- There are always risks of simplification in demarcating boundaries and registering property rights, depending on the methods used.
- An evolutionary process is often appropriate (as developed in Mozambique) – formalisation is a matter of degree – individual or collective boundaries can first be demarcated, then registered, and perhaps subsequently upgraded to title.
- Traditional cadastral survey methods and the central maintenance of comprehensive land records are highly expensive and not appropriate for rural Africa.
- In practice, responsibilities for surveying and registration of rights need to be delegated to decentralised bodies, such as village or district land registries, aided by local surveyors.
- However, computer based technologies do have the capacity to provide appropriate land information systems for Africa covering different types of land rights recorded at different levels; GPS is a cheaply available tool for spatial referencing and local demarcation of boundaries.
- In order for technologies such as GPS, maps, computers, and even pen and paper records to be understood, and applied effectively, their uses should be linked to literacy, education and training programmes for the users and at community level.
- Aerial photos and photomaps are extremely useful resources; although detailed, plot level boundary definition can be achieved with very large scale images, these are expensive and

often not needed – much can be done with 1:10,000 or 1:50,000 scale maps which are more widely available.

- The surveying profession needs to be aware that high levels of precision and accuracy in mapping are often not required in rural Africa - nine tenths of the rights registration process is actually social and community development work. Surveyors need greater exposure to the cultural context of land tenure, and this should be properly addressed in professional training.
- The precise location and arrangements for maintenance and access to land records need to be linked to level at which land rights are adjudicated (e.g. by councils of elders or village land tribunals, but records must also be accessible at higher levels for purposes of appeal)

3. The nature of local institutions for land rights management

- The issue is fundamentally one of the institutions for local governance of land and natural resources.
- A variety of institutional arrangements are possible, involving customary leaders, local government, and democratic village bodies in different combinations.
- Land rights holders must have some sort of legal personality, but can include formally constituted local groups such as Communal Property Associations or even village communities (under some legal systems such as in Mozambique) as well as traditional authorities and individuals.
- Institutions for dispute resolution are fundamental and must be considered alongside the maintenance of land rights records.
- The nature of “customary institutions” in land rights management is variable; they may enforce highly inequitable, retrograde practices, or they may be legitimate, consensual, and more democratic. In South Africa particularly, the historical fusion of land ownership and political authority in Traditional or Tribal authorities is highly contested and problematic.
- Legitimacy of local institutions is a critical element, be they customary, formal, or local hybrids; in practice legitimacy develops from the practical exercise of authority and its recognition and acceptance within local communities.
- Where there is demand for local recording and adjudication of land rights there is evidence of community groups taking on considerable responsibilities.
- The costs of supporting local institutions for recording land rights and settling disputes must be properly considered.
- In practice, existing customary and formal tenure institutions need to be adapted to deliver effective local systems.

4. Role of the state

- Three sets of institutions need to be considered:
 - Survey departments
 - Lands and deeds registries
 - The courts and land tribunal systems
- Experience has shown that when run as centralised institutions, these have tended to be inefficient and inaccessible to local land users.
- The role of the state at central level should be to provide an enabling environment for local institutions, including development of policy, law, training and to act as the ultimate arbiter in disputes.
- Some countries have established district or provincial land boards or land commissions responsible for managing land allocation, the issuing of titles or certificates of customary ownership and the maintenance of land records. There may be questions about just how decentralised, representative and responsive to local interests they are.

- Land registries and survey departments need to evolve so as to support decentralised land rights management.

Conclusions

It is not possible to prescribe universal solutions to the question of whether and how to record or register local land rights. In particular there are a number of enduring and difficult questions which can only be resolved case-by-case:

- Should registration be voluntary or comprehensive ?
- What should be the role of Traditional Authorities, Chiefs or tribal leaders, vis-à-vis local communities and the state ?
- Where should the balance of effort lie between the legal definition, recording and registering of land rights and transactions by the state, and enabling local and community institutions to resolve disputes and administer land rights as they see fit?

Nevertheless, the themes addressed and points raised by the workshop do provide a basis for a constructive agenda of change and development for the local governance of land as the major rural livelihood resource in rural Africa.

A key concern in developing good practice in land administration in Africa is the need to bring the planning and surveying profession together with socio-economic, legal and anthropological researchers and practitioners concerned with land, within Africa and amongst international and north - based institutions.

It was agreed:

- To distribute the findings and papers amongst the participants;
- To make them available through LANDNET AFRICA regional organisations and networks and to DFID staff in Africa.
- To promote networking and continued debate in UK amongst the participants via the *Livelihoods Connect* interactive website: <http://www.livelihoods.org/>
- To try to develop a joint “DFID and partners” submission, based on the workshop papers and findings for the World Bank conference on *Good practice in land policy and administration*, anticipated for Spring 2001.

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