

Communal tenure reform: potential and pitfalls

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What is communal tenure?

- Systems that combine individual/family rights to land and natural resources with group oversight and rules to keep land within the group
- i.e. mixed regimes, comprising variable bundles of individual, family, sub-group and large group rights and duties
- Distinct from 'Western-legal' forms of private property, which are much more exclusive
- Often derived from customary norms and principles

Is communal tenure a constraint on agricultural productivity?

- Rights are not necessarily insecure, constraining long term investment in soil fertility, tree crops, conservation etc
- Replacing communal tenure with individual titling does not necessarily lead to more investment and increasing productivity
- Land titles as collateral? Banks not interested if value is low compared to costs of repossession and resale
- Land markets do not necessarily lead to transfers to productive farmers (e.g. land held for speculative purposes)
- No evidence for linear 'evolution' of customary land rights towards private property

Legal insecurity

- Land rights under communal or customary systems often not secure in law (*de jure*) which can lead to vulnerability in practice (*de facto*) – eg when predatory states re-allocate land to foreign investors
- Colonial history of “subversion, suppression & expropriation of indigenous conceptions of land rights” (Okoth-Ogendo)
- Tenure reform required to secure *de facto* rights in law & give them *de jure* recognition

A reform agenda

- Unequivocal recognition of indigenous law as part of national legal systems
- Reversing legislative and judicial policies which oppress & suppress indigenous legal regimes
- Correcting public policy prejudices against development of land resources under indigenous law
- Democratising land administration systems through effective use of indigenous land governance institutions and structures
- Provision of capacity and resources to effectively safeguard indigenous land rights systems

(Okoth -Ogendo 2008)

Underlying norms and principles informing indigenous land rights

1. Land and resource rights are directly embedded in a range of social relationships and units, including households and kinship networks; the relevant social identities are often multiple, overlapping and therefore 'nested' or layered in character (eg. individual rights within households, households within kinship networks, kinship networks within wider 'communities').

Underlying norms and principles informing indigenous land rights

2. Rights are derived primarily from accepted membership of a social unit, and can be acquired via birth, affiliation or allegiance to a group and its political authority, or transactions of various kinds (including gifts, loans, and purchases)
3. Land and resource rights include both strong individual and family rights to residential and arable land and access to a range of common property resources such as grazing, forests, and water. They are thus both 'communal' and 'individual' in character.

Underlying norms and principles informing indigenous land rights

4. Access to land (through defined rights) is distinct from *control* of land (through systems of authority and administration). Control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access, and resolving disputes over claims to land. It is often located within a hierarchy of nested systems of authority, with many functions located at local or 'lower' levels.

Underlying norms and principles informing indigenous land rights

5. Social, political and resource boundaries, while often relatively stable, are also flexible and negotiable to an important extent; this flows in part from the nested character of social identities, rights and authority structures

(N.B. The extent to which, and ways in which, these principles are found in 'actually-existing' land tenure regimes is variable. Where these characteristics are present, however, property regimes remain distinct from 'Western-legal' forms of private property - a challenge to tenure reform)

Reform paradigms: from replacement to 'adaptation'

- Explicit recognition of indigenous tenure rules
- Legal protection for land held under them
- Strengthening of local institutions which administer those rules
- Recognition or provision of mechanisms for resolving disputes

(John Bruce 1998)

Adaptation: from paradigm to practice

- *Codification* of local rules, by systematizing and giving them legal definition (but problem of diversity, imprecision & flexibility)
- *Registration* of local rights (but uncertainty over legal categories & how to record overlapping rights, loss of flexibility, costs, problem of how to keep up to date)

Adaptation: from paradigm to practice

- Creating effective *local institutions and procedures* for administration and dispute settlement (but how to avoid capture by powerful local interests, get states to devolve authority, provide adequate resources and support, ensure accountability of local structures)
- *Determining the boundaries* of group and individual land through low-cost surveying (but boundaries are often ambiguous, or flexible, or overlapping)

Processual vs rules-based approaches

- Insights from anthropology: “rules” by themselves are an unreliable guide to how land tenure systems work in practice
- Often more important than rules are the key dimensions of power relations and culturally defined meanings
- “Security of tenure” secured not through law and administration, but through open-ended, on-going processes of negotiation, adjudication and political manoeuvre

Processual vs rules-based approaches

- Berry (1993): despite attempts to clarify land rights and regulate processes of allocation, inheritance and transfer, access to land in rural Africa has remained contested and negotiable. Access has continued to hinge on social identity and status, and hence on membership of groups and networks; land has therefore remained subject to multiple interests, and "a dynamic of litigation and struggle which both fosters investment in social relations and helps to keep them fluid and negotiable"
- Governments should rather focus on strengthening institutions for the mediation of conflicting interests

Processual vs rules-based approaches

“Legislating negotiability”: providing sufficient clarity as to the legal status of land rights to enable rights holders to press their claims with the backing of the law, while leaving open the precise content of these rights.

Subject to ongoing processes of negotiation at local levels, within institutional contexts that are overseen to a degree by the state in the interests of equity, transparency and accountability.

Boundaries

- Can be complex, overlapping, contentious, but “potential benefits from agreeing customary territories so high that almost always resolved” (Alden Wily)
- However, “communities” do not always have unambiguous social & political (jurisdictional) boundaries
- In South Africa, three key issues: (a) nested levels of social and political organization; (b) contested jurisdictions; (c) forced removals

South Africa's Communal Land Rights Act (2004)

- Transfer of state land to “communities”