

# IMPROVING TENURE SECURITY FOR THE POOR IN AFRICA

## SYNTHESIS PAPER: DELIBERATIONS OF THE LEGAL EMPOWERMENT WORKSHOP – SUB-SAHARAN AFRICA



Professor Patrick McAuslan

May, 2007



FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Support to the Legal Empowerment of the Poor (LEP)

Improving tenure security for the rural poor –

with the financial assistance of Norway under a Programme Cooperation Agreement





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**DELIBERATIONS OF THE REGIONAL TECHNICAL WORKSHOP FOR SUB-SAHARAN AFRICA ON LEGAL EMPOWERMENT OF THE POOR**

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Photograph by Francesco Bertolazzi  
(intricate rural property patterns in the Kenyan part of the Great Rift Valley)

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Most of the world's poor work in the "informal economy" – outside of recognized and enforceable rules. Thus, even though most have assets of some kind, they have no way to document their possessions because they lack formal access to legally recognized tools such as deeds, contracts and permits.

The **Commission on Legal Empowerment of the Poor** (CLEP) is the first global anti-poverty initiative focusing on the link between exclusion, poverty and law, looking for practical solutions to the challenges of poverty. CLEP aims to make legal protection and economic opportunity the right of all, not the privilege of the few. (see <http://legalempowerment.undp.org/>)

CLEP has identified specific tenure issues, including i) how to make property rights accessible to all, especially poor and marginalized communities, groups or individuals and ii) how to ensure that property rights of the poor function as means of achieving economic and social empowerment, particularly in the context of gender equity and those affected by HIV/AIDS.

There is growing empirical evidence that giving legal recognition to informal property rights in urban areas brings positive results. However, a similar body of evidence does not exist for the empowerment of people in rural areas. Instead, the signs are mixed, resulting in a largely sterile and divisive debate on formalization of rights.

FAO, with donor funding from Norway, has undertaken a set of activities for "Improving tenure security of the rural poor" in order to meet the needs of FAO member countries and, in turn, support the CLEP. This work falls within the FAO corporate strategy on "Sustainable rural livelihoods and more equitable access to resources". Recognizing that secure access to land and other natural resources (forests, water, fisheries, pastures, etc.) is a crucial factor for eradication of food insecurity and rural poverty, FAO's cross-departmental and cross-disciplinary work focused 2005-2006 activities on sub-Saharan Africa which has the world's highest percentage of poor and hungry people.

This paper is part of FAO's effort to inform the CLEP through its working group on property rights. It was prepared after the regional technical workshop on "Improving tenure security of the rural poor" held in Nakuru, Kenya, October 2006, at which issues relating to property rights were reviewed and actions were initiated to develop common strategies for improving the protection of rights to land and other natural resources of the rural poor.



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## LIST OF ACRONYMS

ADR	–	alternative dispute resolution
AU	–	African Union
CBO	–	community-based organization
CLEP	–	Commission on Legal Empowerment of the Poor
FAO	–	Food and Agriculture Organization of the United Nations
IFI	–	International Financial Institutions



## INTRODUCTION

This paper aims to provide a synthesis and commentary with recommendations of the papers given and the discussions which took place at the technical workshop on Improving Tenure Security for the Rural Poor in Africa in October 2006. The workshop brought together a wide range of persons from civil society – academics, representatives from NGOs – the FAO, the principal sponsors of the workshop, and from some donors working on land issues from all over Sub-Saharan Africa with an emphasis on Anglophone Africa. The views expressed in this workshop are of significance. They are not the official positions of governments but they are representative of grass-roots involvement in land relations in Africa and are therefore entitled to respect.

The paper aims to bring out and emphasise the positive conclusions of the workshop and so focuses on key matters rather than attempting to summarise all the discussions. Throughout the workshop, participants were conscious of the overall aim of trying to create systems of land administration and management that were pro-poor, that is, that had as their main thrust, facilitating the poor's access to land and ability to use their land to improve their economic and social well-being.

It is important to highlight at the outset of this paper a fundamental underlying belief or feeling which motivated the contributions of participants at the workshop: that the policies, laws and practices on land administration and management developed and implemented by central governments have been designed to benefit the “haves” – those in central government – at the expense of the “have nots” – the rural poor, and there needs to be a fundamental rethink of the whole basis of land administration to bring about a radical devolution of power to local communities before the rural poor are likely to be able to improve their condition.

Four key issues are highlighted at the workshop:

- localism as the basis of land management
- the role of customary tenure
- access to information, justice and training
- gender

## LOCALISM AS THE BASIS OF LAND MANAGEMENT

The overwhelming message which came out of the workshop and the theme around which all discussions centred was the importance of working with and involving local communities in natural resources management. This was a feature of the papers presented to the workshop, and although the discussions did not revolve specifically around the details of the papers, the theme of localism was ever-present.

There were differences of emphasis both on what was involved in working with local communities and with what was meant by local communities and localism. In discussions, there was greater emphasis on working with traditional leaders in countries in West Africa than in countries in East Africa. Countries in Southern Africa split both ways: for instance, South Africa's recent legislation on communal lands has placed considerable powers in the hands of chiefs; while both Lesotho and Botswana on the other hand prefer elected or appointed local land management bodies. In Tanzania and Uganda, the lowest levels of local government, villages in Tanzania and parish councils in Uganda have significant land management powers vested in them. There was however general agreement that greater efforts must be made to create a participatory political culture nationally and stimulate and support local involvement and accountability in natural resources management.

Local land management was considered to encompass:

- allocation of land;
- adjudication and registration of title;
- regulation of dispositions and use;
- management and operation of the register;  
and in addition though using separate local bodies,
- dispute settlement using traditional and modern ADR<sup>1</sup> systems.

All recent land law reforms have in one form or another provided for these matters to be handled locally, though usually providing for the possibility of an appeal or referral to higher bodies where grievances are not settled locally.

It is within the context of localism that the other issues that were discussed may best be understood. At the time they appeared somewhat disparate, but once the overarching theme is in place, they can be understood as necessary outcomes of that theme.

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<sup>1</sup> alternative dispute resolution



## **THE ROLE OF CUSTOMARY TENURE**

There was a strong concern that there had been a wholly undesirable continuation of the colonial attitude towards customary tenure by many independent governments: that it was a body of customs, practices, and attitudes that needed to be replaced by more ‘modern’ national laws created by the state. Only in the last few years had official opinion begun to change and greater recognition accorded to customary tenure. Papers from Ghana, Mozambique, and Mali and legislative examples from Tanzania and Uganda all drew attention to the strength and flexibility of customary tenure in adapting to a market economy whilst retaining some of the social concerns of local communities. It is also important to note here (although the matter is taken up in more detail later) that even in the area of women’s rights to land, there is evidence that under conditions of extreme stress – HIV/AIDS and genocide for instance – customary tenure has been flexible and socially responsive enough to adapt to the acceptance of women inheriting land.

As an aspect of seeing customary tenure as a vital part of any national policy, law and practice on land management, the paper on Mozambique and during discussions, information on practice from Ethiopia drew attention to the success of local level processes of adjudication and registration of customary tenure rights. The complexities of providing for the multiplicity of secondary rights in land were better provided for by local level implementation of adjudication than by national implementation. By way of contrast, the papers from Mali and Rwanda were critical of the top-heavy and bureaucratic centralised approaches to registration of land titles that those two countries were attempting; it was doubted whether this would assist the poor. A very careful two-stage process – first a registration of customary titles; second, a transformation of these titles into formal statutory titles – was suggested in the paper from Mali as being the best way forward.

Generally speaking, there was no support for massive national programmes of land titling and registration aimed at converting local customary tenures into statutory state-created national systems of tenure. The paper from Rwanda was particularly critical of this policy. There was no support for the over-simplified version of the de Soto thesis (which seemed to be the policy of some donors and IFIs) that such programmes on their own would enable the poor to use their titles as security to obtain credit and so transform their economic and social fortunes. There was an understanding – this came through clearly from the paper on Kenya, Tanzania and Uganda (the East African paper) – that land in urban and peri-urban areas might benefit from programmes of title registration but outside those areas, registration and indeed land reform generally should be tailored to local economic and social circumstances and might differ from area to area within the same country. In addition, better access to credit and agricultural marketing facilities were needed for the rural poor to be able to improve their circumstances.

Overall, the view of the workshop was that:

- customary tenure was and should remain a legitimate part of the national tenure arrangements of all countries
- national land laws should be adapted to ensure that proper recognition was accorded to customary tenure
- local level adjudication and registration programmes using, as far as possible, local and well known customary systems of sorting out differences about who has what rights in what land will be more effective than centrally managed and executed formal programmes

- providing the rural poor with formal titles so that they can access credit cannot be seen as a solution to rural poverty alleviation in the absence of appropriate institutions, policies and laws which facilitate the provision of credit by banks and micro-finance agencies to the poor
- as the East African paper put it: “the legal systems should begin to create a framework for the orderly development of a jurisprudence of customary law thereby strengthening what is good in custom while at the same time subjecting it to overarching values contained in the Constitutions and global human rights.”

There was considerable discussion about the need for research on customary tenure and law as a necessary precondition for its greater use and legitimacy at the national level. While it is certainly the case that first, there are many systems of customary tenure in Sub-Saharan Africa and numbers of these have not been the subject of research so that their detailed rules and practices are not well known, and second, greater awareness of local and traditional knowledge about land, natural resources and their use would improve land management, the author’s view is that the need for research can be over-stated and may act as an excuse for inaction. Over fifty years ago, the great African jurist, Justice T.O. Elias wrote *The Nature of African Customary Law*. It is time that an equivalent book synthesising the nature of African customary tenure on the basis of the ‘known knowns’ drawing attention to and perhaps speculating on the ‘known unknowns’ and the ‘unknown unknowns’ were written which could form the basis of that ‘jurisprudence of customary law’ called for at the workshop.

## ACCESS TO INFORMATION AND JUSTICE

Access to information and justice was a sub-theme that came through many contributions during the discussions. There were a variety of ways of formulating it. If local communities are to be able to play an active part in land management, then they needed to:

- understand national policies and laws;
- have access to advice about those policies and laws;
- have access to institutions which would enable them to assert their rights under the law;
- receive appropriate training and education;
- participate in adapting and developing new institutions to facilitate their involvement in land management;
- be able to challenge the decisions of officials which they considered adverse to their interests; and
- be enabled to make use of local knowledge and ideas about land use and development.

In pursuance of these requirements, concern was expressed at the complexity of many of the statutory provisions that applied to land, the complexity of their explanation in official publications and textbooks, the over-bureaucratised centralised institutions of management that existed, the lack of arrangements for the involvement of local communities in management, and the lack of access to courts and other agencies which would facilitate the rural poor's pursuit of their rights.

To counteract these deficiencies in current land administration arrangements, the workshop drew attention to the need for powers over land to be *vested* in local institutions and not merely devolved from the centre in such a way that at any time they could be relocated back at the centre. Furthermore and specifically there was a need for:

- clear and simple publications about policies and laws in local languages;
- simplifications of the laws by greater recognition and use of local ideas, principles and practices in their drafting;
- greater public input into law making: the Malawi, Mozambique and South Africa examples demonstrate that this is possible and workable;
- the provision of legal aid and assistance (as was discussed in the Namibian paper on local conservancies) to local communities to enable them to understand and use the laws to their benefit and access the judicial and legal system more effectively;
- the creation of local institutions and the adaptation of traditional institutions to facilitate the development of participative land administration such as are being developed in Tanzania, Mozambique, Namibia and Ghana;
- the creation or reform of institutions at all levels of government – courts, Ombudsmen, grievance-handling agencies applying the fundamental principles of administrative justice – designed to assist the poor to assert their rights;
- training and capacity building programmes to enable local communities and CBOs manage their land more effectively; and
- greater willingness on the part of central government and its officials to listen to and learn from local representatives and make use of local knowledge in land management.

## GENDER

Considerable discussion took place on this sub-theme with many moving accounts of the problems encountered by women in trying to assert their rights to land, especially in the context of succession to land arising out of the death of a husband through AIDS. There was, underlying the discussions, a recognition of the issue posed in the keynote paper: while progress at least as regards law can be shown with respect to women's land and property rights, it is still the case that women are too often left to fight their own battles in an unpropitious political and social climate. Furthermore, the return to the customary is not necessarily going to benefit women; indeed it may not benefit them at all and there are examples of the notion of "customary" is being used deliberately to hold back women in the sense that women's land rights are stigmatised as being a Western imposition and contrary to traditional African beliefs and practices which should form the bedrock of African land management. The papers from Mali and Ghana were particularly open about the adverse effect of customary tenure rules on women's tenure rights.

Despite the recognition of the existence of a major problem – that over half the adult population of every country in Sub-Saharan Africa, the half that do the bulk of the agricultural labour – is denied equal access to land despite the fine words of most constitutions, there was a paucity of positive suggestions and possible solutions as to how to remedy this state of affairs. The fundamental dilemma surrounding the issue of gender was not addressed head-on by the workshop: how to support at one and the same time a greater acceptance of the gradual evolution 'from the inside' of customary law and tenure which denies a woman's right to access and own land with a commitment to gender equality to be brought about by externally imposed statutory reform of customary tenure. A typical statement of aspiration (from notes of comments at the closing session) was "Gender equality must be ensured."

In pursuit of this laudable aim, the following suggestions were offered:

- promote affirmative action with quotas of women and other marginalised groups on decision-making bodies (a policy mandated by law in Tanzania);
- campaigns of awareness creation among all people at the grass-roots;
- support training, build capacity, encourage participation by all stakeholders;
- provide that both spouses' names must be on any property used as the family homestead (a policy mandated by the law in Uganda);
- reform inheritance laws to enable wives to inherit the family homestead and women property generally (as is provided by the law in Rwanda).

None of these suggestions can be criticised; but on the evidence of their use hitherto, none on their own are likely to achieve a breakthrough.

The effect of HIV/AIDS has tended to exacerbate the plight of women (and orphans) with respect to land, and it is only in Rwanda that specific legislative steps have been taken to try and alter customary practices with respect to inheritance. Taken together and implemented consistently, one could foresee that the above proposals might bring about significant change within one generation but this will require political commitment from the top both nationally within states, and supranationally via regional institutions and the African Union (AU). While governments and, therefore, regional institutions and the AU remain overwhelmingly dominated by men, such political commitment is unlikely to be forthcoming. A greater stress on constitutional reform to support women's rights backed up by, for instance, institutional

mechanisms to implement any such provision might help bring about a more rapid transformation. However, the example of the referendum on the Kenyan constitution will have been noted: there were many reasons why the constitutional reforms did not receive majority support but specific suggestions for increasing women's constitutional rights with respect to access to land were used as a powerful and persuasive argument against reform by those opposing the reforms.

## **PASTORALISM**

Although not one of principal themes of the workshop, it is important to acknowledge the issue of pastoralism. There was considerable discussion of pastoralism at the workshop during discussions of customary tenure and resource management and use at the local level. There were few representatives of pastoralists at the workshop so discussions were rather general. They were not, however, negative.

Pastoralism was accepted as being a positive contribution to land use and management and pastoralists should be involved in the management and regulation of their own ranges. Localism applied as much to pastoralists as to sedentary farmers, and customary approaches to land management and resolving conflicts between pastoralists and sedentary farmers were much more likely to be successful than imposed solutions from central government.

## ROLES OF GOVERNMENTS AND DONORS

There was a recognition that the approaches argued for at the workshop required fundamental changes from national governments. An underlying concern of participants was that existing systems of laws and policies, existing institutions and agencies and existing personnel supported the status quo – the maintenance of a land management system that benefited the rich and hurt the poor and disadvantaged. There was a need to change power relationships both nationally and globally. Throughout the workshop there was a wariness about central government and the relationships between central governments and donors.

The author's view on this is that while such concerns are understandable and have a fair amount of evidence to support them (as illustrated in the keynote paper), there is also considerable evidence that both at the supranational level and at the national level, policies and laws are changing in a pro-poor direction and are beginning to grapple with the land rights of women. At the national level, the case studies from Mozambique, Mali, East Africa (with particular reference to Tanzania and Uganda) and Namibia, the efforts in South Africa since 1994 to redress the land injustices of the apartheid years; at the international and supranational level, the efforts of FAO, the Habitat Agenda and the Global Plan of Action of 1996 and all the follow-ups from that date, the new land policy from the World Bank (though not, it must be said with regret, practices in the field) all testify to the position that there is official movement in the right direction. It is too simplistic to dismiss all national and international institutions as committed to maintaining the status quo.

The overall conclusions of the keynote paper are relevant here:

*There are then two competing models of governance and development on offer in and for Africa with respect to land relations and policies designed to benefit the poor. One is to adopt the agenda of the international community...: make the land available for international investment and development via free and open land markets and homogenized national land laws and reap the benefits of globalization. Such an agenda downplays issues of security of tenure for the poor, decentralized land management and women's rights to land.*

*The other model is to develop national agendas, not to repel globalisation for that is impractical but to ensure that national and local considerations are at the forefront of policy. This means giving primacy of place to the land concerns of the poor, both women and men who are now and are likely to be for some considerable time to come the majority of land holders in all countries in Africa. It is their natural resource and land rights that need to be secured; their conflicts and disputes over land that need to be settled and not left to fester; their productive uses of land that need to be developed by appropriate forms and institutions of finance.*

There is encouraging evidence within Africa to show that pro-poor policies are slowly being adopted and implemented. In such a situation, the role of civil society becomes crucial at the national level and the role of donors at the international level. At the national level, national institutions of civil society have to

- put the case for and support those elements of government in favour of locating land management at the local level and adopting pro-poor policies;

- champion the interests of women, orphans, and other disadvantaged persons in the implementation of land management;
- take an active role in policy and law making:
  - putting forward proposals for new policies and laws which provide pro-poor national standards and principles applied in accordance with principles of administrative justice which all local land institutions must conform to;
  - commenting on proposed new policies and laws put out by governments and, in particular, being vigilant to assess new laws and policies urged on governments by international financial institutions (IFIs) and donors which are adverse to the interests of the poor; and
  - stimulating and assisting local community groups to do likewise.
- develop programmes of public education and training to enable the rural poor and their CBOs to access and use policies and laws to improve their social and economic conditions;
- monitor the implementation of pro-poor policies and laws; and
- lobby governments to amend policies, laws and practices as required.

The role of donors – bilateral, international agencies, IFIs (not donors when they are lending money) is more complex. It was clear that participants considered that donors had a role to play, but there was also a recognition that there was an inherent tension between the kind of outside pressures and ‘interference’ that donor involvement might be responsible for and the importance of developing policies from the bottom up and making more use of local knowledge, personnel and practices.

In order to try and resolve this tension, the workshop suggested that the donors’ role must be geared more specifically towards:

- supporting the institutions of civil society in their work on pro-poor land issues;
- being more aware of the local impact of their interventions on land matters;
- providing funds directly to local communities and CBOs to enable them to access their rights via courts, administrative agencies and national action and provide programmes of public education to the people; and
- supporting research and publications on customary tenure and pilot studies on reforms.



## CONCLUSIONS

Participants at the workshop were concerned to try and advance policies and proposals which would assist the rural poor to access land, obtain secure tenure and then be able to use their resources to better themselves. They were only too well aware that forty to fifty years of centrally directed policies, legal reforms and practices on land tenure had done far too little to assist the rural poor and that the conflicts and civil wars within many countries have their roots in tensions and conflicts over land. Land and natural resources reform then is an essential component not just of more equitable economic and social policies, but also of social and political stability and good governance.

To this end the following key recommendations to guide national, supranational and international policies on land matters were distilled from the workshop:

- the role of central governments is to set national policies and laws, provide training and capacity building for and monitor the performance of local level land administration institutions
- fundamental principles of land policies should be set out in constitutions
- civil society involvement and participation in the development of national policies and laws should be mandated by constitutions
- local land administration should be the responsibility of local level agencies and in determining at what level such agencies must be, the principle of subsidiarity should be applied
- while local level agencies may include traditional land managers such as chiefs, or be an element of local government or a specially created agency the law must provide for all such agencies to be accountable to local communities and all the people within such communities for their performance
- civil society has a central role to play in land administration, particularly:
  - monitoring performance of national and local agencies;
  - undertaking programmes of public education; and
  - providing legal and other aid and assistance to individuals and communities to access and assert their rights to land/natural resources.
- programmes of public education in local languages have a vital role to play in local involvement in land administration
- customary land tenure is an integral part of any system of national land law and must be provided for as such; abolition of customary tenure is not a sensible option
- national policies and laws providing for land adjudication, title registration and the development of a land market must provide for
  - local implementation of programmes
  - acceptance that local customs and circumstances might dictate differential solutions to adjudication and registration
  - communal title to be accepted and registrable
  - the land rights of pastoralists are incorporated into such programmes
  - local regulation of the operation of land markets
  - local dispute settlement
- all local land administration institutions must by law provide for
  - appropriate (not less than 30%) representation for women; and
  - carry out their functions in such a manner that women are enabled to play a full role in them
- all land laws must be reviewed and where necessary amended

- to accord women equal rights, opportunities and responsibilities to men with respect to accessing and disposing through market processes or by inheritance and having title to land and specific processes; and
- institutions must be created to enable these equal rights to be asserted and their implementation monitored
- rule of law and justice reform programmes must include arrangements to provide that
  - principles of administrative justice inform all land administration processes and procedures; and
  - dedicated courts and dispute settlement agencies at the local level separate from land administration institutions are provided for the handling of disputes over land
- donors should work with and provide funding direct to local level land institutions.